The Investigative Obligation Under Article 2 of the European Convention on Human Rights – When does it arise?

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The Origins of the Investigative Obligation

1. Article 2 of the ECHR provides, materially:

   “1. Everyone’s right to life shall be protected by law. No one shall be
   deprived of his life intentionally save in the execution of a sentence of a
   court following his conviction of a crime for which this penalty is
   provided by law....”

2. Article 2 imposes three distinct duties on the state:

   (a) A negative duty, namely a duty not to take a person's life intentionally,
   save in the circumstances specified in the article.

   (b) A positive duty, namely to take all reasonable steps to protect a person's
   right to life under the article. This entails “above all a primary duty on the
   State to put in place a legislative and administrative framework designed to
   provide effective deterrence against threats to the right to life.” There must be
   “effective criminal-law provisions to deter the commission of offences against
   the person backed up by law-enforcement machinery for the prevention,
   suppression and sanctioning of breaches of such provisions.” (see the
   summary of the position in R (Middleton) v West Somerset Coroner [2004]
   UKHL 10 by Lord Bingham). In some situations this duty (the “protective
   duty”) requires the state to do more than to operate an effective criminal
   justice system designed to deter the taking of life. One example is that the
   state is required to take all reasonable care to protect the life of a person
   involuntarily in its custody (Lord Bingham in R (Amin) SS Home Dept [2004]
   1 AC 653 at para 30).

   (c) A second positive duty, collateral to the first, namely the investigative
   duty. Article 2 requires the State to “initiate an effective public investigation
   by an independent official body into any death occurring in circumstances in
   which it appears that one or other of the foregoing substantive obligations has
   been, or may be, violated, and it appears that agents of the state are, or may be,
   in some way implicated” (Middleton at paragraph 3).

3. The duty has been held to arise in a wide variety of situations:

   - A shooting by agents of the State (McCann)
   - A death in custody, whether a suicide or a killing by another (Edwards, Amin)
   - Dangerous activities and unexplained disaster (Oneryildiz v Turkey)
   - Failure by the police to protect those whom they know or ought to have known
     require protection to minimise an immediate risk to life (Osman v UK)
   - Failure by child protection agencies to protect a child, when they knew or ought to
     have known of a “real and immediate risk” to that child’s life (Plymouth CC v HM
     Coroner for Devon, applying Osman)
   - An allegation of an attempted killing by a police officer whilst on duty (Green v
     Police Complaints Authority).
Investigating the Actions of non-State agents

4. Lord Bingham’s summary of the Strasbourg caselaw, cited above, assumed that the investigative obligation was triggered only if (a) there was, at least arguably, a breach of the substantive obligations to protect life; and (b) agents of the State were or might be in some way implicated. Equally, the cases listed above are ones where the State or its agents is somehow implicated in the incident in question. This has been the category of case that has generated most attention.

5. However, an investigative obligation may be triggered by the mere fact that a death or life-threatening injuries have been caused, as a result of the State’s general duty to:

“…secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.”

6. This is a quotation from Menson v UK (No. 47916/99, an admissibility decision of 2003). Menson was a single thirty-year old black man. He took the wrong bus one night, and was subsequently attacked by four white youths who had got off the bus with him. He was set alight, and severely injured; eventually he died. The principal complaint related to the police’s failure to conduct a proper criminal investigation seeking to identify the perpetrators. The Court observed:-

“….. that the applicants have not laid any blame on the authorities of the respondent State for the actual death of Michael Menson; nor has it been suggested that the authorities knew or ought to have known that Michael Menson was at risk of physical violence at the hands of third parties and failed to take appropriate measures to safeguard him against that risk. The applicants’ case is therefore to be distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion (see, for example, McCann and Others v. the United Kingdom …), or in which the factual circumstances imposed an obligation on the authorities to protect an individual’s life, for example where they have assumed responsibility for his welfare (see, for example, Paul and Audrey Edwards v. the United Kingdom, no. 46477/99, judgment of 14 March 2002, ECHR 2002-II), or where they knew or ought to have known that his life was at risk (see, for example, Osman v. the United Kingdom, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII).

