What is required to satisfy the investigative obligation under Article 2 and/or 3 ECHR?

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Thursday 25th January 2007
General principles regarding the content of the obligation

1. This paper primarily considers the content of the Article 2/Article 3 investigative obligation. In other words, once the duty to undertake some form of investigation is triggered, what, in practical terms, is required in order to discharge that duty?

2. The answer, unsurprisingly, is that the form of investigation may vary according to the specific circumstances of the case. Thus, in some instances, a disciplinary or civil remedy may suffice; in other cases (particularly those involving deaths in custody) a more rigorous and detailed investigation must be undertaken.

3. Although the European Convention is not prescriptive about the manner in which the investigation should take place, there is case-law to suggest that the more serious the events that call for inquiry the more intensive should be the process of public scrutiny: see, e.g., *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129 at paragraph 62. Of equal relevance, however, and notwithstanding the seriousness of the events under examination, is the extent to which the facts surrounding a deprivation of life are clear and undisputed. In such cases “the subsequent inquisitorial examination may legitimately be reduced to a minimum formality” (Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653, quoting from the Commission’s decision in *McCann v United Kingdom* (1995) 21 EHRR 97). Therefore a case involving the use of lethal force by state agents may conceivably require less by way of investigation than a systemic failure to protect the lives of detained persons: see Lord Bingham in *Amin* at para. 21.
4. The House of Lords in *Amin* identifies the purpose of investigation under Article 2 as being:

“to ensure so far as possible that the full facts are brought to light, that culpable and discreditable conduct is exposed and brought to public notice, that suspicion of deliberate wrongdoing if unjustified is allayed, that dangerous practices and procedures are rectified, and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”

5. In cases involving a death it is clear that an inquest (provided that it is *Middleton*-compliant, as to which see below) will almost always suffice as a means of discharging the investigative obligation. Lord Justice Pill has, both in *R (Sacker) v HM Coroner for West Yorkshire in the Court of Appeal* [2003] EWCA 217 and more recently in *R (Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343 (paragraphs 69-70), expressed a degree of scepticism about the suitability of a jury in a coroner’s inquest as a vehicle for carrying out state’s obligations under Article 2. Nonetheless the House of Lords has plainly stated (in particular see *R (Middleton) v West Somerset Coroner* [2000] 2 AC 182 at paragraph 20) that in England and Wales an inquest is the means by which the state ordinarily discharges the investigative obligation, save where a criminal prosecution intervenes or a public enquiry is held into a major accident usually involving multiple deaths.
6. Recent case-law has established (see, e.g., *R (JL) v Secretary of State for the Home Department*) that the investigative obligation may also arise in cases of suicide attempts which do not result in death. In such cases, there will, plainly, be no inquest and some other form of inquiry will need to be established.

7. Whatever precise form the investigation takes – inquest, prosecution, public inquiry or some other process – the European Court of Human Rights has stipulated that there are certain minimum requirements which must be fulfilled. As will be apparent from the following discussion, however, the precise extent and nature of those minimum requirements will also vary depending upon the specific circumstances of the case: see *Goodson v HM Coroner for Bedfordshire [2004] EWHC Admin 2931* (para 68).

*The minimum procedural requirements*

8. The following minimum procedural requirements arise (these have been stated and restated in various decisions of the ECtHR, see for example *Jordan v United Kingdom [2003] 37 EHRR 2*):

8.1. the state must act of its own motion;

8.2. there must be a sufficient element of public scrutiny;

8.3. there must be sufficient involvement of the next-of-kin;

8.4. the investigation must be independent;

8.5. it must be effective; and

8.6. it must be reasonably prompt.
9. Some of these require little by way of further explanation (although caselaw and indeed experience suggests that the requirement that the investigation be reasonably prompt is frequently breached).

10. The state authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (how that squares with the approach in medical negligence cases is unclear but what is clear is that the civil proceedings route will not be sufficient in death in custody cases).

11. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny may well vary from case to case. This is further discussed in the context of the case of D, below.

