Blackstone
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Presented by Blackstone Chambers in association with Liberty
Focus on Public Law and Human Rights
18th November 2005

POSITIVE OBLIGATIONS UNDER ARTICLES 2 AND 3 OF THE ECHR

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(I) The basic obligations

1. Article 2 protects the right to life. It provides that "*everyone's right to life shall be protected by law*". It then sets out a prohibition on intentional deprivation of life save in specific circumstances.

2. Article 3 prohibits subjecting anyone to torture or to inhuman or degrading treatment or punishment.

3. Article 1 imposes a duty on States to secure to everyone within their jurisdiction the rights and freedoms set out in the ECHR. It is this provision, or this provision combined with the notion of implying additional rights and duties to make the express rights and duties effective in practice, that has led to the development of positive obligations on the State going beyond the express obligations imposed on them by Articles 2 and 3.

4. Two of those positive obligations are important in the present context.

   4.1. The first may be described as the "*protective*" obligation. In a variety of circumstances, the State is obliged to take all reasonable steps to protect a person's life / avoid a real and immediate risk of Article 3 ill-treatment – so for example, as in **Amin** [2004] 1 AC 653, the State is obliged to take reasonable steps to prevent one prisoner killing another one. At its heart therefore, this obligation is akin to negligence.

   4.2. The second may be described as an "*investigative*" obligation. This obligation is to conduct an appropriate investigation into a death or a case of Article 3 ill-treatment in appropriate cases. This obligation was described in **Khan** [2004] 1 WLR 971, in the context of gross hospital negligence causing the death of a child (Article 2), as having three interlocking aims: "*to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; and to assuage the anxieties of the public*" (para 67(3)). This was expanded by Lord Bingham in para 31 of *Amin*, where he described the rationales for this investigative obligation 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. It is important to bear in mind that these obligations became part of domestic law only with the introduction of the Human Rights Act 1998 – i.e. on 2 October 2000. The decision of the House of Lords in **Re McKerr** [2004] 1 WLR 807 is important in that respect. In summary, it held that if the death or ill-treatment occurred before that date, there was no surviving domestic law obligation, based on the ECHR, to investigate.

McKerr did not of course preclude claimants from seeking to challenge the exercise of ministerial discretion conferred for example under a statute on traditional public law grounds, but such a challenge ultimately would have to be based on irrationality – a more formidable hurdle for a claimant than Article 2.

6. However, in **The Commissioner of Police for the Metropolis v Christine Hurst** [2005] EWCA 890, the Court of Appeal distinguished **McKerr** in the context of a refusal by a Coroner to reopen an inquest into a death occurring before the commencement of the HRA. The Court noted that **McKerr** had held that no claim could be brought under section 7 of the HRA on the ground that a coroner had acted unlawfully under section 6 by not respecting the applicant's right into a proper investigation into the death. However, unlike section 6, the interpretative provision under section 3 is concerned with the rights and obligations existing in international law. Thus, article 2 rights under the ECHR having arisen prior to the commencement of the HRA, were to be taken into account when interpreting legislation pursuant to section 3. Accordingly, the Court of Appeal declined to agree with the Divisional Court's conclusion in **Pearson v HM Coroner** [2005] EWHC 833 (Admin), that **McKerr** inexorably prevented the application of section 3 in the case of a death that occurred before 2 October 2000.

(II) The protective obligation

i. Types of obligations

7. The protective obligation may take a variety of forms. At its most basic, the positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction imposes a duty on the State to put in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery of the prevention, suppression and sanctioning of breaches of such provisions (e.g. **LCB v UK** (1998) 27 EHRR 212, **Osman** *v UK* (1998) 29 EHRR 245). Similarly, it has been recognised in the healthcare context that it includes action by the state in **regulating** how healthcare professionals work so as to ensure that high standards, appropriately protecting life, are established and maintained.

8. It can also give rise to an obligation to provide **information** regarding a possible risk to life caused by the actions of the state (e.g. **LCB v UK** (1998) 27 EHRR 212, warning of the risk of contracting a life-threatening disease), or even by their own actions where the opportunity arises as a result of the provision of facilities by the state (**Barret v UK** (1997) 23 EHRR CD 185, hazards of excessive drinking, **Wockel v Germany** App. No.32165/96, failure to take steps to prohibit smoking in public places / allowing the advertising of tobacco).

