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**INVESTIGATING THE NHS – PROTECTING THE VULNERABLE  
AND DEFENDING PATIENT SAFETY:  
USING THE PROTECTIVE AND INVESTIGATIVE OBLIGATIONS  
UNDER ARTICLES 2, 3 & 8 ECHR IN HEALTHCARE SETTINGS**

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- Jesse Nicholls -

1. Mid-Staffordshire, Morecambe Bay, Winterbourne View, Southern Health. Sadly the NHS is far from immune from preventable deaths, individual and systemic abuse, and deficient investigations into its own failings. The need for effective systems that will prevent death and serious harm, protective duties that require staff to take operational measures to protect those in their care, and robust, searching investigations into deaths and incidents of mistreatment are needed in healthcare and clinical settings now more than ever.
  
2. The protective and investigative obligations under Articles 2, 3 and 8 ECHR provide some much-needed but incomplete protection for vulnerable patients in healthcare settings and offer vital opportunities for accountability and lesson-learning. This paper considers the protective and investigative obligations that are available where healthcare providers fail to protect patients in their care and fail to investigate alleged violations of the State's duty to protect people from death and serious harm. The paper considers the following:
  - (1) The **substantive obligations** imposed by Articles 2, 3 and 8:
    - (i) The **negative obligation** not to inflict harm;
    - (ii) The **systems obligation** to establish a framework of laws, precautions and means of enforcement which will protect life and prevent serious harm 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 **investigative obligation** to conduct an effective investigation into possible violations of the substantive obligations to protect life and prevent ill-treatment and unjustified interferences with the right to private life.

## THE RIGHT TO LIFE

### (1) The systems obligation

3. 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, paras 73, 89; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), paras 50-52; *Smith v Ministry of Defence* [2014] AC 52, para 68).

#### **Systems, training and guidance**

4. 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 in this sphere 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).

### **Healthcare settings**

5. The systems obligation requires 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).
6. The systems obligation may be violated, for example, by the slow dispatch of ambulances in response to an emergency call (*R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, paras 69-70), or by the poor organisation of a healthcare system, resulting in the failure to ensure the availability of sufficient hospital places so that a newborn baby could receive emergency care (*Asiye Genç v Turkey* (App. No. 24109/07)).
7. Evidence of a lack of coordination between different medical services may demonstrate dysfunction in a public hospital service. Where this results in a patient failing to receive appropriate urgent care, the ECtHR has found violations of Article 2 (*Asiye Genç v Turkey* (App. No. 24109/07), para 82; *Mehmet Senturk and Bekir Senturk v Turkey* (App. No. 13423/09), para 97; *Fernandes v Portugal* (App. No. 56080/13), para 114).
8. Failing to carry out proper vetting checks on State officials may breach the systems obligation (*Gorovenky and Bugara v Ukraine* (App. Nos. 36146/05 and 42418/05): in which a firearm was issued to a police officer who had displayed previous troubling behaviour).

### **Legal framework for the use of force**

9. 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, including the use of restraint. 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 restraint, detailed and precise guidance is likely to be necessary (*Saoud v France* (App. No. 9375/02)).
10. 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).

### ***Repeated violations***

11. Where numerous deaths occur in identical or similar circumstances this can amount to a pattern of violations that are afforded official tolerance, rather than a series of isolated incidents. In these circumstances Article 2 can impose an obligation on the national authorities to bring such violations to an end by the implementation of comprehensive, complex and sufficient measures (*Ireland v UK* (1979) 2 EHRR 25, para 159; *France v Turkey* (1984) 6 EHRR 241, para 19; *Aslakhanova v Russia* (2944/06), para 217). Where repeated violations of Article 2 occur in interconnected cases, the investigative obligation is likely to be engaged (*R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), para 192).

### ***Identified victim not required for a violation***

12. 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).

## **(2) The operational obligation**

13. 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 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. 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 26-29, 31).