However, the absence of any direct State responsibility for the death of Michael Menson does not exclude the applicability of Article 2. It recalls that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see L.C.B. v. the United Kingdom, judgment of 9 June 1998, Reports 1998-III, p. 1403, § 36), Article 2 § 1 imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the
person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see Osman, cited above, § 115).

With reference to the facts of the instant case, the Court considers that this obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in Michael Merson’s case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life (see mutatis mutandis, the Paul and Audrey Edwards judgment, above-cited, § 69).”

7. So the police’s duty was triggered by the mere fact of the injuries suffered in suspicious circumstances, and did not depend on an allegation that they themselves were at fault in having failed to prevent them, or that there has been breaches of the substantive obligations defined at 2(b). Rather, the duty which the Court imposed appears to have been a part of the ‘substantive’ obligations imposed by Article 2 themselves.

8. However, in this context the scope of the inquiries needed to discharge the duties becomes all-important. This is not, to date, a route whereby a public inquiry into the events of 7/7 will be secured.

Deaths whilst under the care of Clinicians

9. The issue of whether or not a duty to conduct an effective investigation is part of the State’s ‘substantive’ obligations to protect life has also arisen in the context of healthcare decisions.

10. Article 2 may be engaged by issues of health care policy. The leading UK case is R(Takoushis) v HM Coroner for Inner North London [2005] EWCA Civ 1440. The case concerned the suicide of a man who had been taking to hospital after expressing an intention to commit suicide. He was assessed in the Accident & Emergency Department as a high suicide risk, and should have been seen by a clinician within 10 minutes of that assessment. However, he was not, and before a clinician attended he left the hospital and, shortly thereafter, committed suicide. Much of the judgment is concerned with the coroner’s duty to investigate ‘systemic’ failures, quite
independently of Article 2. However, the Court of Appeal also held that Article 2 was engaged.

11. The Court noted that Strasbourg jurisprudence established that the substantive obligation under Article 2 meant that, in the field of healthcare policy, a State must make provision for securing high professional standards amongst health professionals and hospitals. This applied whether or not the professionals operated in the public or the private sector (see *Calvelli v Italy* App. No. 32967/96, para 49).

12. Equally, the positive obligations “also require an effective independent judicial system to be set up so that the cause of death in of patients in the care of the medical sector, *whether in the public or private sector*, can be determined and those responsible made accountable …” (*Calvelli*, emphasis added).

13. Thus, the existence of the obligation does not depend on whether or not ‘agents of the State’ are responsible – doctors in the private sector could not be so characterised. Equally, it does not depend on whether or not there was, at least arguably, a breach of the State’s substantive obligation. A single negligent act or omission by a healthcare professional does not demonstrate that the State’s regulatory framework is inadequate. Rather, the duty is characterised as being part of the State’s ‘positive obligations’, not as a mere ‘procedural’ obligation. This helps to explain how it could extend to the investigation of deaths caused by the acts or omissions of clinicians working within the private sector. So although the debate on whether or not investigative obligations are ‘substantive’ or ‘procedural’ may be thought to be obscure, it is not unimportant. If the obligation is part of the State’s core obligations under Article 2, it helps to be explain why an investigation could be needed even if the acts or omissions which caused the death were not ones for which the State can be held accountable.

14. Thus, Langstaff J observed in *JL*:

“Article 2 must necessarily be engaged in every situation to which it might conceivably apply, since it is an absolute obligation (within its terms) resting upon the state. To talk about it being "engaged", or aspects of it being "triggered" may be no more, therefore, than to ask what, in given circumstances, satisfaction of the Article requires.”
I wonder, therefore, whether a clear line can be drawn between the "threshold" type of question which I am asked to determine, and the "content" issues which the early cases have considered at the highest level. However, both parties wish me to approach the issue in such terms, and, with the reservation I have expressed, I shall do so. However, those wishing to rely upon my decision subsequently should note the reservation.”

