

# Positive Obligations under European Convention on Human Rights In the Context of Policing and Prosecution

## Introduction

Positive duties under the Convention have the potential to improve the experiences of victims in the criminal justice system and provide accountability for inadequate policing and prosecution. The post-HRA position represents a radical departure from the immunity from suit imposed in the sphere of negligence. This has remained relatively unexplored territory in the UK courts and there is a significant body of Strasbourg caselaw which has barely made its way into the domestic arena.

The primary duty upon states under the ECHR is the negative obligation to refrain from inflicting loss of life, torture, inhuman and degrading treatment and other breaches of the Convention upon individuals.

Additionally, there are a range of obligations upon states to take positive action in certain circumstances. Four categories of positive obligations can be identified:

1. Enhanced investigative duty
2. Systemic duty
3. Operational duty (duty to protect)
4. Duty to investigate and prosecute

This paper will examine the four strands above focusing on the third and fourth and their implications for day to day policing and prosecution in the contexts of Articles 2, 3, 4 and to some extent 8.

## Enhanced Investigative Duty

This duty arises when there is an arguable breach of the negative obligations under Article 2 or 3 *by the state*. The majority of domestic caselaw on positive duties has arisen in the context of inquests and attempts to establish public inquiries (see *R (Amin) v SSHD (2003)*). The well known criteria for an enhanced investigation under Article 2 are set out in *Jordan v UK (2003)*. This duty has been extended to near deaths in custody (*R (D) v SSHD (2006)*).

In order to trigger the enhanced investigative duty there must be an arguable breach, see *R (AP) v HM Coroner for Worcestershire (2011)* where the Administrative Court declined to order that the Coroner hold an inquest, having found no arguable failings on the part of the authorities linked to the death of a young man with Asperger's Syndrome killed by an associate who he had accused of rape.

There have been a number of domestic challenges relating to this duty where the state is alleged to have breached Article 3, see *R (AM) v SSHD* (2009) in relation to conditions at Harmondsworth Immigration Detention Centre, *R (P) v Secretary of State for Justice* (2009) in relation to the detention of mentally ill prisoner and *R (Morrison) v IPCC* (2008) seeking an investigation by the IPCC of a complaint about the use of a taser. The UK courts have adopted a more flexible standard where breaches of Article 3 are alleged and stated that procedural requirements are less onerous than in relation to Article 2. For example, investigations by the Prisons and Probation Ombudsman (*AM*) and a local police investigation in combination with a right of appeal to the IPCC (*Morrison*) have been regarded as sufficient to meet the procedural requirements in relation to Article 3, although they do not fulfill all of the *Jordan* criteria.

### **Systemic Duty**

There is a well established duty upon the state to adopt an effective system of criminal law supported by adequate law enforcement machinery in order to deter the commission of offences and punish individuals in relation to breaches of Articles 2, 3, 4 and 8.

An example of a finding of systemic failure is *MC v Bulgaria* (2004) where the European Court found that a policy of requiring proof of physical resistance by the victim before a prosecution for rape is brought was in breach of Articles 3 and 8.

An example in the UK context is that prior to 2002 there was no criminal offence in place prohibiting human trafficking and prosecutors had to rely upon charges of assault and false imprisonment. This was found to be a breach of Article 4 in *Siliadin v France* (2006).

In the sphere of healthcare the only duty upon the state is a systemic one, see *R (Humberstone) v Legal Services Commission* (2010) , *R (Rabone) v Pennine Care NHS Trust* (2010). Individual failings, whilst they may give rise to a claim for clinical negligence, cannot found a claim for breach of Article 2. In *AP* a similar approach was applied in respect of the duty on social services, contrasting with the decision of the European Court in *Z v UK* (2002), where the failures constituting a breach of Article 3 were not systemic.

### **Operational Duty**

#### **Article 2**

Police and prosecutors enjoy a long-established “core immunity” from civil claims for negligence when exercising the functions of investigating and prosecuting crimes. See *Hill v Chief Constable of West Yorkshire* (1988) as confirmed by the House of Lords in *Brooks v Commissioner of Police* (2005). This is based on public policy grounds, as re-stated in *Brooks*, “by placing general duties of care on the police to victims and witnesses the police’s ability to perform their public functions in the interests of the community, fearlessly and with dispatch, would be impeded. It would, as was recognized in *Hill*, be bound to lead to an unduly defensive

approach in combating crime.” In relation to a similar immunity for prosecutors see *Elguzouli-Daf v Commissioner of Police* (1995).