### **“Real and immediate” risk to life**

14. 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<sup>1</sup>).
15. 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). Risk can be immediate where it is not apparent just before death (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 40).
16. 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).
17. 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). However, the authorities do not need to be formally or directly told that there is a risk to life for the obligation to arise (*Cesnulevicius v Lithuania* (App. No. 13462/06), para 89).

### **Knowledge of risk**

18. 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). Outside the community healthcare context 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 (*Osman v UK* (2000) 29 EHRR 245, para 116).

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<sup>1</sup> 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.

### **Reasonable steps in response to risk**

19. 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. The obligation is not to prevent death; it is to take reasonable steps to *try* to prevent death and to *minimise the risk* of it happening (*Osman v UK* (2000) 29 EHRR 245, paras 115-116; *Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252, paras 26-29, 31; *R (Wiggins) v HM Coroner for Assistant Coroner for Nottinghamshire* [2015] EWHC 2841 (Admin), para 112).
20. The operational obligation 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). 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 in ordinary community healthcare settings**

21. In an ordinary healthcare setting, for example a life-saving operation in hospital, the operational obligation is not owed. Individual negligence or poor co-ordination between health professionals in these circumstances will not amount to a breach of Article 2 (*Powell v UK* (2000) 30 EHRR CD 362; *Byrzykowski v Poland* (App. No. 11562/05), para 104; *Dodov v Bulgaria* (App. No. 59548/00); *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, para 19).
22. Gross negligence in an ordinary healthcare setting may violate Article 2 (*R (Khan) v Secretary of State for Health* [2004] 1 WLR 971; *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461, para 96, *R (Moss) v HM Coroner for the North and South Districts of Durham and Darlington* [2008] EWHC 2940 (Admin), para 6(3)).

### **The operational obligation in detention healthcare settings**

23. The State may be subject to the operational obligation where healthcare is provided to a person in State detention, including healthcare provided to detained mental health patients and prisoners. In this context, clinical and other healthcare staff can be subject to the operational obligation and can violate Article 2 where they fail to take preventative measures which might be expected to avoid a risk to life (*Daniel v St*

*George's Healthcare NHS Trust* [2016] 4 WLR 32, paras 14-29; *Tarariyeva v Russia* (2009) 48 EHRR 26, paras 73-74, 80, 88). In this context, individual negligence can amount to a violation of Article 2.

24. In the detention context, the operational obligation can arise where the risk to the individual is from a pre-existing illness or medical condition not caused by the conditions of the deceased's detention (*R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520, paras 55-57; *Tarariyeva v Russia* (App. No. 4353/03), paras 73-74, 80, 88; *Kats v Ukraine* (App. No. 29971/04), para 104; *Slimani v France* (2006) 43 EHRR 49, paras 30-31; *Makharadze v Georgia* (App. No. 35254/07), para 74).

***The operational obligation in Rabone community healthcare settings***

25. The operational obligation can in certain circumstances be owed to individuals receiving healthcare who are not formally detained by the State. 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 can be owed by healthcare professionals 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).
26. 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.

### (3) The investigative obligation

#### ***Effective judicial system***

27. The general procedural obligation imposed by Article 2 requires the State to have in place an effective judicial system so that the cause of any death can be investigated, determined and those responsible held to account. This duty includes the possibility of a criminal investigation, a domestic, non-Article 2 inquest into the death, and civil proceedings (*R (Takoushis) v HM Coroner for Inner North London* [2006] 1 WLR 461, paras 105-106; *Railean v Moldova* (App. No. 23401), para 28).