12. In all cases the next of kin of the victim must be involved in the procedure. This is subject to an important qualification – the right of involvement is not absolute but is “to the extent necessary to safeguard his or her legitimate interests”. Edwards v UK (2002) 35 EHRR 19 concerned a prisoner placed in a cell with another prisoner who was displaying symptoms of bizarre behaviour and who was killed by him. The state appointed a panel to conduct a private non-statutory inquiry. The report of the inquiry was found by the Court to be thorough and sensitive, but nonetheless there was a violation of Article 2 because the panel had no power to
compel two of the prison officers to give evidence to them and because the deceased’s parents were excluded from the inquiry except when giving evidence. They were not represented and were unable to put any questions to witnesses, either through a representative or through the inquiry panel. They had to wait for the publication of the final version of the report to discover the substance of the evidence. The Court considered that they could not be regarded as involved in the procedure to the extent necessary to safeguard their interests.

13. A police investigation, in which the family will usually play little or no part, is unlikely to be sufficient in this respect, nor will internal investigations undertaken by the particular stage agency usually involve sufficient family participation.

14. The Court of Appeal’s judgment in Scholes (paragraphs 75-6) suggests that less may be required by way of family involvement where the investigation is into matters of policy and resources, than where the investigation is concerned with the underlying facts.

15. In order for the family to play an effective part in the investigation, it will often be the case that legal representation, or more particularly state funding for legal representation, will be required: see Khan (above) and D (below).

16. The persons responsible for the investigation must be independent from those implicated in the events. This means hierarchical or institutional independence and also practical independence: Mastromatteo v Italy (Appln No 37703/97). An
internal prison service investigation into a death in custody will not meet this criterion, no matter how rigorous and thorough.

17. As to the requirement that the investigation be effective (see, e.g., Edwards at paras 69-73 and Amin), the procedure must work in practice and must fulfil the purpose for which the investigation is established (see Middleton para 8). Lord Hope in Sacker suggested that this requires the investigation to be “rigorous”. In Jordan (para 107) the Court explained that the investigation must be capable of leading to a determination of whether the force used in such cases was not justified in the circumstances and to the identification and punishment of those responsible, but emphasised that this is “not an obligation of result but of means”. The Court of Appeal in D suggested that the requirement for an “effective” investigation meant that it must be conducted in a manner that does not undermine its ability to establish the relevant facts (para 9 iii) c).

18. Lord Bingham in the Middleton case considered the question of what is required by way of verdict, judgment, findings or recommendations. He observed that the European Court has never expressly ruled what the final product of an official investigation should be. The House of Lords concluded that the inquest ought ordinarily to culminate in an expression, however brief, of the jury’s conclusion on the disputed factual issues at the heart of the case. The means by which these conclusions could be expressed include a narrative verdict in which the jury’s factual conclusions are briefly summarised or a questionnaire inviting the jury’s answers to factual questions put by the coroner. In order to ensure Convention compliance, the House of Lords decided that the word “how” in s. 11(5)b)(i)(ii) of
the Coroners Act 1988 and rule 36(1)(b) of the Coroners Rules 1984 should be construed as “by what means and in what circumstances”. However, it emphasised that compliance with the ECHR does not require that the jury should determine what reasonable precautions may be taken to prevent the recurrence of fatalities. The obligation is satisfied with the coroner’s power to make an appropriate report where he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. The coroner should therefore announce publicly not only his intention to report any matter but also the substance of the report (neutrally expressed) that he intends to make (Middleton, para 38). In Scholes (paragraph 71) the Court of Appeal confirmed that Article 2 does not go further and impose a duty to find solutions to the problems which the investigation exposes.

The case of D

19. R (D) v Secretary of State for the Home Department [2006] EWCA Civ 143 concerned the procedural requirements of an inquiry set up in order to discharge the procedural obligation under Articles 2/3. D was a young man remanded in custody for amongst other things attempted robbery. He was assessed as being at risk of self harm suicide. He hanged himself using bed-linen in his cell and was discovered, cut down and revived in time to save his life but too late to save him from suffering permanent and irreversible brain damage. He was left with an organic personality disorder arising from a traumatic brain injury and for the last 4 years or so had been detained under s. 3 Mental Health Act. There was an internal investigation and report by a senior investigating officer (the Draper
report) which as far as it went was conscientious, thorough and in respects critical of the prison service.

