Update on articles 2, 3 and 4 of the European Convention on Human Rights

- Adam Straw -

1. This is half of a seminar, co-presented with Jesse Nicholls, which aims to summarise some of the recent developments in the law relating to articles 2, 3 and 4 ECHR.

Systems and policy

2. The Convention may be used to challenge government policy which puts people at risk of an individual violation. There are a number of positive duties requiring the state to put in place appropriate protective systems.

3. For example, article 2 requires the state to put in place systems, precautions and procedures which will, to the greatest extent practicable, protect life: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, at §2. This includes a duty to employ and train competent staff, and to adopt appropriate systems of work.

4. Similarly, in *LW v. Sodexo* [2019] EWHC 367 (Admin), the High Court held:

> "§41… there is also a positive obligation inherent in Articles 3 and 8 on [the relevant authorities] to ensure so far as reasonably practicable that individuals are protected from cruel, inhuman and degrading treatment (Article 3) and from a disproportionate interference with their private life (Article 8)…
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> 46. In order to fulfil this obligation, there must, at a minimum, be an appropriate legislative and administrative framework which makes for the effective prevention of the risk of breaches of Articles 3 and 8... In addition. there must be appropriate preventative operational measures with suitable supervisory control and monitoring. In other words, it is not sufficient for the state simply to point to black letter provisions as fulfilling its positive obligation. There must be mechanisms to ensure that such provisions are effectively implemented." §41.

5. That case decided that there were a range of systemic failures at HMP Peterborough which breached article 8, including (i) by Sodexo, in failing to train staff in relation to strip-search policy, and in producing forms which incorrectly identified the requirements of searches: §87, and (ii) by the Secretary of State in failing to effectively monitor and supervise what training Sodexo was giving to its staff: §97. The court noted:

> "105… compliance with the positive obligation imposed by Article 8 required the Secretary of State to put in place adequate and effective measures to ensure so far as reasonably practicable that Sodexo's staff were being adequately trained so as to guard against the risk of an infringement of Article 8."

6. General duties arise in many contexts, including the following:

   a. the prison authorities must to minimise opportunities for suicide, a practical example of which is removing things such as sharp objects, belts or laces: (*Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681);

   b. regulations and practices, and the manner in which they are implemented, must adequately secure the well-being of children in immigration detention: *Mubilanzila Mayeka and Kanika Mitunga v Belgium* (2008) 46 EHRR 23, §54.

   c. military authorities must put systems in place, including an effective system of rules, guidance and control, and to provide soldiers with appropriate equipment (*R (Long) v Secretary of State for Defence* [2015] 1 WLR 5006 and Smith v Ministry of Defence [2014] AC 52, §63 and 68);

   d. the Ambulance Service must put in place resources and operational systems to ensure ambulances are dispatched to home emergencies without delay (*R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, §69-70);

   e. social services must take general measures to provide effective protection to children and other vulnerable people from abuse: *Z v United Kingdom* (2002) 34 EHRR 3, §73;

   f. the government must deactivate land mines and give residents warnings about remaining dangers (*Albekov & Others v Russia* 68216/01, 9th October 2008);

   g. the government must protect patients from a care home which was closed, when that closure might have a negative impact on life expectancy (*Watts v United Kingdom* [2010] 51 EHRR SE5);

h. the authorities are, in at least some contexts, required to impose an adequate administrative framework affording protection against acts of violence perpetrated by private individuals: *S v Sweden* (2014) 58 EHRR 36, §80.

7. The duty extends to the effective *implementation* of the regulatory framework. There must be an effective mechanism for the detection and reporting of ill-treatment, for example of sexual abuse in a private school: *O'Keeffe v. Ireland* [2014] 59 EHRR 15. There must be an adequate inspection and enforcement mechanism, which ensures compliance with the systems and policies in place, for example to identify and remedy dangers on a private construction site: *Cevrioglu v. Turkey* (69546/12) 4 January 2017, §69.