#### ***Automatic cases***

28. An enhanced obligation on the State to initiate 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 self-inflicted deaths in custody and in compulsory mental health detention (*Edwards v UK* (2002) 35 EHRR 19, para 74; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, paras 31, 50; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, paras 58-59, 61, 113; *R (Smith) v Oxfordshire Deputy Coroner* [2011] 1 AC 1, paras 84, 98; *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, para 58; *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681; *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), paras 72-91).
29. The outer limits of the automatic category of cases touch on healthcare issues. The courts have recently or are currently considering whether the investigative obligation arises automatically in all self-inflicted deaths of non-detained psychiatric patients (*R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin)) and in all prison deaths arising from natural causes (*R (Tyrell) v HM Coroner Senior Coroner for the County of Durham and Darlington* CO/3068/2015). The Court of Appeal is also due to consider whether a deceased subject to a Deprivation of Liberty Safeguard should be deemed to have died in “state detention” for the purposes of Article 5 ECHR and under domestic inquest law (on appeal from *R (Ferreira) v HM Coroner for Inner South London* [2015] EWHC 2990 (Admin)).



### ***Arguable breach cases***

30. If the enhanced investigative obligation does not arise automatically it will nonetheless apply to any death occurring in circumstances in which it appears that one or more of the substantive obligations 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).
31. Where a death occurs in a healthcare setting there may be an arguable breach of Article 2 where, for example, there are no or inadequate systems in place to prevent fatal accidents occurring. Similarly, an enhanced investigation will be required where there is an arguable breach of the operational obligation due to gross negligence (in an ordinary healthcare context) or due to the failure to take reasonable steps to prevent a risk of death (in circumstances where the deceased was owed the operational obligation under the *Rabone* criteria).
32. The case for an effective public investigation into a death or series of deaths 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 a pattern or system (*R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), para 192).

### ***The purposes of the investigation***

33. The Article 2 investigation into a death 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***

34. The investigative obligation may be met by a combination of investigative measures. The entirety of the 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).

35. The investigation should meet a number of 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).
36. The Grand Chamber has recently stated that the investigative obligation should not be reduced to a check-list of mandatory steps that must be satisfied in every case. The nature and degree of scrutiny that will satisfy the minimum threshold of the investigative obligation depend on the circumstances of the particular case. The essential parameters of an Article 2 investigation – adequacy, promptness, involvement of the deceased’s family and independence – are inter-related and Article 2 does not require all the essential parameters to be satisfied individually, one by one. Rather, an investigation should be assessed against the essential parameters to determine the overall effectiveness of the investigation and its compliance with the right to life (*Tunc v Turkey* (App. No. 24014/05), paras 176, 225).
37. A number of the Article 2 requirements that are most relevant to deaths occurring in healthcare settings are considered below.

### ***Independence***

38. Those 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.
39. Article 2 does not require that every stage of the State’s overall investigation into a death must be independent. Domestic law currently allows NHS Trusts to conduct initial investigations into deaths occurring under their responsibility, where an Article 2-compliant inquest is to follow (*R (Antoniou) v Central and North West London NHS Foundation Trust* [2013] EWHC 3055 (Admin), paras 75-79). Judgment from the Court

of Appeal in the case of Chris Brennan (Deceased) is currently awaited on whether this practice is compatible with Article 2.

#### ***Examination of the circumstances surrounding the death***

40. The investigation should examine the facts and circumstances surrounding the death, the systemic defects or regulatory shortcomings that caused or contributed to the death, the operation at every level of the systems and procedures which are designed to save lives, whether the State has complied with the substantive obligations under Article 2, and whether State agents have been in breach of duty under Article 2 (*Jordan v UK* (2001) 37 EHRR 52, para 143; *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, paras 30, 31, 36, 45; *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, para 11; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 94; *Al-Skeini v UK* (2011) 53 EHRR 18, para 163; *R (JL) v Secretary of State for Justice* [2009] 1 AC 588, para 29).

#### ***Capable of identifying and punishing those responsible for the death***

41. 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***

42. Reasonable steps must be taken to secure all relevant evidence concerning the death and its circumstances, including eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (*Jordan v UK* (2001) 37 EHRR 52, para 107; *Edwards v UK* (2002) 35 EHRR 19, para 71; *Ramsahai v Netherlands* (2008) 46 EHRR 43, para 321; *Tunc v Turkey* (App. No. 24014/05), para 174).
43. 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)).

### **Expert evidence**

44. Sufficient expert evidence must be called, where required. A failure to do so may violate the investigative obligation (*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).

