
Article 2 Inquests

PETER SKELTON QC, CAROLINE CROSS AND KATE BEATTIE

I. Overview

Article 2 of the European Convention of Human Rights (Article 2) protects the right to life. States are required to take steps to protect this right, either through commission or omission. Where there is a (suspected) breach of the state's obligations that causes death, an 'Article 2 inquest' is required.

The Convention has been described as a 'living instrument',¹ and this is particularly the case with Article 2. As Lord Kerr stated in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*, 'Convention rights do not generally lend themselves to the application of inflexibly prescriptive rules. This is especially true of article 2 rights.'² However, the application of Article 2 can be difficult. As Baroness Hale said in *Rabone v Pennine Care NHS Trust*,³ the 'broad statements' of principle made by the Strasbourg Court are 'hard to interpret and even harder to apply'.

Article 2 is often divided into three broad obligations:

1. The positive obligation—the duty to take appropriate steps to protect life. This is broken down further into two components: (1) the general or systemic duty; and (2) the operational duty;
2. The negative obligation—the prohibition of intentional and unlawful taking of life by state agents. This is also broken down into (1) the general or systemic duty; and (2) the operational duty;
3. The procedural obligation—the duty to investigate potential violations of the negative or positive obligations.

Each of these obligations is dealt with in the cases below.

There are some cases where the application of Article 2 is clear-cut. However, many cases are borderline: it is in this nebulous area where the case law has been expanding rapidly over recent years.

¹ See, eg, the cases cited by Baroness Hale in *In re McCaughey* [2011] UKSC 20, para 90.

² *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665, para 209.

³ *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2013] 2 AC 76, para 97.

II. Legislation and Other Sources

Human Rights Act 1998

6. Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

...

7. Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

...

22. Short title, commencement, application and extent

...

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

HRA 1998, Schedule 1, Part 1: The European Convention on Human Rights

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.

Coroners and Justice Act 2009

5. Matters to be ascertained

(1) The purpose of an investigation under this Part into a person's death is to ascertain—

- (a) who the deceased was;

- (b) how, when and where the deceased came by his or her death;
- (c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

(2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)), the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.

(3) Neither the senior coroner conducting an investigation under this Part into a person's death nor the jury (if there is one) may express any opinion on any matter other than—

- (a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);
- (b) the particulars mentioned in subsection (1)(c).

This is subject to paragraph 7 of Schedule 5 [Coroner's power to take action to prevent other deaths].⁴

Guidance

See the Chief Coroner's Guidance No 17 on Conclusions⁵ in relation to Article 2 inquests. See also the Chief Coroner's Guidance No 22 on Pre-Inquest Review Hearings, which at paragraph 7 advises coroners that the issues to consider at such a hearing will often include whether Article 2 is engaged. Specific guidance on the application of Article 2 is anticipated but has yet to be published.

III. Cases

A. The Positive Obligation Under Article 2

(1) *The General/Systemic Duty*

The general/systemic duty (also called the substantive duty) is a generic term for measures taken by a state to protect life. As stated by Lord Bingham in *R (Middleton) v West Somerset Coroner*:⁶

The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.

The state must put in place 'a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.⁷ This framework includes laws and regulations,⁸ as well as effective systems of work and administration aimed at protecting life.

⁴ See Chapter 25 on PFD reports.

⁵ 30 January 2015, from para 45. Available at www.judiciary.gov.uk/wp-content/uploads/2013/10/guidance-no17-conclusions.pdf (3 March 2015).

⁶ *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 2. See further later in this chapter.

⁷ *Osman v United Kingdom* (2000) 29 EHRR 245, para 115; *Öneryıldız v Turkey* (2005) 41 EHRR 20, para 89; *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, para 12.

⁸ cf *Nachova v Bulgaria* (2006) 42 EHRR 43, para 93.