In *Osman v UK* (1998) the European Court set out the parameters for a duty under Article 2 upon the police to protect the lives of those threatened by the criminal acts of other citizens and found that a blanket immunity was an unjustified restriction of the right under Article 6 of access to the court.

The well known *Osman* test does not impose an absolute requirement to prevent loss of life but considers the actions of the police within the wider context in which they operate:

“116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

□

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), 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.

The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case. □”

The operational duty upon the police under Article 2 is now uncontroversial, although the UK authorities are limited. See the discussion by the House of Lords in *Van Colle v Chief Constable of Hertfordshire* (2008) and *Smith v Chief Constable*

of *Sussex* (2008), heard jointly with *Van Colle*, when the Lords declined to extend the law of negligence in light of liability arising for a breach of Article 2.

Causation is established if the state failed to take measures which “could have had a real prospect of altering the outcome” (*Van Colle* in Court of Appeal) in contrast to the “but for” test in negligence.

A “real and immediate risk” can be an ongoing risk over a period of time and need not have materialized or become accentuated immediately prior to the death. For example, in *R (Savage) v South Essex NHS Trust* (2010) such a risk was found to have existed where the deceased was detained in a psychiatric hospital, presented a general risk of suicide, but there was no noticeable deterioration during the days leading up to her death. In *Milanovic v Serbia* (2010) the applicant was a member of the Hare Krishna religious community and had been attacked, possibly by far right extremists, on four occasions between 2001 and 2007 with periods of a year between each attack. The European Court found that the risk he faced was “real, immediate and predictable”.

The operational duty includes a duty to protect detainees from taking their own lives in custody, see *Keenan v UK* (2001), and a duty to protect detainees from attacks by fellow prisoners, see *Edwards v UK* (2002).

### **Article 3**

The operational duty has gradually extended from Article 2 to ill treatment falling within the ambit of Articles 3 and 4.

In *Z v UK* (2002) the European Court applied the *Osman* test and found that the Article 3 rights of the child applicants had been breached by the failure of the local authority to protect them from neglect and abuse at the hands of their parents. It reversed the findings of the domestic courts which had denied a cause of action in negligence on public policy grounds, and found a breach of Article 13, the right to an effective remedy.

The requirement upon the state to protect individuals from breaches of Article 3 by other states is well-established, see *Chahal v UK* (1996). In *Saadi v Italy* (2006) the European Court considered the proposed deportation of the applicant to Tunisia, and, applying a similar test to that under *Osman*, considered whether the applicant faced a real risk of being subjected to treatment contrary to Article 3.

In *R (Adam) v SSHD* (2005) the House of Lords found that asylum seekers rendered destitute by rules prohibiting them from working and by the state withdrawal of support had suffered a breach of Article 3. The House of Lords explored the distinction between negative and positive obligations under Article 3 and suggested that proportionality comes into play when the harm is inflicted unintentionally.

In *Opuz v Turkey* (2009) the European Court spelt out the responsibility upon the police and prosecuting authorities to protect individuals from inhuman and degrading treatment by “non-state actors”. The police had failed to protect the

applicant and her mother from repeated domestic violence at the hands of the applicant's husband over many years, leading to the applicant suffering significant injury and her mother being killed. The Court regarded as relevant the fact that the failure was to prevent repeat and continuing attacks and that the victim was a member of a vulnerable group. The authorities had not displayed the required diligence, arresting the husband but then releasing him pending trial and imposing only modest imprisonment and fines for the infliction of serious injuries. The prosecutor should have implemented the law of his own motion without requiring specific requests from the applicant. The authorities had failed to take protective measures in the form of effective deterrence.

In *Milanovic v Serbia* (2010) the Hare Krishna applicant was stabbed repeatedly by unknown assailants apparently motivated by his religious affiliation. Applying the *Osman* test, the Court noted that by 2005 it should have been obvious to the police that the applicant, who was a member of a vulnerable religious minority, was being systematically targeted yet nothing was done to prevent such attacks on two further occasions in 2006 and 2007. The Court criticized a failure to put in place video or other surveillance, a police stakeout, and the fact that the applicant was never offered protection by special security which may have acted as a deterrent.

