



## **THE LEGAL BASIS OF THE DUTY TO INVESTIGATE (2):**

### **THE DUTIES TO INVESTIGATE WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

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1. This section of the talk considers the duties to investigate within the ECHR. It is aimed at the lawyers in the audience who already have some experience in this area, so I apologise to those of you who have no interest in this sort of detail. This is a huge topic, and we only have a short time, but if you need more information, I would highly recommend the article 2 chapter in the Sweet & Maxwell Human Rights Practice encyclopedia (by me) and the book *Inquests – A Practitioner’s Guide* (also partly by me).
2. The Human Rights Act 1998 has had a big impact upon the duties the state has to investigate when something goes seriously wrong. For example, before the HRA, if a manifestly unarmed man was shot seven times in the head while sitting in his seat in an underground train, or if an Asian man was beaten to death by his racist cell-mate, or even if someone died due to failures by psychiatric nurses to protect him or her from suicide, the investigation into the death could not identify what went wrong. Now, the investigation must culminate in a conclusion that identifies what went wrong, so that lessons can be learned to prevent the same thing happening again in future.
3. If you are trying to bring about an investigation or inquiry, the Convention duties to investigate are normally the most powerful means of doing so. That is partly because these are legal obligations placed on the state, which can be enforced in court, and the court must decide for itself whether an investigation is required. They may oblige the state to carry out an investigation into a broad range of subjects, such as:



- a. an allegation of human trafficking;
  - b. an incident of self-harm in custody;
  - c. a shoot to kill policy;
  - d. the high suicide rate of young people in detention;
  - e. mistreatment by British forces in Iraq or Afghanistan;
  - f. whether Ministers authorized torture during the Northern Ireland conflict; or
  - g. historic allegations of the sexual abuse of children.
4. In the absence of a Convention duty, a decision whether to establish an inquiry is generally discretionary and a refusal to do so is very difficult to challenge in the courts.
5. Under the ECHR, the investigation must satisfy certain minimum standards, a failure to satisfy them may be challenged in the courts, and it is for the courts to decide what the convention mandated. For example, the ECHR may require:
- a. a wholly independent body to conduct every stage of the investigation;
  - b. legal aid to be provided to the family of the deceased;
  - c. the victim or family to be provided with relevant disclosure and a right to question witnesses;
  - d. an examination of the circumstances surrounding the death or mistreatment;
  - e. a conclusion which identifies what went wrong;
  - f. disciplinary proceedings against, or prosecutions, of those responsible; and
  - g. changes to be made to prevent the same thing happening again in future.
6. Absent the Convention, the investigative steps taken are often principally a matter for the investigator's discretion, and any particular omission is more difficult to tackle.
7. To take a recent example, a few weeks ago the Home Secretary established a public inquiry was established into the fatal shooting of Anthony Grainger by the police. This had been an inquest, but there was relevant sensitive information that an inquest could not consider. The ECHR requires the state to examine that sensitive material, and in



consequence the Home Secretary was obliged to bring about an inquiry as it is the only means by which the material could be examined.

8. There are two key questions: what triggers the investigative duty, and when that happens, what minimum standards must the investigation meet?

### **What triggers the investigative duty?**

9. The starting point is that the state comes under a procedural duty to bring about an effective and independent investigation when it is arguable that there has been a breach of one or more of certain substantive rights. Those substantive rights include article 2 (the right to life), article 3 (the prohibition of torture, and inhuman and degrading treatment), and article 4 (the prohibition of slavery and forced labour). To decide whether a particular incident arguably breaches those rights, we need to understand what the rights are.

### *Article 2*

10. Article 2 contains a number of overlapping duties.
11. The first is a **negative obligation** not to take life. Lethal force used by a state agent must be “no more than absolutely necessary” for the purposes specified in article 2(2), which include to prevent unlawful violence or in self-defence. The Grand Chamber recently clarified the test for self-defence within article 2, in the case brought by the family of Jean Charles de Menezes<sup>1</sup>. The court judges the question of whether lethal force was absolutely necessary, 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.

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<sup>1</sup> *Da Silva v. United Kingdom* appn no. 5878/08, 30 March 2016.