20. The SSHD accepted that the Draper investigation did not in itself satisfy the Article 2 obligation because it was not published and neither D nor his representatives played any part in its production. Moreover and fundamentally it was not independent. The SSHD therefore invited the Prisons and Probation Ombudsman (Mr Stephen Shaw) to carry out the inquiry. It was proposed that the inquiry would be conducted along the following lines: the PPO would not hold public meetings or hearings but his report would be made public; some funding would be made available for legal representation for D; the PPO would have unfettered access to Prison Service information, documents, establishments and individuals; any information obtained by the PPO would be disclosed to D’s representatives in advance unless the PPO considered that it would be unlawful or against the public interest; D’s representatives would be invited to put forward issues, areas of concern and questions for witnesses; but there would be no opportunity for cross examination of witnesses, no power to compel witnesses (although prison service staff would be required under their conditions of employment to offer all reasonable co-operation). This process was described as an ad hoc inquiry which was not set up under the terms of any particular statute.
21. Mr Justice Munby concluded at first instance that:

21.1. the inquiry must be held in public, unless there are Convention compatible reasons to hear the evidence of a particular witness, or other parts of the hearing, in private;

21.2. the inquiry must be capable of exercising a power to compel the attendance of witnesses, if this becomes necessary for the inquiry to be effective, and this power must be capable of being exercised without undue delay;

21.3. subject to the first point above, D’s representative must be able to attend at public hearings of the inquiry and put questions to witnesses in person;

21.4. D’s representative must be given reasonable access to all relevant evidence in advance; and

21.5. adequate funding for D’s representative must be made available without inappropriate conditions attached and at such a level to enable D to be involved in the investigative procedure to the extent necessary to satisfy his legitimate interests.

22. By the time of the hearing in the Court of Appeal the two key areas of dispute were that the fact that it was not intended to hold the inquiry in public and the fact that there would be no opportunity to cross-examine witnesses.

23. On the issue of a public inquiry, the Court of Appeal held as follows:

“23. We recognise that each case turns on its own facts and that account must be taken of all the investigations set up by the state. Thus in a case in which
there is a death in prison, the obligation of the state under article 2 of the Convention may be discharged by an inquest, provided that it is an enhanced inquest of the kind identified by the House of Lords in R (Middleton v West Somerset Coroner [2004] UKHL 10, [2004] 2 ACT 182, and discussed in Takoushis. Such an inquest would, however, be in public. In such a case there may also be an investigation by the PPO but there would ordinarily be no need for him to hold his inquiry in public because the requirements of article 2 in this regard would, at any rate in most cases, be satisfied by the inquest.

In considering whether the judge erred in principle, it is in our view important to have in mind what the judge meant by directing that the inquiry must be in public. We do not think that he can have meant that the whole process must be in public. No inquiry is ever wholly in public. Thus, for example, the police investigate a death and report to the coroner. Their investigation is not in public. Nor is the preliminary process of obtaining evidence, including witness statements in any public inquiry. Examples which spring to mind are the Marchioness inquiry and the Bloody Sunday inquiry, in each of which many statements were taken before any public hearings were held. All depends on the circumstances. We think that the judge must have contemplated simply that Mr Shaw (or whoever conducts the inquiry) would make the evidence and any written submissions public and take oral evidence in public, subject to the proviso which he included in the order to the effect that there might be Convention compatible reasons for not holding the whole investigation in public. It will of course be for the person conducting the inquiry to decide what oral evidence to call and indeed whether he wishes to hear oral submissions.

We have reached the conclusion that the authorities, and in particular, Amin, demonstrate that the judge was correct to hold that the investigation into the attempted suicide of D should be in public (in the sense just described) in order to discharge the United Kingdom’s obligations under article 2 of the Convention.”