This approach has far reaching implications for policing. It may arise particularly in the context of repeat attacks on vulnerable groups such as domestic or racially motivated violence. However, a simple extension of the *Osman* test to Article 3 would establish liability whenever police fail to employ reasonable measures available to them to prevent an attack when they knew or ought to have known of a real and immediate risk.

There is no domestic authority in which this approach has been applied.

### **The duty to investigate and prosecute**

#### **Duty to investigate**

The Convention also imposes a duty upon the police to initiate an investigation into a credible allegation of a breach of Article 2, 3 or 4 and to investigate and prosecute crimes competently where Convention rights are engaged. Unlike the operational duty, the duty to investigate and prosecute applies to historical crimes, although clearly it also has a deterrent effect.

To date there is only one domestic authority on the duty to investigate offences by private individuals, *OOO and others v Commissioner of Police* (20 May 2011). The claims arose from a failure to investigate credible allegations that the claimants had been subjected to domestic servitude amounting to a breach of the prohibition of slavery and forced labour under Article 4 ECHR. The judge made clear that his approach applied equally to Articles 2 and 3. The defendant sought to rely upon the "core" immunity however the judge found that this was of no relevance to a claim brought under the HRA and that there had been a breach arising from the failure of the police to commence criminal investigations. Each claimant was awarded £5,000 for frustration and anxiety over a period of 12 to 15 months, following which the defendant did offer to conduct criminal investigations.

In *OOO* the defendant argued that in deciding whether the investigative duty is triggered a different approach should be adopted when the ill treatment alleged was by private individuals as opposed to the state. In particular it was argued that the alleged victim must show that the ill treatment did occur, and not merely show a credible allegation. The judge did not adopt this approach and the European Court has never made such a distinction between investigations into the acts of private individuals and acts by the state.

In *Rantsev v Cyprus and Russia* (2010) the European Court summarised the principles applicable to an investigation into a death in suspicious circumstances arising under Articles 2 and 4. The applicant's daughter Oxana Ranteva, who had apparently been trafficked from Russia to Cyprus, had been released by the police into the hands of her potential traffickers and died later that night falling from the balcony of an apartment containing men who may have been imprisoning her. The Court identified broad principles as follows:

- There should be an effective official investigation where death occurs in suspicious circumstances not imputable to state agents;
- The authorities must act of their own motion once the matter has come to their attention, ie there is no requirement for a complaint to be lodged by the victim or next-of-kin;
- The investigation must be capable of leading to the identification and punishment of those responsible;
- A requirement of promptness and reasonable expedition is implicit;
- The next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his/her legitimate interests.

The European Court acknowledged that there was no evidence that Ms Rantseva died as a direct result of the use of force, nevertheless the investigative duty under Article 2 arose and was breached in the circumstances. The police arrived quickly and sealed off the scene within minutes. Photographs were taken and a forensic examination was carried out. That same morning, the police took statements from those present in the apartment when Ms Rantseva died, from a neighbour who had witnessed the fall and from police officers who had detained her shortly before her death. An autopsy was carried out and an inquest was held. However, the European Court was critical of a failure on the part of the police to attempt to resolve inconsistencies and anomalies in the evidence. No effort was made by the Cypriot police to question those who worked with Ms Rantseva in the cabaret. Further, notwithstanding the striking conclusion of the inquest that Ms Rantseva was trying to escape from the apartment, no attempt was made to establish why she was trying to escape or to clarify whether she had been detained in the apartment against her will. The Court delved below the question of what procedural steps were taken and considered the extent to which the investigation grappled with the essential issues being investigated.

A similar approach to that adopted in *Rantsev* would undoubtedly apply under Article 3. Strasbourg caselaw has long recognised that Article 3 requires state authorities to investigate allegations of ill treatment when they are “arguable” and “raise a reasonable suspicion” even if such treatment is administered by private individuals (see *Ay v Turkey* (1996)).