12. It is not just the decision to use force that may breach article 2, but also the operation that led to it and the regulatory framework that governed it. The operation must be planned and controlled so as to minimise, to the greatest extent possible, the risk to life or of bodily harm<sup>2</sup>.
13. This requirement means, for example, that officers must receive clear and precise instructions on the use of firearms, restraint<sup>3</sup>, Tasers, or CS Gas<sup>4</sup>, and must receive special training in how to detain mentally ill and dangerous individuals<sup>5</sup>. An example of a breach of the duty to plan an operation carefully is the ‘death on the rock’ case, and in particular the decision to allow suspected terrorists to enter Gibraltar, rather than apprehending them before they would pose a risk<sup>6</sup>. Arguable evidence of any such breach may require the state to bring about an effective inquiry into it.
14. Secondly, there are several **positive obligations** to protect life. The boundary between them is not always clear.
15. There is a broad ‘**general duty**’ to put in place appropriate systems for the protection of life, which applies in any context in which the right to life may be at risk<sup>7</sup>. For example:
  - a. For those in custody, the systems must minimise opportunities for suicide, a practical example of which is removing things such as sharp objects, belts or laces<sup>8</sup>.

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<sup>2</sup> *Makaratzis v. Greece* [2005] 41 EHRR 49; and *R (FI) v. Secretary of State for the Home Department* [2014] HRLR 30.

<sup>3</sup> *Nachova v. Bulgaria* [2006] 42 EHRR 43; and *Kemal Bas v. Turkey* app no. 38291/07, 19 February 2013.

<sup>4</sup> *Tali v. Estonia* 66393/10, 13 Feb 2014.

<sup>5</sup> *Shchiborshch and Kuzmina v. Russia* appn no 5269/08, 2 June 2014.

<sup>6</sup> *McCann v United Kingdom* [1996] 21 EHRR 97.

<sup>7</sup> *Oneryildiz v Turkey* [2005] 41 EHRR 20, §71 and 73.

<sup>8</sup> *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681 §30.



- b. Medical authorities must take appropriate measures to protect their patients' lives, including employing competent staff, training those staff to ensure high professional standards are maintained, and putting in place suitable systems of work<sup>9</sup>.
  - c. The military authorities must put systems in place to provide appropriate equipment to protect soldiers from the risk posed by the extreme temperatures in which they had to serve in Iraq<sup>10</sup>.
  - d. The ambulance service is required to put in place resources and operational systems to ensure ambulances are dispatched to home emergencies without delay<sup>11</sup>.
  - e. Steps must be taken to protect patients of a care home due to be closed, when that closure might have had a negative impact on life expectancy<sup>12</sup>.
  - f. There must be sufficiently strong windows in place to prevent psychiatric patients falling out of them<sup>13</sup>.
16. Again, if there is credible evidence that the state has failed to carry out any one of these systemic obligations, and this might have led to death or serious injury, that will trigger the Convention investigative duty.
17. There is a similar duty involving **dangerous activities**. If the state knew or ought to have known that a particular activity poses a danger to life, it must take practical steps to

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<sup>9</sup> *Savage v South Essex Partnership NHS Trust* [2009] 1 AC 681, §45.

<sup>10</sup> *R (Smith) v Oxfordshire Deputy Coroner* [2011] 1 AC 1.

<sup>11</sup> *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, §69-70.

<sup>12</sup> *Watts v United Kingdom* [2010] 51 EHRR SE5.

<sup>13</sup> *Reynolds v United Kingdom* [2012] 55 EHRR 35, §61.



ensure the effective protection of those at risk<sup>14</sup>. For example, a failure to provide masks to protect state employees from asbestos exposure<sup>15</sup>, and a failure to provide information about the dangers of deep sea diving<sup>16</sup>, have breached this duty. You might use this duty to try to bring about protections for the public from air pollution, by preventing companies like VW from cheating diesel tests.

18. The above duties are in fairly general terms and are principally violated by defects in systems rather than by individual error.
  
19. However, in certain circumstances, officials come under an **‘operational duty’** which (unlike the systemic duties) can be breached by a one-off error of judgment by an individual. More specifically, that duty is breached if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life and, if so, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. This operational duty is applicable to the following circumstances:
  - a. The police must protect members of the public from threats from third parties<sup>17</sup>.
  - b. The authorities must protect anyone detained, and also voluntary psychiatric in-patients, from suicide<sup>18</sup>.
  - c. The police owe an operational duty to protect a person they are trying to evict from her home who is at real and immediate risk of suicide<sup>19</sup>.

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<sup>14</sup> *Oneryildiz v Turkey* [2005] 41 EHRR 20, §90.

<sup>15</sup> *Brincat & Others v. Malta* appn no. 60908/11, 24 July 2014, §101.

<sup>16</sup> *Vilnes v. Norway* appn no. 52806/09, 5 Dec 2013.

<sup>17</sup> *Sarjantson v. Chief Constable of Humberside* [2014] QB 411.

<sup>18</sup> *Rabone v. Pennine Care NHS Trust* [2012] 2 AC 72, §15; and *Savage v South Essex Partnership NHS Trust* [2009] 1 AC 681, §72.