8. There is a similar duty to safeguard the lives of the population from any "dangerous activity": *Oneryildiz v. Turkey* (2005) 41 EHRR 20. This is any activity, whether public, private, or even natural, where life may be at risk. This duty may be violated by a systemic (and perhaps a one-off) failure to provide the public with information about the risk to life, such as the risk from a municipal rubbish tip (*Oneryildiz*), from a mudslide (*Budayeva v. Russia* 15339/02, 20 March 2008, §136) or from flooding (*Kolyadenko v. Russia* (17423/05 & Ors) 28 Feb 2012, §181 and 185). Other factors which point towards a violation include a failure to monitor risk (*Budayeva* and *Kolyadenko*); and a breach of domestic or EU law: *Brincat v. Malta* (60908/11) 24 July 2014, at §101.

9. In this context, the scope of the positive obligations under article 2 of the Convention largely overlaps with that under article 8: *Brincat.* This can be a useful point, because some of the article 8 caselaw is more developed.

10. To establish a breach of articles 2, 3 or 4, whether systemic or otherwise, the causation test is looser than the ordinary domestic approach. A failure to have in place an appropriate system, which had a real prospect of altering the outcome, is sufficient to breach article 2: *Cevrioglu* at §69 and *O'Keeffe* at §149.

11. An example of how this may be applied is Grenfell Tower. The following may violate article 2: a flaw in the regulatory framework for the construction or operation of buildings, which puts people at risk of fire; a failure to supervise and enforce

compliance with fire safety regulations; or (where the building is managed by the government) a decision to use building materials that are dangerous. Article 2 may be used to prevent deaths. A building's resident who can show one of the flaws mentioned above, may be able to obtain an order from a court requiring changes to be made to eliminate the risks.

12. I will now look at how the systemic duties have been applied in some other contexts.

Air pollution

13. It is estimated that air pollution kills 40,000 people each year in the UK. The failure to take steps to ensure that, as soon as possible, levels of nitrogen dioxide are brought below EU limit values[1], has been held to be unlawful[2]. A failure to prevent someone suffering health problems from air pollution may breach Convention rights (articles 2, 3 or 8) or be negligent in domestic law. As has been seen above, failures to inform the public of the dangers of air pollution, to monitor air pollution, and to comply with EU or domestic laws may show there was a violation of the Convention. More substantive failings to tackle pollution might also breach article 2.

14. *Fadeyeva v. Russia* (2007) 45 EHRR 10 concerned pollution produced by a privatized steel plant. The applicant, whose flat was nearby, was exposed to the pollution, and this caused her health to deteriorate. There was a breach of article 8, because (i) pollution levels exceeded domestic maximum limits: §83; (ii) the state had recognized that the pollution caused an increase in the morbidity rate: §85; (iii) the state was aware that the flat was in an area of high pollution; and:

> "the State did not offer the applicant any effective solution to help her move away from the dangerous area… there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels." §133.

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1 Laid out in in Annex XI of the European Directive 2008/50/EC: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:152:0001:0044:en:PDF

2 *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25 and see *R (ClientEarth) v. Secretary of State* [2017] PTSR 203

15. *Jugheli & Ors v. Georgia* (38342/05), 13 July 2017, concerned pollution emanating from a privatized power plant. The Court reiterated "that article 8 may apply in environmental cases whether the pollution is directly caused by the State or where the State responsibility arises from a failure to regulate private industry properly" §73. There was a breach of article 8, in part due to the absence of the application of "the necessary safeguards to avoid or at least minimise the air pollution and its negative impact upon the applicants' health" §75. A similar more recent decision is *Cordella v. Italy* (54264/15) 24 January 2019.

Windrush, healthcare and benefits

16. There have been a number of recent cases involving systemic duties in the context of healthcare.

17. The Grand Chamber decision in *Lopes de Sousa Fernandes v. Portugal* appn no. 56080/13, 19 December 2017 addresses the question of whether ordinary physical healthcare, for a person who is not detained, will breach article 2. In this context, article 2 will be violated if there is a systemic failure, that is, a failure to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. The circumstances in which an act or omission of an individual healthcare practitioner will breach article 2 are very limited. The criteria include that the practitioner denies a patient emergency medical treatment despite being aware that the person's life is at risk if that treatment is not given.