15. The question arises whether the same duty to have effective systems to investigate clinical error will arise in cases where major injury has been suffered, short of death. Are obligations imposed by Article 3? In *Howard and Wright-Hogeland v Secretary of State for Health* [2002] EWHC 396 (Admin), the Court, rejecting a claim for a public inquiry into allegations of medical malpractice, said briskly that “clinical negligence is not a sufficient foundation for an Article 3 claim.” But given the willingness of the ECtHR to extend the investigative obligation to cases of serious injury in other contexts (see below), is this necessarily so?

16. *Vo v France* (2005) 40 EHRR 12 was concerned with medical negligence which led to the early (and unwanted) termination of a pregnancy. The doctor faced criminal proceedings but was acquitted on the grounds that the foetus was not a human person. The Court held that there was no violation of Article 2. The main focus of the case was on the Applicant’s argument that she should have had a remedy in the criminal law – ie, that her unborn child should have been recognised as a person. The Court rejected this, and went on to consider the procedural requirements imposed by Article 2. It recited the caselaw developed in the context of deaths in hospital, but then stated:

“However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case.”

17. The relevant point is that the Court contemplates an “infringement of physical integrity” as triggering the investigate obligation. Equally, in *Byrzykowski v Poland* (Application no. 11562/05), the Court spoke of an “infringement of the right to life or to personal integrity”, in a case where the Applicant’s wife had died and his son had suffered serious injury. Both of these cases were analysed under Article 2, with no reference to Article 3. So perhaps Article 3 does not need to be invoked to achieve the desired end. However, what becomes important is the scope of the duty to investigate; criminal investigations and the possibility of taking civil actions in
negligence may be sufficient to discharge the obligation and there is no right to a public inquiry as usually defined in the UK.

Cases of Life-Threatening Injuries

18. The investigative obligation established by Article 2 now extends beyond cases where a death has resulted, to cases where “life-threatening injuries” have occurred. In cases of violent death, there will be an inquest, which should now usually be Article 2 compliant. If there has been a ‘near-death’, however, there will not be an inquest; hence the litigation about alternative forms of inquiry.

19. The difference between a case where death has occurred, and one in which serious injuries have occurred may “be no more than an accident of circumstances, in particular that of timing” (see JL, below, at para 19). Or, as Lord Scott stated in Green v Police Complaints Authority [2004] UKHL 6:

“Mr Green was alleging that DS Lawrence had driven the car into him deliberately. He said it had been an attempt by DS Lawrence to kill him. If Mr Green had been killed by the collision with the car and it had been the case that the fatal collision had been deliberately brought about by DS Lawrence, there can be no doubt but that article 2 would have been engaged. It would have been incumbent on the state to conduct a "thorough, impartial and careful examination of the circumstances surrounding the killing" (McCann v United Kingdom (1995) 21 EHRR 97, 164, para 163). A no less thorough, impartial and careful examination would be required in the case of an allegation of an attempted killing by a police officer while on duty.

Further, if a police officer while on duty were to drive a car at someone with the intention of inflicting serious physical injury, such as the fractured femur that Mr Green sustained, the infliction of the injury could, in my opinion, reasonably be represented as constituting inhuman treatment for article 3 purposes.

It is clear, therefore, that Mr Green's allegation that DS Lawrence drove the car at him deliberately in order to kill or seriously to injure him did engage articles 2 and 3 and did require a thorough, impartial and careful investigation by a suitable and independent state authority”.

20. The application of the investigative duty in a case of serious injury was accepted by the State in D v Secretary of State for the Home Department [2006] EWCA Civ 143. D was a prisoner who was a known suicide risk – he had been placed on 15 minute watches. However, he hanged himself in his cell. He suffered permanent brain damage. The SSHD accepted that in circumstances where: (a) D was known

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1 This is the reference to the Court of Appeal judgment, but the concession had been made throughout the case; the issue was the scope of the obligation, not its existence.
by the prison authorities to be a “real and immediate suicide risk”; (b) the incident and its consequences were serious; and (c) there existed issues as to whether more could have been done to deal with the risk, the investigative obligation under Article 2 was triggered.