<sup>19</sup> *Mammadov v. Azerbaijan*, 4762/05, 17<sup>th</sup> March 2010.



- d. The authorities must protect children from known risks to their lives or of serious mistreatment<sup>20</sup>, even from the risks arising from bad weather: *Kemaloglu v. Turkey* appn no 19986/06, 10 July 2012, §36 and 41. In that case, there was a breach of the operational duty when a child froze to death after the school failed to inform the bus operator that it would close early on a cold day.
20. This duty has been the subject of a considerable amount of litigation. The circumstances in which it applies have been gradually expanded, and it is likely that the higher courts will have to continue to grapple with its boundaries. For example, one contentious issue is whether it applies to compliant mentally incapacitated people who have been deprived of their liberty.
21. Even if the state authorities are not aware of a real and immediate risk to life, such as to engage the operational duty, they have further obligations. They must protect the health and well-being of individuals arrested or in detention, and protect their lives from a foreseeable danger. There are certain basic precautions which state agents should be expected to take in all cases in order to minimise any potential risk to those in detention.
22. Examples of this duty being breached include a failure to take steps to minimise a foreseeable risk posed by an attempt to escape or abscond, such as failure to ensure the detainee was effectively supervised where that made it possible for her to jump out of a window<sup>21</sup>; and a failure to ensure timely access to medical testing, to provide medicine or to monitor the effects of that medicine<sup>22</sup>. This is a fairly new class of duty, and it is yet to be recognised in a domestic court.

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<sup>20</sup> *O-Keeffe v. Ireland* [2014] 59 EHRR 15, §148; *Nencheva and Others* appn no 48609/06 18 June 2013; and *Kayak v. Turkey* appn no. 60444/08 10 July 2012.

<sup>21</sup> *Fanziyeva v. Russia* App. No. 41675/08, 18 June 2015.

<sup>22</sup> *Makharadze v Georgia* App. No. 35254/07, 22 November 2011 §71, 75 and 91.



23. There are some contexts where it is fairly clear that the operational duty will not apply. One example, at least until recently, was physical medical care given to someone in the community. However, in *Lopes de Sousa Fernandes v. Portugal* application no. 56080/13, 15 December 2015, it appears that the European Court decided there was a breach of article 2 by negligent physical medical care in this context. Again, the domestic courts may need to grapple with this in the near future.
24. **Practices and repeated breaches:** The duty to investigate gains a particular importance where there are a series of connected breaches that appear to be some form or practice, official tolerance, or policy, rather than merely isolated incidents<sup>23</sup>. The Harris Review was established after we argued that the repeated suicides of young people in custody were connected, and this suggested official tolerance. In consequence, there was a Convention duty to investigate this broader issue even though there had been inquests into the individual deaths.
25. **Causation:** To establish a breach of article 2, it is not necessary to show that “but for” the omission the ill-treatment would not have happened. A failure to take reasonably available measures which might have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State<sup>24</sup>. So if the police failed to promptly come to the aid of a man who was being attacked by a gang of men with baseball bats, the fact that delay may have made no difference does not prevent there being a duty for an independent investigation into what went wrong.

*Article 2: Other investigative triggers*

26. Even where there is no breach of the substantive duties, the state may nevertheless come under a duty to investigate. The duty arises automatically whenever an individual has

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<sup>23</sup> *Ireland v United Kingdom App No 5210/71, §159.*

<sup>24</sup> *O-Keeffe v. Ireland* [2014] 59 EHRR 15, at §149; and *Sarjantson v. Chief Constable of Humberside* [2014] QB 411, §27-28.





been killed as a result of the use of force by agents of the state<sup>25</sup>, and for any suicide or near suicide in state detention<sup>26</sup>.

27. There is also what is sometimes called a ‘*Menson duty*’ upon the state to investigate when there is reason to believe that someone was killed or seriously injured by a member of the public, who was not a domestic state agent: *Menson v. United Kingdom* [2003] 37 EHRR CD220<sup>27</sup>. Mr Putin’s decision to authorise the nuclear poisoning of Alexander Litvinenko did not put the British state under the ordinary article 2 investigative duty, as it was decided that only wrongdoing by British officials could do that. However, this ‘*Menson duty*’ to investigate was triggered by the murder<sup>28</sup>.