18. Following *de Sousa, R (Parkinson) v. Kent Senior Coroner* [2018] 4 WLR 106 accepted that article 2 could be violated by a systematic failure in the context of physical healthcare, such as the failure to provide suitable facilities, or adequate staff, or appropriate systems of operation.

19. In *Sarishvili-Bolkvadze v. Georgia* (58240/08) 19 July 2018 there was a violation of the duty to provide "an effectively functioning regulatory framework" (§77). This duty encompassed putting in place necessary measures to ensure compliance with the applicable regulations, as well as implementation, supervision and enforcement. Several of the doctors involved in the treatment of the applicant's son had been

operating without the requisite licences or qualifications, in violation of domestic law. There appeared to be a framework for supervising compliance with relevant licensing conditions. However, there was a breach of article 2 because the government did not show how the implementation of the regulatory framework was secured in practice.

20. One government system which arguably violates articles 2 or 3 is the hostile environment policy. This meant that many Windrush migrants were wrongly denied benefits, healthcare, housing and the right to work, and were put at risk of deportation. The flaws in the policy included that the evidential threshold for obtaining official proof of settled immigration status was unreasonably high. The consequences of this put the lives and physical integrity of some Windrush migrants at risk.

21. *Cyprus v. Turkey* (25781/94) 10 May 2001 held that there may be a breach of article 2 where: "it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally" §219. There was no violation because the authorities had not "adopted a practice of delaying the processing of requests of patients to receive medical treatment" which would have put the life of a patient in danger: §219. This suggests that if the authorities do adopt such a practice, that may breach article 2.

22. Immigration legislation and policy which has the effect of preventing an asylum seeker from working, and denies shelter, food or the most basic necessities of life, will breach article 3 ECHR if it reaches a minimum level of severity: *R (Limbuela) v. Secretary of State for the Home Department* [2006] 1 AC 396, §7 and 9. There is no good basis for distinguishing between articles 2 and 3 in this context: *R (Rabone) v. Pennine Care NHS Trust* [2012] 2 AC 72, §23. This indicates that, if the system had those effects, and this put a migrant's life at risk, there will be a breach of article 2.

Healthcare for detainees

23. A more exacting standard applies to physical healthcare for those who are detained, or psychiatric care for a voluntary or detained patient. The authorities must provide detainees with timely and appropriate medical care and assessment. This can be breached by one-off, operational failures, as well as systemic failings, and is not limited to where there is a real and immediate risk to life (*Daniel v St George's Healthcare*

NHS Trust [2016] 4 WLR 32, §23; *Blokhin v Russia* (App. No. 47152/06), 23 March 2016 §137).

24. It appears that the duty to investigate will arise in any case of a death in prison custody. *Petrovic v Serbia* (App. No. 40485/08) 15 July 2014 §74 held:

> "In cases in which a detainee dies while in the custody of State authorities, whatever mode of investigation is employed, the mere fact that the authorities have been informed of the death will give rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death, irrespective of whether the alleged perpetrators are State agents, or are unknown, or even that the harm was self-inflicted…"

25. *R (Tyrrell) v HM Coroner Senior Coroner for the County of Durham and Darlington* [2016] EWHC 1892 (Admin), §19-27 suggested that not every death in prison from natural causes engages the procedural obligation, but not all of the relevant authorities were cited to the High Court in that case.

Conditions of detention

26. Living conditions in prisons and other forms of detention are generally deplorable. HM Chief Inspector of Prisons' most recent annual report began with this[3]:

> "The year 2017–18 was a dramatic period in which HM Inspectorate of Prisons documented some of the most disturbing prison conditions we have ever seen – conditions which have no place in an advanced nation in the 21st century."