21. The parameters of the concession in \( D \) were tested in \( R(JL) \) v Secretary of State for the Home Department [2006] EWHC 2558 (Admin), in which limb (a) was immediately widened by Counsel for the SSHD to include cases where the person injured ought to have been recognised as a “real and immediate” suicide risk. However, Langstaff J held that this was still not wide enough. If a risk had been unknown, and revealed only by the ‘near miss’, it would still require investigation; not because someone who had erred needed to be held accountable, but because “the lessons of history must be learned”. He was inclined to accept that the fact of the incident was enough (just as, in the case of deaths in custody, knowledge of the death was enough to trigger the obligation – see the ECHR case of \( Salman \)). However, he limited this obligation to custody cases. In cases of injury from a third party, or a case of self-harm:

“where the victim is otherwise free within society, not every suicide or suicide attempt necessarily requires investigation. The distinction between such cases, and those such as the present is that in the latter the individual concerned is involuntarily under the care and under the direct control of the State.” (para 33).

22. This meant that the State had “assumed responsibility” for either victim or perpetrator, and the victim’s circumstances at the relevant time were under the direct control of the State or its agents. That was to be contrasted with cases where the allegation was that there had been a failure to take a positive step required by Article 2 - eg to provide police protection to a person. In those circumstances, a higher threshold would have to be passed before the investigative obligation was triggered (see \( Osman \) v UK and \( Plymouth CC \) v HM Coroner for Devon).

23. In the end, Langstaff J shied away from proposing a “single unifying threshold test”; to the extent that he proposed one, and measured it against the facts of the case, it was whether or not “… a State or its agents potentially bear responsibility for loss of life” (para 40). In deciding whether or not an inquiry was needed, the issue was
whether there was “potential” State responsibility: an arguable case would be another way of putting it; this was the language used in the Plymouth case.

Dangerous Activities

24. In Oneryildiz v Turkey (2004) ECHR 48939/99, the principles applicable to cases where the State’s agents have used lethal force were extended to cases where ‘dangerous activities’ have led to death. The complaint was that “the national authorities did not do all that could have been expected of them to prevent the deaths of the applicant’s close relatives in the accident of 28 April 1993 at the Ümraniye municipal rubbish tip, which was operated under the authorities’ control.” (para 70). The tip was an unauthorised one close to a slum; the allegation was that the authorities had failed to take any effective steps to deal with the hazards that resulted.

25. The Court ruled that the positive obligation to protect life “…must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.” So the State was expected to regulate such activities in order to discharge its obligations to protect life. But:

“...The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.” (paragraph 91).

26. In this case, the Court held, the “applicable principles are .. to be found in those the Court has already had occasion to develop in relation notably to the use of lethal force.” This is particularly so when the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities. “Such considerations are indisputably valid in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant
knowledge to identify and establish the complex phenomena that might have caused such incidents.” As a result, there was an exacting scrutiny of the State’s investigation and (in particular) its willingness to bring criminal proceedings. The same scrutiny could therefore follow major public disasters in the United Kingdom.

Events Outside the United Kingdom

27. Briefly: events in Iraq has raised the issue of whether or not the State’s investigative obligation extend to deaths in that country.

28. The death of a serviceman killed in Iraq will have be the subject of a coroner’s inquest in the UK; the inquest should be Article 2 compliant (see R (Gentle & Clarke) v The Prime Minister [2006] EWCA Civ 1690).

29. However, Convention rights are granted only to those within “the jurisdiction”. The implication of this limitation was considered in the major case of R(Al-Skeini and Others) v The Secretary of State for Defence [2004] EWHC 2911. The Court of Appeal held that there was no duty to hold an Article 2 compliant inquiry into the deaths of civilians in Basrah; the UK did not exercise ‘jurisdiction’ there because its forces were not in effective control of the city. However, when a civilian who had been held in military detention by UK forces died, the opposite conclusion followed; he was within the jurisdiction of the UK and (furthermore) the HRA conferred enforceable rights upon him.

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