24. In reaching this conclusion the Court of Appeal noted in particular:

24.1. in Edwards the investigation was held to be inadequate because, inter alia, it was conducted in private with no opportunity for the family to attend save when giving evidence themselves;

24.2. in Wright v Secretary of State for the Home Department [2001] UKHRR 1399 Mr Justice Jackson held, in the case of a serving prisoner who suffered an asthmatic attack and died and where there were questions about the quality of medical treatment and conduct of the responsible medical
officer, that there should be an independent investigation to be conducted in private;

24.3. Mr Justice Hooper reached the same conclusion at first instance in *Amin*;

24.4. Lord Bingham in *Amin* expressly approved the approach in *Wright* and Hooper J’s conclusions;

24.5. Lord Hope in *Amin* placed particular reliance on the system of fatal accident inquiries in Scotland (“it has for a long time been recognised in Scotland that it is in the public interest for a public inquiry to be held into the death of a person who at the time of the death was being held in custody”);

24.6. Lord Hope also relied on a passage from *Edwards* in which the Court held that:

“The Government argued that the publication of the report secured the requisite degree of public scrutiny. The court has indicated that publicity of proceedings or the results may satisfy the requirements of article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as in theory of the state agents implicated in the events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest public exposure possible …”

24.7. Lord Hope concluded that failures by the prison service which lead to a prisoner’s death are no less demanding of investigation and of the widest
possible exposure than lethal acts which state agents have deliberately perpetuated, perhaps more so.

The Court of Appeal thus concluded that the facts of D’s case require public examination for much the same reasons as given by Lord Hope in *Amin*.

25. The second key issue was cross-examination, the judge having held that in order to satisfy Article 2 the inquiry must afford D’s representatives the right to cross-examine witnesses. The Court of Appeal noted that the House of Lords in *Amin* did not give the same detailed consideration to this question as it did to the question whether the inquiry should be in public and that the European Court of Human Rights had not expressed a similar view to the effect that cross-examination must be permitted in a death in custody case. In *Edwards*, the European Court noted that the parents had not been able to put questions to witnesses, but the Court of Appeal considered that “the Court did not say that the family should have been entitled to cross-examine witnesses themselves, but implied that they might have been permitted to put questions through the panel”. It was, so the Court of Appeal explained, unsurprising that the European Court had not gone further as most member states, unlike the UK, do not have an adversarial system and most inquisitorial systems involve the chairman of the relevant tribunal asking the questions. The Court continued as follows:

“40. We note that the 2005 Act [the Inquiries Act] does not give parties represented at an inquiry under it rights to cross-examine witnesses ... By section 17(1), the procedure and conduct of the inquiry are to be as the chairman may direct and, by section 17(3), he must act with fairness and with regard to the need to avoid unnecessary cost. Thus while, by section 17(2), he may take evidence on oath, there is no provision entitling interested parties to cross-examine witnesses. It is a matter for the chairman of the particular
inquiry to decide whether and to what extent to permit interested parties or their representatives to ask questions of witnesses.

41. We see no reason why an inquiry conducted in such a way should not be compatible with article 2 of the Convention. The underlying obligation of the chairman is to act fairly. In discharging that obligation, the chairman may or many not allow others to question witnesses, depending upon the circumstances of the particular case. In some cases it may be appropriate to do so and in others it may not. For example, where there is counsel to the inquiry, it may not be appropriate, whereas where there is no such counsel, it may, but all will depend upon the circumstances.

42. We have reached the conclusion that the judge went too far, in so far as he concluded that D’s representatives must be entitled to cross-examine witnesses. They must in general be entitled to see the written evidence, to be present during oral evidence and to make appropriate submissions, including submissions as to what lines of enquiry should be adopted, what questions asked and, indeed, who should be permitted to ask witnesses questions about what. As just stated, it will be a matter for the chairman to decide what procedure to adopt. Such an approach, which is that specified in the 2005 Act, will, in our judgment, discharge the United Kingdom’s obligations under Article 2 of the Convention on the facts of this case and be consistent with both the Strasbourg jurisprudence and the reasoning of the House of Lords in Amin."

26. On the remaining issues, the Court of Appeal largely endorsed the judge’s approach. In particular it agreed that the judge was entitled to direct that the inquiry must be capable of exercising a power to compel the attendance of witnesses, if this becomes necessary for the inquiry to be effective.

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25 January 2007