### **Public scrutiny**

45. 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 and do not speak with one voice (*Edwards v UK* (2002) 35 EHRR 19, para 83; *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, paras 21, 24, 35, 42, 46; *Ramsahai v Netherlands* (2008) 46 EHRR 43, paras 321, 353-354).

### **Involvement of the next of kin**

46. A number of factors are relevant in determining whether the deceased's family have been sufficiently involved in the investigation to satisfy the investigative obligation, including whether public funding has been provided, the extent of the disclosure provided, the extent to which the family were able to attend hearings into the death, whether the next of kin were informed of the substance of the evidence prior to the general publication of the results of the investigation, and level of involvement and participation, if any, of the deceased's family in the range of other investigations into the death (*Edwards v UK* (2002) 35 EHRR 19, para 84; *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; *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, para 77; *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), paras 68, 70).
47. There is no 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).

***Assessing whether the investigative obligation has been met***

48. A number of measures may be relevant when assessing the totality of the State's investigation into a death.
49. Criminal proceedings may provide, or form a decisive part of, the investigation (*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 individual culpability of the accused, rather than alleged systemic failings), they are less likely to satisfy the investigative obligation without additional 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).
50. The absence of criminal charges may in certain circumstances violate the investigative obligation (*Öneryildiz v Turkey* (2005) 41 EHRR 20, para 93), although the investigative obligation is an obligation of means, not results.
51. Disciplinary proceedings against those responsible for the death may be relevant (*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). If there have been no criminal proceedings, disciplinary proceedings may be required to meet the investigative obligation, even where a detailed independent investigation and an inquest have taken place (*R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), para 52).
52. An internal, non-independent investigation may contribute to the State's overall investigation. Such investigations may be limited in their ability to satisfy Article 2 as they are likely to focus on matters of professional conduct by individual members of staff rather than considering the State's compliance with Article 2 (*R (Medihani) v HM Coroner for Inner London (South)* [2012] EWHC 1104 (Admin), para 50).
53. The extent to which an independent investigation into the death will satisfy the investigative obligation will depend on its 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).

54. An Article 2 inquest, which must culminate in an expression, even if brief, on the central issues, circumstances and systemic defects that caused or contributed to the death, is generally the means by which the investigative obligation is satisfied (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 16-20, 31, 36, 45, 47).
55. Where a public inquiry is held into the death, or a group of deaths, it is likely to form a substantial part of the State's investigative measures.
56. The case law is inconsistent on the role that civil proceedings can play in satisfying the investigative 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, for example 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).
57. It has been regularly stated that civil proceedings cannot be taken into account *at all* when assessing whether the investigative obligation has been met (*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; *Al-Skeini v UK* (2011) 53 EHRR 18, para 165).
58. However, later domestic cases have held that civil proceedings can be 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).

## INHUMAN AND DEGRADING TREATMENT, ABUSE AND ILL-TREATMENT

### (1) The minimum severity requirement for Article 3

59. 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).
60. 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).
61. 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).
62. 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).
63. 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).

## (2) Interferences with Article 8

64. Private life is a broad concept and includes a person's physical and psychological integrity, personal autonomy and protection against compulsory treatment (*X and Y v Netherlands* (1985) 8 EHRR 235, para 22; *Niemietz v Germany* (1992) 16 EHRR 97; *Pretty v UK* (2002) 35 EHRR 1, para 66; *Storck v Germany* (2005) 43 EHRR 96; *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123, paras 21-22).

## (3) The negative obligation

65. 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).

66. 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; *Vezenadaroglu v Turkey* (2001) 33 EHRR 59, para 29; see also *R (B) v Haddock* [2006] EWCA Civ 961 concerning compulsory treatment under Article 8).

67. 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, even where there is 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 systems obligation

68. 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). Article 8 can also impose positive obligations to secure respect for private life (*Marcks v Belgium* (1979) 2 EHRR 330).