9. The protective obligation arises not only where the risk to life or ill-treatment arises as a result of the state's or authority's acts, but also extends to ill-treatment administered by private individuals (e.g. **A v United Kingdom** (1998) 27 EHRR 611, **Amin** [2004] 1 AC 653, **Pretty v United Kingdom** (2002) 35 EHRR 32).

10. This type of protective obligation commonly arises in relation to agencies of the state with protective functions (police, prison authorities, social services etc), requiring them to take appropriate, **"***operational***"** action**.**

11. **Osman v the United Kingdom** (1998) 29 EHRR 245 first identified the ingredients of this operational action aspect. There will be a violation of Article 2 if four matters are established:

    11.1. There was a "*real and immediate risk to the life of an identified individual*" from the criminal acts of a third party.
    11.2. The authorities knew or ought to have known about that risk at the time.
    11.3. There was a failure to do all that could reasonably be expected of them to take steps to deal with the risk.
    11.4. Had such steps been taken they might have been expected to deal the risk and prevent the death.

12. These principles have been applied in the context of:

    12.1. **Prisons**: see notably **Edwards v the United Kingdom** (2002) 35 EHRR 487 (which bore a strong similarity on the facts to *Amin* – and see for a similar situation *R (Wright) v Home Secretary* [2001] EWHC Admin 520); *Keenan v the United Kingdom* (2001) 33 EHRR 913.

    12.2. **Social services**: in the context of alleged failures by social services to protect children and others for whom social services have responsibilities: see eg **Z v the United Kingdom** (2002) 34 EHRR 3 at para 73 and **Plymouth City Council** [2005] EWHC 1014.

13. Although the European Court has not ruled out in principle the application of the **Osman** approach to the field of health care policy, it has consistently adopted a different approach (see e.g. **Powell v the United Kingdom** (App No 45305/99); **Sieminska v Poland** (App No 37602/97); **Calvelli and Ciglio v Italy** (App No 32967/96); **Vo v France** (App No 53924/00); **R (Khan) v Secretary of State for Health** [2003] EWCA Civ 1129; and **Goodson**). The Court has declined to get sucked into an analysis of the kind undertaken in the police and prison cases – the negligence analysis. Rather, it has held that, for reasons not explained, errors of judgment/negligence by doctors are different. In those circumstances, the mere existence of disciplinary regulation and the fact of civil proceedings (even though settled) was sufficient to satisfy the protective obligation under Article 2. The Court has generally addressed the matter from the angle of the adequacy of the mechanisms for shedding light on the course of the events, that is, the "*investigative*" obligation.

ii. The Osman operational duty

14. One important issue arising from the **Osman** formulation is the extent to which it is necessary that there be an "identified individual" for the duty to arise.

15. In **Edwards** the Court found that the test was satisfied as "*any prisoner sharing a cell with Richard Linford that night would have been at risk to his life*", Christopher Edwards happening to be that prisoner (§58). In other words, the individual was identified by the nature of the risk.

16. The **Osman** approach was applied in **Bromiley v United Kingdom** (App. No. 33747/96), which concerned a claim by the mother whose daughter had been murdered by a prisoner released on licence, in which the Court declared the application inadmissible because, amongst other matters, there was no evidence that the applicant's daughter would have been at foreseeable risk, i.e. that she was an identified individual.

17. The case of **Mastromatteo v Italy** (App No 37703/97, Judgment 24 October 2002), though, creates some uncertainty. It concerned similar facts to **Bromiley***:* the applicant's son had been killed by prisoners who had been granted home leave and had taken the opportunity to abscond. As the Court noted, it was not concerned with the situation in **Osman** and **Edwards** (the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act), but with the issue of the obligation to afford general protection to society against the potential acts of one or several persons serving a prison sentence for a violent crime (§69). However, the Court simply did not address whether the **Osman** approach could be said to apply in that case, finding that there had not been any violation of Article 2 on other grounds.

18. It is suggested that it will be sufficient for there to be an identifiable individual or individuals. See, for example, **Robert H v Ashworth Hospital Authority** [2001] EWHC 872 (Admin), in which *H* sought to challenge the condom policy at Ashworth hospital as being in breach of Article 2. Notably, the hospital did not seek to argue that Article 2 did not apply in circumstances where the risk arose from H's potential contact with other patients in highly monitored situations, with only about 18 patients on a ward, and a total of about 405 patients. (The Court found there to be no violation on other grounds).