27. The rate of assault and self-harm in prison has risen dramatically over recent years, and is at a record high[4]. Where the authorities know or ought to know that a detainee is at risk of self-harm or violence, they are required to take reasonable steps which have a real prospect of altering the outcome or mitigating the harm: *Premininy v Russia* (2011) 31 BHRC 9, §84. In *Gjini v. Serbia* (1128/16) 15 January 2019, article 3 was violated where the prison: "failed to notice or react to any of the signs of violence … they further

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761589/hmi-prisons-annual-report-2017-18-revised-web.pdf

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774880/safety-in-custody-bulletin-2018-Q3.pdf

failed to secure a safe environment for the applicant and, also, failed to detect, prevent or monitor the violence he was subjected to."

28. A violation of article 3 may be established by a specific, dangerous systemic flaw, or by official tolerance of a pattern of similar breaches by individuals: *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, appn nos 9940-9944/82, 6 Dec 1983 (1984) 6 EHRR 241 ('*the Inter-state case'*), §19; and *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I, (2000) 29 EHRR CD119, CD122.

29. There has been some useful recent Strasbourg caselaw about what conditions in detention will breach article 3, which has given fairly specific guidance. The following factors weigh in favour of a finding of a breach of that provision:
    a. The floor surface per person in a cell is small. Less than 3 sq. m. per person for a sustained period is normally unlawful[5]. 3-4 sq. m. per person is a weighty factor pointing to a breach.
    b. Limited outdoor exercise, or out of cell association.
    c. Poor hygienic and sanitary conditions.
    d. Inability to use the toilet in private.

30. A restrictive regime may violate article 3. For example, in *Simeonovi v. Bulgaria* (21980/04) 12 May 2017, there was a breach when the applicant, for several years:

> "had spent twenty-three hours a day locked up in his cell, mostly on his bed; his access to the prison library had been limited to the few minutes it took to choose and borrow a book; he had been allowed to attend the prison chapel twice a year, with a ban on meeting other prisoners ... In 2008 his prison regime was relaxed ... However… he was still kept separate from the rest of the prison population and his cell was kept locked during the day… the prisoners in the high-security wing of Sofia Prison have very few out-of-cell activities and are kept separated from the other prisoners…"

31. In that case, the ECtHR relied heavily on the concerns raised in reports by the Committee on the Prevention of Torture about Bulgarian prison conditions. It is therefore notable that in 2017, the CPT concluded that juveniles in the UK were being

[5] *Muršić v. Croatia* (7334/13) 20 October 2016 (GC), §136. See also *Abele v. Latvia* (60429) 5 October 2017

held in conditions which amounted to inhuman and degrading treatment[6]. The CPT was particularly concerned about the amount of time the detainees were kept in their cells, the small size of those cells, and that detainees held in restricted conditions, for example on 'separation lists', for several weeks.

32. As Jesse has explained, the threshold for breaching article 3 reduces in respect of those who are vulnerable, such as children and those in detention. However, in *R (AB (A Child)) v. Secretary of State for Justice* [2019] EWCA Civ 9 the Court of Appeal decided that the special detention regime in a young offenders' institution consisting of 8 weeks' solitary confinement for a 15-year-old did not surmount the high threshold required to breach article 3. The court considered that the regime was necessary in order to protect the detainee from himself and from others who had threatened him in response to his own challenging behaviour.

Criminal investigations and prosecutions

33. The state must put in place a legal framework which affords protection against an infringement of articles 2, 3, 4 and 8, consisting of criminal offences for more serious acts, or disciplinary or civil remedies for less serious acts: *Soderman v. Sweden* (5786/08) 12 Nov 2013, §78-85.

34. Similarly, the procedural duties in articles 2 to 4 require there to be a criminal prosecution, where there is sufficient evidence for an offence involving wilful ill-treatment or an intentional life-endangering offence: *Jeronovičs v. Latvia* [2016] ECHR 624 at §107. A criminal prosecution may, in some cases, be necessary in respect of a non-intentional violation of the systemic duty. *Sinim v. Turkey* (9441/10) 6 June 2017 involved a lorry crash. The death was not caused intentionally, but it appeared that there was a reckless failure to obtain a licence, as required by domestic law, for the transportation of a flammable liquid. This required "a criminal-law reaction". There was a breach of the procedural duty because of certain shortcomings in the prosecutor's criminal investigation, and because the deceased victims' relative was unable to participate effectively in the proceedings, in part because relevant evidence (an expert report) was not disclosed to her by the prosecutor: §69.