#### *Articles 3 and 4*

28. Article 3 prevents torture, inhuman and degrading treatment. Whether the mistreatment in question breaches the article depends on all of the circumstances, including the nature and context of the treatment, its duration, its physical and mental effects, whether the victim is detained and the sex, age and state of health of the victim. The substantive obligations within article 3 are analogous in many ways to those within article 2. They include a positive obligation on certain state agencies to protect members of the public from mistreatment that is contrary to article 3, and a duty to put in place protective systems.
29. Examples of treatment by state agents that has been found to violate this provision include:

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<sup>25</sup> *McCann v United Kingdom* [1996] 21 EHRR 97, §161.

<sup>26</sup> *R (JL) v Secretary of State for Justice* [2009] 1 AC 588.

<sup>27</sup> *Angelova v Bulgaria* [2008] 47 EHRR 7, §92-97.

<sup>28</sup> *R (Litvinenko) v. Secretary of State for the Home Department* [2014] HRLR 6.



- a. Any recourse to physical force which has not been made strictly necessary by the applicant's own conduct or medical necessity<sup>29</sup>.
  - b. Handcuffing and transporting a seriously ill prisoner<sup>30</sup>.
  - c. Rules which permitted inflicting pain on children in custody in order to make them to with behave well<sup>31</sup>.
  - d. Delay in transferring a mentally ill man from a police cell to a psychiatric hospital<sup>32</sup>.
30. Article 4 is the prohibition on slavery and forced labour.
31. Again, an arguable breach of one of these duties (or one of those under article 4, below) will trigger the state's duty to conduct an effective independent investigation.
32. There is also a duty equivalent to the *Menson* duty, which arises when a member of the public seriously assaults someone<sup>33</sup>.

### ***Breaches of the Convention abroad***

33. There has been lots of recent litigation about whether the duty to investigate arises in respect of mistreatment that happened abroad. For example, must there be inquiries

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<sup>29</sup> *Ribitsch v Austria* (1996) 21 EHRR 573, §38.

<sup>30</sup> *R (Faizovas) v. Secretary of State* [2009] UKHRR 1093.

<sup>31</sup> *R (C) v. Secretary of State for Justice* [2009] QB 657, §58.

<sup>32</sup> *MS v United Kingdom* (2012) 55 EHRR 23, §39-46.

<sup>33</sup> *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, §48.



involving alleged mistreatment during British military action in Afghanistan and Iraq, torture and rendition of prisoners abroad, or drone strikes?

34. Although a state does not normally owe any Convention duties outside its physical territory, there are a number of circumstances in which it does. They are described in *Al-Skeini v United Kingdom* [2011] 53 EHRR 18, and include whenever state agents exercise control or authority over an individual abroad. There is a breakout session later today which will explore this in more detail.

### *Historic inquiries*

35. The state may be under a Convention duty to investigate incidents that happened some time ago, such as killings or atrocities during the Northern Ireland troubles, historic sexual abuse, or the Hillsborough stadium disaster. That is the case, for example, if important fresh evidence comes to the attention of the authorities. Again, there is a session later in the day which will examine this issue in more detail.

### **The requirements of the investigative duty**

36. The article 2 investigative duty contains certain minimum standards. Although the precise form of the investigation is not prescribed, it must satisfy these minimum standards.
37. Those minimum standards are as follows:
38. **Independence.** In most cases it is essential that the investigation into a fatal breach of article 2 is wholly independent of those implicated in the events from the earliest possible stages. In *Ramsahai v Netherlands* [2008] 46 EHRR 43 a delay of 15 hours in the independent police investigator taking over investigations into a police shooting from the local force contributed to a breach of article 2.



39. **The family** of the deceased must be able to effectively participate in the investigation. That generally means they must have reasonable access to relevant evidence, and be allowed to propose questions for witnesses and what lines of inquiry should be adopted. The state is under a duty to provide funding for legal representation where it is likely to be necessary to enable the next of kin to play an effective part in the proceedings<sup>34</sup>.
40. **Public scrutiny.** There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice.
41. The investigation must be **prompt**.
42. **Effective.** The investigation must be capable of leading to a determination of whether force used was or was not justified; of ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system; and of identifying the State officials or authorities involved in whatever capacity in the chain of events in issue<sup>35</sup>.
43. The investigation should be broad enough to take into consideration not only the actions of the State agents but also all the surrounding circumstances including such matters as the planning, management and control of the operations in question, as well as the instructions, training and supervision given to state agents<sup>36</sup>.

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<sup>34</sup> *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, §77.

<sup>35</sup> *Oneryildiz v Turkey* [2005] 41 EHRR 20, §94; and *Jordan v. United Kingdom* [2003] 37 EHRR 2 at §107.

<sup>36</sup> *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2)* [2013] HRLR 32, §148-9.



44. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident<sup>37</sup>. A refusal to disclose evidence (such as evidence of complicity in CIA rendition) due to claims it is secret and privileged may breach this requirement<sup>38</sup>.
45. It may be necessary for the investigation to be independent and effective from its earliest stages. For example, a failure to take appropriate steps to prevent police or prison officers from conferring after a fatality may breach the Convention procedural duties<sup>39</sup>. Similarly, it may be necessary for there to be an independent investigation from the earliest stages into all deaths of adults or children in psychiatric hospitals.
46. The state must also ensure that, where appropriate, disciplinary proceedings take place, and that life-endangering offences are prosecuted and punished. A decision to allow an official to resign and thereby avoid disciplinary proceedings<sup>40</sup>, or a failure to pursue a prosecution, may therefore breach the Convention. Similarly, a manifestly inadequate sanction may breach article 2<sup>41</sup>.

#### ***The investigative duty under articles 3 or 4***

47. There has been considerably less litigation about this, than in the context of article 2. In *Commissioner of the Police for the Metropolis v DSD* [2015] EWCA Civ 646 the Court of Appeal confirmed that the nature, scope and rigour of the investigative exercise required by articles 2 and 3 is essentially the same. The same should apply to article 4<sup>42</sup>.
48. Where there has been a serious assault by a member of the public, the main point is that “the police must investigate in an efficient and reasonable manner which is capable of

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<sup>37</sup> *Ramsahai v Netherlands* [2008] 46 EHRR 43, §321.

<sup>38</sup> *El Masri v Macedonia* (2013) 57 EHRR 25.

<sup>39</sup> *R (Duggan) v. ACPO & Others* [2014] EWCA Civ 388.

<sup>40</sup> *R (Birks) v. Commissioner of Police for the Metropolis* [2015] ICR 204.

<sup>41</sup> *Da Silva* §238; *Oneryildiz v Turkey* [2005] 41 EHRR 20, at §96.

<sup>42</sup> *Rantsev v. Cyprus* [2010] 51 EHRR 1.



leading to the identification and punishment of the perpetrator(s)” (§216) within a reasonable time.

49. However, the Court of Appeal also said that there is a ‘sliding scale’ of the extent of the investigation that is required, depending on the nature and seriousness of the allegation. Deliberate torture is at one end of the scale, while simple negligence by non-state agents is at the other. In serious cases, “it is nevertheless expected of national authorities that they pursue all possible leads to establish the circumstances in which a person has been killed, in order to comply with their procedural obligations under Article 2 of the Convention”<sup>43</sup>. In a less serious case, the interview of the alleged attacker and a decision not to prosecute may be sufficient<sup>44</sup>.

*What measures may satisfy the procedural duty?*

50. In general terms, it is up to the state to decide what form the investigation takes, providing it satisfies the minimum standards. So the state could use an inquest, a public inquiry, or some other form of investigation.
51. When someone dies, the inquest is normally the means by which this duty is satisfied. However, the inquest may be unable to do so. For example, it cannot hear evidence in private. If there is relevant evidence which cannot be made public, it may be necessary for there to be a public inquiry.
52. The availability of civil proceedings cannot discharge the article 2 procedural duty, because they depend on the initiative of the family of the deceased, whereas the state must take responsibility for bringing about the investigation<sup>45</sup>.

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<sup>43</sup> *Jelic v. Croatia* 57856/11, 12 June 2014, §86.

<sup>44</sup> *M. and M. v. Croatia* App. No. 10161/13, 3 September 2015.

<sup>45</sup> *Jordan v United Kingdom*: [2003] 37 EHRR 2.



53. The inquest may not satisfy all aspects of the procedural duty. For example, it cannot ensure that police officers do not collude immediately after the incident, and it cannot secure prosecutions. That means that, even if there is an inquest, article 2 may require other steps to be taken, such as a preliminary independent investigation by an Ombudsman or the IPCC.
54. By contrast, a civil claim for damages and (where relevant) proper police inquiry may well satisfy the investigative duty under articles 3 or 4<sup>46</sup>. Whether those proceedings are capable of doing so depends on the context. For example, a more onerous duty will arise for mistreatment that is criminal, and for serious atrocities, such as complicity in torture or rendition<sup>47</sup>. Moreover, if there are issues that cannot be addressed in civil proceedings, such as systemic flaws, further inquiries will be necessary<sup>48</sup>.

**ADAM STRAW**

**Doughty Street Chambers, April 2016**

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<sup>46</sup> *R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, §55.

<sup>47</sup> *El Masri v Macedonia* (2013) 57 EHRR 25, §151.

<sup>48</sup> *AM v Secretary of State for the Home Department* [2009] UKHRR 973, §33.