The state must also have appropriate measures in place to prevent risks to health or wellbeing, and in particular to persons who are known to be at risk, for example those who are in detention, conscripts or in environmentally hazardous situations.⁹ However, where the activities are dangerous, the risk cannot be ruled out completely; consequently, there must be sufficient regulation and control to reduce the risk to the minimum level that is reasonably possible.¹⁰

The framework of procedures and enforcement mechanisms must also include preventative measures after death, such as ‘means of civil redress and criminal prosecution’ where appropriate.¹¹ There must also be a competent legal system to enforce the right to life.¹²

(i) *Osman v United Kingdom (2000) 29 EHRR 245, 5 BHRC 293, [2000] Inquest LR 101*

Keywords: Article 2, police

In this leading case, the European Court of Human Rights (ECtHR) set out the general positive obligations under Article 2, as well as setting a high threshold for establishing a breach of the state’s operational duties.

A teacher, Paul Paget-Lewis, waged a campaign of harassment, vandalism and victimisation against his former pupil Ahmet Osman and Ahmet’s family. On 7 March 1988 he shot and wounded Ahmet and shot dead his father, Ali Osman.

The Osman family brought a negligence claim against the police on the basis that a duty of care was owed by the police to Ali and Ahmet Osman. The police had received numerous complaints regarding Paget-Lewis’ disturbing behaviour in the months prior to the shooting; however, notwithstanding the clear warning signs, the police had failed to appreciate the serious risk he posed to the Osman family. The police sought to strike out the case as showing no reasonable cause of action. While the police lost at first instance, the Court of Appeal struck out the case as demonstrating no cause of action, and refused leave to appeal.

The applicants applied to the ECtHR, alleging (amongst others) a breach of Article 2 because the police had failed to protect the lives of Ali and Ahmet Osman. The ECtHR found no violation of Article 2 because there was no breach of the operational duty (see next section). However, the Court did outline the general obligations under Article 2 that a state is expected to uphold:

115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State’s obligation in this respect extends beyond its primary 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 sanctioning of breaches of such provisions. It is

⁹ cf *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, para 21; *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, para 36; *Öneryıldız* (n 7) para 89.

¹⁰ *Stoyanovi v Bulgaria* App no 42980/04 (ECtHR, 9 November 2010), approved in *Smith v Ministry of Defence* [2014] 1 AC 52 (the *Susan Smith* case). See further later in this chapter and Chapter 23 on military personnel and civilians in war.

¹¹ *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29 (the ‘*Catherine Smith*’ case), para 203. See further later in this chapter.

¹² *Öneryıldız* (n 7) para 94.

thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

(ii) *Öneryildiz v Turkey (2005) 41 EHRR 20, 18 BHRC 145, [2004] Inquest LR 108*

Keywords: Article 2, human rights, local authorities

In *Öneryildiz*, the ECtHR emphasised that the positive, general obligations under Article 2 required a legislative and an administrative framework aimed at deterring threats to the right to life, especially in relation to dangerous activities.

The applicant and his family lived in a slum near a municipal rubbish tip in Istanbul. In 1993 a methane explosion caused a landslide that killed 39 people, including the applicant's relatives, and destroyed 10 homes. In 1991, almost two years prior to the explosion, the authorities had been warned of the life-threatening risks posed by the tip; however, even though the operation of household refuse tips and slum areas were subject to regulations, the authorities did not enforce them.

Immediately following the accident, a committee of experts was commissioned to investigate who was responsible for the explosion. Their report concluded that the federal and local authorities were predominantly to blame.

Two officials were prosecuted and found guilty of negligence in the exercise of their duties. Their prison sentences were commuted to fines. In September 1993 the applicant sued four local and federal authorities, seeking compensation for the loss of his relatives and home. A court gave judgment in his favour, although it awarded minimal compensation. The compensation was not paid.

The Grand Chamber unanimously held that there had been a breach of the substantive aspect of Article 2, and by 16 votes to 1 that there had been a breach of its procedural aspect:

70. In the instant case the complaint before the Court is 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 April 28, 1993 at the Ümraniye municipal rubbish tip, which was operated under the authorities' control.

71. In this connection, the Court reiterates that Art.2 does not solely concern deaths resulting from the use of force by agents of the state but also, in the first sentence of its first paragraph, lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction.

The Court considers that this obligation 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 ('dangerous activities').

...

89. The positive obligation to take all appropriate steps to safeguard life for the purposes of Art.2 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.