*MC v Bulgaria* concerned an alleged rape by two men of the applicant when she was aged 14. The European Court gave detailed consideration to the police investigation and prosecutorial decisions. The Court defined its task as not merely a consideration of legislation and practice but also their application in the case at hand and of the alleged shortcomings in the criminal investigation, to assess whether there were such significant flaws as to amount to a breach of the state’s positive obligations. The Court stated that it was not concerned with allegations of errors or isolated omissions in the investigation. However, in other cases the European Court has not required systemic or cumulative failings but simply addressed the question of whether an investigation was effective.

In *Vasilyev v Russia* (2009) the applicant and his friend were assaulted in the street receiving strong blows to the head causing the applicant to faint, and robbed. The following morning both were found unconscious and an ambulance called. The applicant was in a coma and underwent brain surgery. The next day the matter was allocated to a police officer who did not take any steps to inspect the crime scene, identify witnesses or interview the victims. 18 days later the crime scene was examined and a criminal investigation commenced within a further 2 days and then only limited steps were taken. The file was closed on the grounds that the perpetrator could not be identified. A year later the investigation was re-opened for further enquiries to be made.

The European Court summarised the investigative duty in the following terms:

“For the investigation to be regarded as “effective”, it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context.”

On the facts of this case the delay in over 20 days in opening an investigation made it impossible to secure the evidence and even then important investigative steps were not taken. The Court concluded that the investigation was not prompt, expeditious or sufficiently thorough and was therefore ineffective.

In *Secic v Croatia* (2007) the Roma applicant was attacked and subjected to racist abuse. The police investigation was limited to interviewing the applicant and a number of witnesses proposed by his lawyer. The European Court found that the investigation breached the requirements of Article 3 as no attempts were made to conduct any further enquiries including questioning members of a skinhead group thought to be responsible, questioning a particular potential suspect and seeking

the identity of a source from a journalist who had interviewed a skinhead who appeared to have knowledge of the incident.

The European Court has frequently stressed the need for an investigation to be effective and the requirement for the authorities to act with impartiality and diligence. In *Gldani Congregation of Jehovah's Witnesses v Georgia* (2007) the Congregation were holding a meeting when they were attacked by a group of Orthodox believers led by a former Orthodox priest. 60 Jehova's Witnesses were beaten and struck with iron crosses, sticks and belts. The Court concluded that "the relevant authorities, having had at their disposal sufficient tangible evidence in good time in order to fulfil the task incumbent on them under the law, were clearly negligent in identifying the suspects" and had "allowed the limitation period to pass without good reason". The approach appears consistent with that adopted in *Osman*, that there is no requirement to show gross negligence or willful omissions. The need to show gross negligence to demonstrate a failure of the investigative duty was explicitly rejected by the judge in *OOO v Commissioner of Police*.

### **Duty to prosecute**

The duty extends beyond the investigation stage to the prosecution stage. The only domestic authority is *R (B) v DPP* (2009) when a decision to discontinue the prosecution of an assailant who had bitten off a piece of the claimant's ear was found to have been unlawful. The judgment deals primarily with a successful irrationality challenge. However the Divisional Court also noted that Article 3 carries a positive obligation to provide a legal system for bringing to justice those who commit serious acts of violence against others. The abandonment of the criminal proceedings had contributed to the victim's sense of being "beyond the protection of the law" and breached Article 3. The claimant was awarded £8,000 as compensation for being deprived of the opportunity of the proceedings running their proper course and damage to his self-respect.

In another domestic challenge in 2010 the CPS admitted that it made the wrong decision in offering no evidence against an alleged perpetrator in a criminal prosecution for sexual assault and agreed to pay his victim £16,000 in recognition of its failure to protect her rights under Article 3.

In *Beganovic v Croatia* (2009) the applicant complained to the police that a number of individuals had beaten and kicked him and hit him on the head with a wooden plank, causing him to lose consciousness. He suffered lacerations on his head and body and concussion. The police investigated and lodged a file with the State Attorney's office but no steps were taken by that office. The applicant lodged a complaint with the local State Attorney's office which remained inactive for 8 months until it was forwarded to another State Attorney office. The prosecutor then determined that the injury was of a lesser nature and would not be prosecuted by the state but only by a private prosecution. The applicant brought a private prosecution which failed due to being time-barred. The European Court found that the manner in which the criminal law mechanisms were implemented was defective to the point of constituting a violation of Article 3.