### **Systems, training and guidance**

69. The Article 2 systems obligation requires the State 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 obligation is imposed by Article 3, 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), para 223).
70. Systemic practices which have been held to breach Article 3 in the policing context include improper resource allocation, inadequate training and supervision of officers, failure to follow standard procedure and failing to identify patterns in serial offending (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 13). Similar systemic failings may arise in the healthcare context, for example the failure to ensure that senior staff properly supervise care plans, or the failure to have in place a system that identifies concerning patterns of mistreatment or inadequate care.

### **Legal framework for the use of force**

71. 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). Guidance on police restraint must be detailed and precise (*Saoud v France* (App. No. 9375/02)). Similar standards should apply under Article 3.
72. 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 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).

### **Repeated violations**

73. As under Article 2, where numerous incidents of ill-treatment occur in identical or similar circumstances this can amount to a pattern of violations that are afforded official tolerance, rather than a series of isolated incidents. In these circumstances Article 3 can impose an obligation on the national authorities to bring such violations to

an end by the implementation of comprehensive, complex and sufficient measures (*Ireland v UK* (1979) 2 EHRR 25, para 159; *France v Turkey* (1984) 6 EHRR 241, para 19; *Aslakhanova v Russia* (2944/06), para 217). Where repeated violations of Article 3 occur in interconnected cases, the investigative obligation is likely to be engaged (*R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), para 192).

### ***Criminal law provisions***

74. 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).

### **(5) The operational obligation**

75. 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).
76. The Article 2 case law summarised above is likely to apply in the Article 3 context, including the distinction that has been drawn between community healthcare provision (where the operational obligation does not arise under domestic law) and healthcare provided to detainees or others for whom the State has assumed responsibility (where the operational obligation may arise under domestic law).

### **(6) The obligation to protect the health of detainees**

77. 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).

## **(7) The investigative obligation**

78. The Article 3 investigative 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; *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* [2015] EWCA Civ 646, paras 23-25, 36-37, 41).
79. The allegation need not be made by the alleged victim (*OOO v Commissioner of Police of the Metropolis* [2011] EWHC 1246 (QB)). In the healthcare context, allegations of ill-treatment made by family members, other patients or members of staff are capable of triggering the duty to investigate.

### ***The purposes of the investigation***

80. The investigation intended to satisfy the investigative obligation under Article 3 may have a number of purposes, including to:
- (1) Protect and safeguard individuals from serious ill-treatment, whoever inflicts it. This single protective principle underlies Article 3 (*DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, paras 43-44, 50, 59, 61-62).
  - (2) 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).
  - (3) 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).

- (4) Guard against impunity (*El Masri v Macedonia* (2013) 57 EHRR 25, para 192; *Velev v Bulgaria* (App. No. 43531/08), paras 50, 62).
- (5) 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***

81. An Article 3-compliant investigation may be required to meet a number of requirements, though they will vary according to the circumstances. These requirements include that: 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. The principles set out above under Article 2 apply under Article 3, and only a small number of additional points have been made below with particular relevance to the position under Article 3.

#### ***Capable of identifying and punishing those responsible***

82. The investigation must be capable of identifying and punishing those responsible for a violation of Article 3. This is not an obligation of results, but of means (*Assenov v Bulgaria* (1999) 28 EHRR 652, para 102; *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* [2015] EWCA Civ 646, paras 22, 52).
83. The State is under an obligation to ensure effective prosecution of those considered responsible for alleged violations of Article 3, including State agents (*MC v Bulgaria*

(2005) 40 EHRR 20, paras 153, 166; *R (B) v DPP* [2009] 1 WLR 2072). In certain circumstances Article 8 can also impose a positive obligation to provide an effective criminal remedy, and vulnerable individuals are particularly entitled to effective protection (*R (Waxman) v Crown Prosecution Service* [2012] EWHC 133 (Admin), paras 21, 24; *Hajduova v Slovakia* (2011) 53 EHRR 8, paras 45-46, 50; *A v Croatia* (2015) 60 EHRR 26, paras 59-60; *Jankovic v Croatia* (App. No. 38478/05), paras 45-47, 58; *X and Y v Netherlands* (1985) 8 EHRR 235). However, there is no right to have an alleged perpetrator prosecuted in all cases (*Secic v Croatia* (2007) 49 EHRR 19, para 54).

