

Human rights challenges in relation to social care

Nicola Greaney

Steve Broach

Steph David

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VICTIM STATUS (1)

- ECHR, Art 34 “victim”, S. 7 HRA
- ECtHR – Practical Guide on Admissibility Criteria (2019)
- “Direct victims” and “indirect victims”
- **Direct victim:** Directly affected by the alleged violation (*Lambert v France* (2016) 62 EHRR 2)
 - Includes class of people who might be affected *Campbell and Cosans v United Kingdom* (1980) 3 EHRR 531, *Klass v Germany* (1978) 2 EHRR 214
 - Family members have been recognized as direct victims of Art 2 breaches - *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, *Yasa v Turkey* (1998) 28 EHRR 408
 - Family members can in principle be recognized as direct victims of Art 3 on account of suffering stemming from serious HR violations affecting relatives (*Selami v former Yugoslav Republic of Macedonia* [2018] ECHR 211)

VICTIM STATUS (2)

- **Indirect victim:**

- “Close family members” – complaint about death or disappearance of relative alleged to engage state responsibility under Article 2 (*Van Colle v United Kingdom* [2010] ECHR 247)
- See *Daniel v St George’s NHS Trust* [2016] EWHC 23 (QB)
- Such family members can also bring complaints under other Articles such as 3 and 5 – provided alleged violation closely related to death or disappearance
- If violation not closely linked to death or disappearance, more restrictive approach
- Concept of non-transferable rights
- May recognize victim status in respect of Art 3 complaint of late relative if “*strong moral interest, beyond mere pecuniary interest*” or other “compelling reasons”

Article 2

“(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. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Article 2 duties

Three elements (Lord Dyson in *Rabone v Pennine Care NHS Trust* [2012]):

- a) a **negative duty** to refrain from taking life save in the exceptional circumstances...;
- b) a **positive procedural duty** to conduct a proper and open investigation into deaths for which the state might be responsible;
- c) a **positive duty** to protect life in certain circumstances.
 - a) **General positive obligation** - Legislative and administrative framework to provide effect deterrence against threats to the right to life: *Öneryildiz v Turkey* (2004)
 - b) **Operational duty**: “*preventative operational measures*” to protect those whose life is at risk from the criminal acts of another.

The general positive obligation

- This requires the state to establish a framework of laws, 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)
- What does it include? See: *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681; *Öneryildiz v Turkey* (2005) 41 EHRR 20
- Possible to bring a free standing claim for a breach of this obligation – see *Savage* at para 31, supported by *Palmer v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin) at para 54 and *R v SSHD ex parte FI* [2014] EWCA Civ 1272

Positive obligation: access to life-saving emergency treatment

Lopes Fernandes v Portugal Grand Chamber

- GC confirms distinction: mere negligence and cases involving denial of access to life-saving treatment
- Chamber found breach of procedural and substantive obligations under Art 2. GC only found violation of procedural aspect. No violation of substantive obligation because **NOT DENIED HEALTHCARE**
- Violations of procedural duty under Art 2 (lengthy, lack of promptitude etc). **Domestic system as a whole, failed to provide an adequate and timely response.**

Lopes: Grand Chamber Judgment (2)

- “Mere medical negligence” cases
 - Only find violation if deficiencies in regulatory framework shown to have operated to the patient’s detriment (para 188) [causative link]
- ONLY IN EXCEPTIONAL CIRCUMSTANCES THAT RESPONSIBILITY OF STATE ENGAGED BY ACTS /OMISSIONS OF HEALTHCARE PROVIDERS (PARA. 190)
- **First** set of circumstances: **specific patient’s life** is knowingly put in danger by denial of access to life-saving treatment, but does not extend to where patient – deficient, incorrect or delayed treatment
- **Second** set of circumstances:
 - **STRUCTURAL /SYSTEMIC DYSFUNCTION + FAILURE IN REGULATORY FRAMEWORK + HARM TO PATIENT**

Breach of positive obligation in social care settings

- *Dumpe v Latvia* (App No 71506/13)
 - Failure of staff at care home and GP to react to deterioration in condition
 - ECtHR: medical negligence claim
 - Not exceptional circumstances giving rise to liability pursuant to *Lopes*
- *Maguire v HM Coroner for Blackpool & Hyde* [2020] EWCA Civ 738
 - *Exceptional circumstances in Lopes not made out*

The operational Article 2 duty

- This is owed where:
 - assumption of responsibility for the individual's welfare by the state i.e. there must be a sufficient degree of control.
 - Alternatively, the victim's vulnerability (where it is sufficient) may trigger the obligation on its own.
 - If the operational duty is owed the next question is whether there was a "real and immediate risk" to life.

Origin of operational duty

- *Osman v UK* (2000) 29 EHRR 245 – “... it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”
- See also: *Sarjantson v CC of Humberside* [2013] EWCA Civ 1252

The operational duty in social care settings

- *Maguire v HM Coroner for Blackpool & Hyde [2020] EWCA Civ 738*
 - Operational duty not owed to vulnerable woman in care home subject to DOL – not analagous to psychiatric patient in hospital
 - Operational duty can be owed to those in institutional settings – knowledge of appalling conditions,– *Nencheva v Bulgaria* (App no 48606/06). Cf *Z v United Kingdom*.
 - Operational duty did not apply to provision of medical treatment in a care home
 - Duty owed for some purposes only
 - Elderly patient on transfer between two care homes as a result of the general frailty and resistance to change of older people - *Watts v United Kingdom* (2010) 51 EHRR 66. “A defined area of activity” (Maguire)

Causation and Art 2.