19. The scope of the **Osman** operational duty is currently under consideration in the case of **Van Colle v Chief Constable of Hertfordshire**, currently due to be heard in December 2005. In that case, the parents of a potential witness have brought a claim under the HRA for damages following the death of their son allegedly as a result of a failure by the police to take reasonable measures to protect him in circumstances where they knew of a real and immediate risk to life. The police have sought to argue that when considering what might reasonably be expected, the court should effectively apply the common law principles of immunity in **Duwayne Brooks v Commissioner of Police for the Metropolis** [2005] UKHL 24.

(iii) **Duty to protect from destitution or illness**

20. The scope of any positive obligation to protect an individual from destitution or illness was considered in the recent House of Lords' decision in **R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department** [2005] UKHL 66.

21. In the Court of Appeal Laws LJ had drawn a distinction between those two scenarios, and held that whereas state violence (other than in the limited and specific cases allowed by the law) was always unjustified, acts or omissions of the state which exposed a person to suffering other than violence which might breach article 3 were not categorically unjustifiable. He analysed the situation as being a spectrum, the dividing line being between cases where government action was justified notwithstanding the individual's suffering, and cases where it is not.

22. Lord Hope confessed to a '*feeling of unease*' about that analysis (shared by Baroness Hale), as having no foundation in any of the European Court's judgments, and it being hard to find a sound basis for it in the language of Article 3 (§53). He, and Lord Brown, considered that the real issue was whether the state was properly to be regarded as responsible for the prohibited conduct (rather than whether the obligation was positive or negative). Lord Hope held that whilst issues of proportionality would be relevant when an obligation to do something is implied into the Convention[1], such that the obligation is not absolute and unqualified, it was of no relevance where the conduct for which the state is directly responsible results in the Article 3 ill-treatment (§55).

23. The House of Lords rejected the Secretary of State's submission that a failure by the state to provide an individual within its jurisdiction with accommodation and the wherewithal to acquire food and the other necessities of life could not by itself constitute '*treatment*' for Article 3 purposes. Lord Scott noted that although Article 3 did not of itself impose a (positive) obligation to provide a minimum standard of social support for those in need (such that a state's failure to give that support would not without more engage Article 3), the situation was different where the destitution arose from the imposition of a statutory regime on an individual (§66-67).

24. Accordingly, the duty imposed on the Secretary of State arose not from any free-standing positive obligation, but from the prohibition on providing basic benefits to which an individual would otherwise be entitled imposed by the statutory scheme, being 'treatment' by the state.

25. The significance of distinguishing between a positive aspect to a negative obligation imposed (as in **Limbuela**) and a positive obligation (as in **Osman**) was also highlighted by Lord Hope in **R v Ashworth Hospital Authority ex parte Munjaz** [2005] UKHL 58: "*while the absolute prohibition is not capable of modification on grounds of proportionality, issues of proportionality will arise where a positive obligation is implied as where positive obligations arise they are not absolute*" (§78). Thus, Lord Hope concluded that if full effect was given to the Policy on seclusion adopted by the hospital the risk of ill-treatment was "*very low*", and it would be disproportionate for Ashworth to be compelled to abandon the Policy (§82). Lord Bingham, however, found it was not necessary to consider the extent or probability of the risk or the extent to which it must be foreseen, on the grounds that the Policy, properly operated, would be sufficient to prevent "*any possible breach*" of the Article 3 rights of the patient.

(III) <u>The investigative obligation</u>

[1] See, for example, **Ilaşcu and Others v Moldova and Russia** §332.

(i) <u>The Trigger</u>

26. It is important to focus on the nature and ingredients of the protective obligation because in most cases this is the necessary starting point in considering whether or not the investigative obligation is triggered. That is because not many cases involve deliberate killing or ill-treatment by the State – although some do: see e.g. the Gibraltar shootings, the shoot to kill cases in Strasbourg and the Wormwood Scrubs ill-treatment allegations. More cases in which there is a call for a public inquiry involve an alleged, negligent failure by State agencies to protect individuals who are killed or ill-treated by other private individuals.

27. In such cases, the trigger for the investigative obligation is whether there has been an arguable breach of the protective obligation. That involves the courts examining whether there is an arguable case that the ingredients set out above are made out on the particular facts. Most frequently, the critical issue will be whether the State agency had actual or constructive knowledge of a real and immediate risk to life (or of ill-treatment). If not (as in for example the **Plymouth** case), there is no obligation to investigate under Article 2.