***Sliding scale of what is required to satisfy the investigative obligation***

84. Article 3 is premised on a single protective principle requiring the State to safeguard individuals from serious ill-treatment, whoever inflicts it. This principle is met in part by the Article 3 obligation to conduct appropriate investigations into allegations of serious ill-treatment. The energy, intensity and rigour required of the State's investigation varies depending on the nature and severity of the ill-treatment alleged to have taken place (*DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, paras 43-46, 50, 59-62). There is a sliding scale:

(1) Particular rigour will be required where State agents have killed or injured in violation of Article 2 or 3 (para 54).

(2) Not every allegation of ill-treatment which meets the Article 3 threshold requires a full criminal investigation. Where all the facts are known, where the actual or putative victim does not want the police involved, or where the harm is caused by negligence, and there is no criminal act, a full criminal investigation *may* be required, but it may prove to be unnecessary, inappropriate or disproportionate (paras 61-62).

85. The Court of Appeal has previously indicated 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, para 44).

86. The investigative measures required to satisfy Article 3 will vary according to 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 (*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, para 57; *R (NM) v Secretary of State for Justice* [2012] EWCA Civ 1182; *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, paras 43-46, 53-54).

***Assessing whether the investigative obligation has been met***

87. A number of investigative measures may be relevant when assessing whether the investigative obligation has been discharged, including:

- (1) A criminal investigation and prosecution (*Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin), para 16). If there has been a successful prosecution that will generally bring closure to the case (*DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646, paras 57-58).
- (2) Disciplinary proceedings (*Banks v UK* (App. No. 21387/05)). Such measures against State agents will not satisfy the investigative obligation where the alleged violation requires an effective criminal investigation (*DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), para 222).
- (3) An internal, non-independent investigation (*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 (*Allen v Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967, para 51).
- (5) The investigative obligation may require a free-standing inquiry into allegations of a violation of Article 3. However, 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). Some 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).

- (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). Civil proceedings may not satisfy the investigative 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 investigative obligation (*R (MM) v Secretary of State for the Home Department* [2012] EWCA Civ 668, para 59).

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

## **FUTURE ISSUES**

89. A number of outstanding, significant issues remain given the current state of the case law:



- (1) Can recent ECtHR cases (*Asiye Genç v Turkey*, *Mehmet Senturk and Bekir Senturk v Turkey*, *Fernandes v Portugal*) be used to expand the reach of Articles 2 and 3 into ordinary healthcare settings?
- (2) Does the Supreme Court's decision in *Rabone* require greater categories of vulnerable physical and mental health patients to be owed the operational obligation?
- (3) Under the operational obligation, how "immediate" must a "real and immediate risk" be? The Supreme Court in *Rabone* 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 then be re-triggered at a later time?
- (4) Must the relevant knowledge of the risk to life be held solely by one public authority, or can the relevant knowledge be aggregated across multiple public authorities on the basis that it is "the State" that owes the operational obligation? In *Michael v Chief Constable of South Wales* [2015] 2 WLR 343 the Defendant raised this point before the Court of Appeal but the issue was not pursued before the Supreme Court.
- (5) Does the investigative obligation require the investigation of healthcare deaths to be independent from the outset?
- (6) How far does the investigative obligation under Article 3 apply to non-policing public bodies? Can the obligation require healthcare providers to conduct their own initial investigations, or require them to report concerns to other bodies such as the CQC and the police? What standard of investigation will be required where allegations of Article 3 (or 8) treatment arise?
- (7) What is the scope of the positive obligation under Article 8 requiring the State to protect physical and psychological integrity? Will positive and investigative obligations under Article 8 develop in accordance with the principles under Articles 2 and 3?

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