### **The ambit of Article 3**

If potential breaches of Article 3 trigger duties on the state to protect, investigate and prosecute it is important to define such a breach.

The European Court has stated that ill treatment must meet a “minimum level of severity” to fall within the scope of the expression “inhuman or degrading treatment”. This was defined in *Pretty v UK* (2002) as

“actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of article 3.”

The European Court has frequently stated that the assessment of the minimum level of severity is relative, it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim as well as whether the ill treatment was premeditated and/or deliberate.

A serious injury will clearly amount to a breach of Article 3 (see, for example, the bitten ear in *B*) and in some contexts relatively minor injuries may suffice. In *Saya v Turkey* (2009) the applicants were injured by police officers violently dispersing a lawful peaceful demonstration and suffered relatively minor injuries limited to tenderness, bruising and scratches. The European Court found a breach of Article 3, though the Court was no doubt influenced by the fact that the injuries had been sustained at the hands of the state.

In *Morrison v IPCC* (2009), also a case involving injury inflicted by the state, the court considered the extent of injury required to fall within Article 3. The court referred to *Saya* and “the borderline that is perhaps represented by minor bruising or scratches”. There was no doubt that the intense pain inflicted briefly by tasing and significant cuts to the claimant’s face and head crossed the Article 3 threshold.

In *Milanovic v Serbia* the injuries, consisting mostly of numerous relatively superficial cuts, combined with feelings of fear and helplessness, were sufficiently serious to amount to ill treatment within the meaning of Article 3.

It would appear uncontroversial that rape and serious assaults trigger positive duties but the boundary for the applicability of positive duties where ill treatment is inflicted by private individuals remains unclear (though see also duty to investigate arising under Article 8, below). In principle, any treatment which meets the Article 3 threshold, including treatment that is either ‘inhuman’ or ‘degrading’, should give rise to the duties set out above.

### **Investigative failures amounting to a substantive breach of Article 3**

Whilst the enhanced investigative duty is often identified as a procedural duty attaching to an arguable substantive breach, in some circumstances the European Court has found that investigative failures in themselves amount to ill treatment contrary to Article 3.

See *Osmanoglu v Turkey* (2008) where over 11 years the authorities had taken no meaningful action in response to the applicant's reports that his son had been taken away by men claiming to be police officers. The European Court stated that special factors gave the suffering of the applicant a character distinct from the suffering which was inevitably caused to relatives of a victim of a serious human rights violation. The essence of such a breach arose from the authorities' reactions when the situation was brought to their attention, "the manner in which his complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3".

This follows a line of authorities going back to *Kurt v Turkey* (1999) where the complacency of the police in response to the applicants' reports of her son's disappearance at the hands of the state caused her uncertainty, doubt and apprehension over a prolonged and continuing period of time leading to severe mental distress and anguish and amounted to a breach of Article 3 in respect of the applicant herself.

### **Article 8**

A duty to investigate and prosecute effectively can arise under Article 8 even if the threshold under Article 3 is not met.

In *Jankovic v Croatia* (2009) the applicant was evicted from her home and was verbally and physically attacked by three individuals when she returned to the flat having re-gained possession in the civil courts. She lodged a complaint with the police. The European Court stated that under Article 8 states have a duty to protect the physical and moral integrity of an individual from other persons and that acts of violence such as those alleged require the state to adopt adequate positive measures in the sphere of criminal law protection. A breach of Article 8 was found and so the complaint under Article 3 was not examined.

In *MC v Bulgaria* the European Court also asserted that positive obligations are inherent in the right to effective respect for private life under Article 8 and that deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions. Violations of the positive obligations under both Articles 3 and 8 were found.

A similar approach may arise in relation to any sexual offence. The concept of "private life" covers the "physical and moral integrity of the person, including his or her sexual life" see *X and Y v Netherlands* (1985), where a failure to bring criminal

charges arising from sexual intercourse with a 16 year old mentally handicapped girl was found to breach Article 8. The Court stated that effective deterrence could only be achieved by criminal law provisions.

### **Conclusion**

The impact of the European Court's approach to the operational and investigative duties upon the police and prosecution authorities within the UK remains to be seen. However there is little doubt that this developing area of law is likely to yield a closer public scrutiny of the service provided within the criminal justice system. It may yet herald a new dawn in establishing accountability when the system fails victims.

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