(ii) <u>The content of the investigative obligation</u>

28. If the obligation is triggered the next question is: what is needed in terms of process to satisfy the investigative obligation?

(a) General principles

29. The following main principles of relevance appear from the cases (see generally, and for a recent example of the Grand Chamber considering the issues, **Oneryildiz v Turkey**, Judgment of 30 November 2004):

29.1. The purposes of any such investigation are conveniently summarised in para 31 of **Amin**. (See also para 69 of **Edwards** quoted at para 22 of **Amin**). Those purposes are broadly expressed and are consistent with a range of procedures being sufficient to satisfy the obligation.

29.2. The approach to the precise form of Article 2/3 compliant investigations is not prescriptive. See eg **Edwards v the UK**, para 69: "*What form of investigation will achieve those purposes may vary in different circumstances*". See also (a) Lord Bingham in **Amin**: "There must… be a measure of flexibility in selecting the means of conducting the investigation" (para 32); (b) Lord Slynn in **Amin** at para 42 citing **McCann v the UK and Jordan v the UK**; (c) Lord Hope in **Amin** "*the form of investigation which will achieve the purposes of the Convention may vary in different circumstances*" (para 63).

29.3. The investigative obligation can be satisfied by a combination of processes. It is not therefore necessary to identify one process which combines all of the minimum procedural requirements: see (a) the acceptance of this principle by

the appellants in **Amin** at para 28; (b) paras 47 and 52 (2nd sentence) in **Amin**. A combination approach would be sufficient in principle. It could just as effectively meet the rationales for the investigative obligation. Such an approach, as sufficient, would be consistent with the ECtHR approach of examining all the circumstances of each case and with its jurisprudence under Article 6 and the **Bryan v the UK** line of cases.

29.4. That is subject to the House of Lords' opinions in **Amin** indicating certain basic minimum requirements. Those minimum requirements are well established (see eg paras 70-73 of **Edwards** and see para 25 of *Amin* citing with approval the summary of the five minimum requirements by Jackson J in **R (Wright) v Secretary of State for the Home Department** [2001] EWHC Admin 520). They are as follows:

29.4.1. The investigation must be independent.

29.4.2. The investigation must be conducting in a manner that does not undermine the ability to establish the relevant facts.

29.4.3. The investigation must be reasonably prompt.

29.4.4. 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*" (**Edwards v the UK**, para 73 recognising that "*the degree of public scrutiny required may well vary from case to case*").

29.4.5. There must be involvement of the next of kin "*to the extent necessary to safeguard his or her legitimate interests*" (**Edwards v the UK,** para 73).

29.5. Even within those basic minimum requirements there are degrees of flexibility. That is evident from the manner in which the requirements are formulated in the jurisprudence; and from the recognition that the nature of the investigative obligation is fact dependent. The existence of such flexibility has recently been recognised in a national health case raising Article 2 investigation issues: **Goodson v HM Coroner for Bedfordshire** [2004] EWHC Admin 2931 (Richards J). In para 68, Richards J recognised that depending on the context "*the minimum criteria or standards may be the same, but there is room for some flexibility in their application*".

29.6. Ultimately, the yardstick against which the necessity of any particular procedural facet will be judged is the rationale for the investigative obligation under Article 2. The rationales identified in the jurisprudence (see especially para 69 of **Edwards** cited at para 22 of **Amin**) centre on effective accountability of state agents.

(b) Processes outside a specially created public inquiry

30. These general principles are helpful only to a degree in predicting what will be sufficient in any particular context. In most cases raising the possibility of a need for an Article 2/3 investigation, a combination of processes are likely to have been gone through or to be at least available. There are three obvious ones: internal or departmental inquiries, criminal proceedings and civil proceedings (eg for negligence in a failure to protect context).

31. However, two difficulties are likely to undermine the prospects of being able to rely on any or a combination of these.

    31.1. Each of those processes is likely to suffer from a flaw rendering it incapable in itself of satisfying the Article 2/3 investigative obligation. So: internal inquiries tend not to be public and have tended not to involve to any or any sufficient degree the next of kin or victim; criminal proceedings tend to focus on the narrow issues of criminality and rarely (save perhaps eg in a corporate manslaughter case) on broader Article 2/3 issues about whether the State did enough to avert the incident or tragedy; civil proceedings tend either to be some way off at the time of a call for a public inquiry or to have been settled.