- Operational duty: two approaches (note both about operational duty):
 - *Van Colle* [2007] EWCA Civ 325 (undisturbed by subsequent appeal) that **causation is established if there was a “substantial chance” or “real prospect”** that without the violation the outcome would have been different.
 - *Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252 CA suggests there **need not be a causative link** between the breach and the death: ‘*The fact that a response would have made no difference is not relevant to liability*’ (para 28)
- General positive obligation: Causal link is required

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment...”

Rooman v Belgium [2019] ECHR 105

Article 3 generally (1)

- Minimum level of severity depending on circumstances of case: *Ireland v UK* (1979-80) 2 EHRR 25, paras 162, 167
- Ill treatment only amounts to torture where it is **deliberate and causes very serious and cruel suffering** (para 167)
- Treatment = inhuman if it causes intense **physical or mental suffering** (*Ireland v UK* (1979-80) 2 EHRR 25, para 167)
- Treatment = 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)

Article 3 generally (2)

- *Selmouni v France* (2000) 29 E.H.R.R 403 – reclassification of acts as torture
- *R (MIV) v Newham LBC* [2018] EWHC 3298 (Admin) – assessing whether an individual’s “*predicament is sufficiently serious to engage Article 3*” – individual’s particular vulnerability by reason of their disability

Obligations under Article 3

- The **substantive obligations** imposed by Article 3:
 - The **negative obligation** not to inflict harm contrary to Article 3;
 - The **general positive obligation** to establish a framework of laws, which will prevent the occurrence of torture, inhuman or degrading treatment, to the greatest extent possible;
 - The **operational obligation** to take all reasonable preventative measures to protect people from known risks to their life or person;
 - The **protective obligation** owed to those detained by the state;
 - The **procedural obligation** to conduct an effective investigation into possible violations of the substantive obligations.

The negative obligation (1)

- This is the obligation not to inflict treatment that breaches Article 3:
 - Care home abuse
 - *R (Limbuela) v SSHD* [2005] UKHL 66 – denial of most basic needs
 - Probably does not encompass a failure to provide positive welfare support: *Anufrijeva v Southwark London Borough Council* [2004] QB 1124; *R (MIV) v Newham LBC*

The negative obligation (2)

- *R (Bernard) v Enfield* [2003] HRLR 4 – failure to provide appropriate accommodation did not constitute a breach of Art 3
- Supported living or in the community *ZH v Commissioner of the Police of the Metropolis* [2013] EWCA Civ 69
- Seclusion or restraint in the “blue room” – *R (C) v A Local Authority and others* [2011] EWHC 1539 (Admin) – alleged breaches of Articles 3, 5 and 8

The general positive obligation

- Prevent the infliction of harm contrary to Article 3: (*A v UK* (1998) 27 EHRR 611, para 22).
- When could a breach arise?
 - Systemic not individual failings and harm to the individual

The operational obligation

- 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 of** (*Z v UK* (2001) 34 EHRR 97, para 73; *Premininy v Russia* (2011) 31 BHRC 9 (App. No. 44973/04)).
- A denial of treatment that is a medical necessity could amount to a breach of Article 3 – *D v UK* [1997] 24 EHRR 42

The protective obligation

- Article 5(1)(e) “the lawful detention of persons of unsound mind” and the therapeutic aspect.
- Individual’s health: *Rooman, Herczegfalvy*.
- Deterioration in mental health (*Aerts v Belgium* (2000) 29 EHRR 50, paras 64-66) or exacerbate naturally occurring illness – *Pretty v UK* [2002] 35 EHRR 1 para 52.

Article 8

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 8

Scope?

- Conditions in hospital/care home
- failure to treat has caused C to suffer a detriment which falls within Article 8
- Abuse/neglect – no assault/battery
- Secondary victim claims – barred by control mechanisms, no psychiatric injury
- Note – declaration of incompatibility made in *Smith v Lancashire Hospitals* [2017] EWCA Civ 1916
- Disclosure of confidential health information: *Z v Finland* (1998) 25 EHRR 371

Article 8 and the patient with life-threatening illness

- Established that end of life engages Article 8(1): “67. The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. **The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention...**” (*Pretty v UK* (2002) 35 EHRR 1 (emphasis added), overturning *R (Pretty v DPP* [2002] 1 AC 800))

Article 8 and the patient with life-threatening illness

- *R (Purdy) v DPP* [2009] UKHL 45 (Code for Crown Prosecutors insufficient to satisfy requirements of accessibility and foreseeability within Art. 8)
- *R (Tracey) v Cambridge University Hospitals NHS Foundation Trust* [2014] EWCA Civ 822 (Article 8 required notification before DNACPR order made)

Article 8 and the patient with life-threatening illness

- COP has held that in the best interests of an elderly lady with terminal ovarian cancer to leave her care home to live with her daughter; had been unable to visit her in the care home: *VE v AO* [2020] EWCOP 23
- Most people would strongly wish to die with their family around them; the court should seek to ensure circumstances of P's imminent death that are as peaceful and dignified as possible;

Article 8 and the patient with life-threatening illness

- Given the Covid pandemic the most contact she would be likely to have would be one short visit from one family member at or around the time of her death
- Wishes and feelings: would say wished to spend the time left with her daughter
- Not argued that risk of Covid precluded move – no more than a possibility of Covid
- Died within 2 days of moving

Article 8 and the patient with life-threatening illness

- Significance: failure to provide family access to dying patients risks breaching Article 8
- Claims for declarations and for damages
- Care Homes
- Hospitals

Questions?