    31.2. Although there has been "*lip service*" acceptance of the principle that a composite set of processes can together satisfy the investigative obligation (presupposing therefore that none does so individually), the courts have tended to adopt a strict approach. If a process does not meet all the requirements set out in the ECHR case law it is effectively ignored thereafter (see eg **Amin**).

32. Returning briefly to civil proceedings, it is well established that the authorities must act of their own motion and cannot simply leave it to the initiative of the next of kin (in a death case) to launch proceedings. Accordingly, civil proceedings are unlikely themselves to satisfy the State's obligation under Article 2 (at least in a death case, different considerations potentially arising in other cases). However, in certain contexts at least civil proceedings have been recognised as being not merely relevant but central to satisfaction of the obligation: see the healthcare cases referred to above.

33. The principled dividing line between these cases and other situations in which civil proceedings have been held to be irrelevant to satisfaction of the investigative obligation is far from clear. Why for example should civil proceedings be not merely relevant but sufficient to satisfy that obligation in a civilian hospital setting; but wholly irrelevant to its satisfaction in the prison hospital setting?

34. In other contexts, civil proceedings may in fact have been launched and pursued to a public and detailed judgment after a full trial. Again, it is difficult to see why that degree of exposure and consideration of the issues leading to that result should be ignored. Accountability would have been satisfied to a full degree. There may also be live issues as to whether civil proceedings are to be ignored in the Article 3 context, at least in cases where the victim is able to give instructions to lawyers.

35. However, in most cases, the courts have regarded civil proceedings as irrelevant.

36. There will accordingly be a considerable number of situations in which the only way of complying with the investigative obligation is to hold an inquiry. The focus then shifts squarely onto the necessary ingredients of such an inquiry.

(c) The ingredients of an Article 2/3 compliant inquiry

37. A full-blown Saville type inquiry plainly offers a high level of procedural protection. However, that inquiry is perhaps a good example of the need in the public interest for balances to be struck – notably between full procedures and time and cost. The difficulty is that the greater the procedural streamlining, the greater the vulnerability to ECHR challenge.

38. The ingredients with some potential flexibility are the obvious points of focus when considering streamlining. Three deserve mention.

39. **First**, the requirement that the investigation should have a "sufficient element of public scrutiny of the investigation and its results" to secure accountability. The formulation of this requirement by the ECtHR suggests that it is not the same as an inquiry held at all stages in public. That is reinforced by the acknowledgement in eg *Edwards* that the degree of public scrutiny may vary from case to case; and by the fact that at least the ECmmHR has held that a private inquiry was compliant with the obligation: see **Taylor v the UK**, App 23412/94.

40. There may be real disadvantages in holding the inquiry in public at all stages. These have been well traversed in cases in which there have been calls for public inquiries based on public law principles governing the exercise of ministerial discretion: see eg **Persey** [2003] QB 794. They include: the greater formality involved, the potential disadvantage that witnesses will not be as candid, and the increased costs and time that almost inevitably follow. These will need to be weighed against the public confidence benefits of holding all or most of the hearings in public – although this factor diminishes in importance if the report itself is in public and the next of kin are involved in the process. Specific consideration will need to be given to the individual inquiry.

41. Section 19 of the Inquiries Act 2005 seems to me to allow for sufficient flexibility for decisions to be made on an inquiry by inquiry basis: see esp section 19(4)(d).

42. **Second**, the involvement of the next of kin. Again, the formulation of this ingredient by the ECtHR suggests flexibility. The issue here may be as to whether the next of kin have to be allowed to be present throughout and to cross-examine witnesses live. Munby J took a strict view of this (as he did of the publicity ingredient) in the recent *D* case [2005] EWHC 728. His judgment is being appealed. The alternative is to give the next of kin sight of relevant documents and to suggest lines of questioning to the inquiry. Lower informality, enhanced openness of witnesses are potential advantages.

43. **Third**, the power to compel witnesses. This has on occasion been one of the factors leading the ECtHR to conclude that a process was non-compliant. In practice, this only arises as a problem if a critical witness refuses to attend. In those circumstances, there were plenty of opportunities for conversion of inquiries into ones having the power to compel. The problem is now largely addressed by section 21 of the 2005 Act.