6 https://rm.coe.int/168070a773, e.g. page 56.

Abortion and euthanasia

35. There has been a range of litigation recently involving restrictive abortion laws in Northern Ireland. In *R (A) v. Secretary of State for Health* [2017] 1 WLR 2492 the Supreme Court decided 3 to 2 that the fact that a woman in England who was ordinarily resident in Northern Ireland could not access free abortion on the NHS, whereas a woman ordinarily resident in England could access it, was not unlawful. It was not unlawful discrimination. Shortly afterwards, the government changed its policy, and decided to allow women from Northern Ireland to access free abortion.

36. In *Re Northern Ireland Human Rights Commission* [2018] UKSC 27 a majority of the Supreme Court concluded that the law criminalizing abortion when the woman had been subjected to rape or incest, or whose foetus suffered a serious abnormality, was incompatible with article 8 ECHR. It indicated that the application of the law in a particular case could violate article 3. It noted that a foetus does not, in domestic law, have separate rights protected by article 2 ECHR.

37. Challenges to the law about euthanasia have been less successful. In *R (Nicklinson) v. Ministry of Justice* [2015] AC 657 the Supreme Court decided that it would not be appropriate for the it to declare that the prohibition on assisted suicide in s.2 of the Suicide Act 1961 was incompatible with the ECHR, because in the particular circumstances that should be left to Parliament. Parliament reconsidered the law, and decided not to amend it. In *R (Conway) v. Secretary of State for Justice* [2018] 3 WLR 925 the Court of Appeal determined for itself the question of whether s.2 was compatible with article 8 ECHR, and decided that it was.

38. The litigation involving Charlie Gard reiterated the principles that should be applied by a court in deciding whether to declare that the withdrawal of life-sustaining treatment for a patient who lacks capacity or who is a child, would be lawful. The same principles apply when the decision is whether, as an alternative to withdrawal, experimental treatment may be administered to the patient. The court must decide what is in the patient's best interests. In doing so it must take into account certain factors, including any views expressed by the patient. The approach required is set out in *Gard v. Great Ormond Street* Hospital [2018] 4 WLR 5. The ECtHR subsequently decided that, if the

approach in the domestic caselaw was followed then the withdrawal of life-sustaining treatment would not violate article 2: *Gard v. United Kingdom* [2017] 65 EHRR SE9.

The investigatory duty within article 3

39. The state is obliged by article 3 ECHR to conduct an effective investigation into allegations of crime involving serious violence against a person. Significant and egregious errors by the police in the investigation would violate article 3, and compensation is available in principle for such failings: *Commissioner of Police of the Metropolis v. DSD* [2018] UKSC 11.

40. The procedural duty is not limited to bringing about a criminal investigation, nor to cases of serious violence. In *Selami v. Macedonia* [2018] 67 EHRR 29 the applicants alleged the police severely beat Mr Selami in custody, for his alleged killing of a policeman. The court held that domestic proceedings should provide sufficient compensation for a breach of article 3. The state is also required to bring about an effective official investigation itself. That is, the authorities:

> "must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the individual or of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures" §77.

41. This means that the fact that the applicant has brought, or settled, a civil claim for damages, does not absolve the state of its responsibility to bring about an investigation. Likewise in *Gjini v. Serbia* there was a breach of the article 3 procedural duty when a state failed to investigate an allegation by a prisoner of mistreatment by his cell-mates, even though the prisoner could have but did not himself lodge a formal complaint: §94-100.

42. The procedural duty arises whenever there is credible evidence of a violation of the substantive article 3 obligations, for example by a failure to protect a detainee from self-harm. As Jesse has explained, the threshold for a substantive breach of article 3 is not particularly high, at least where vulnerable people are concerned. For example, in *Bouyid v. Belgium* (2016) 62 EHRR 32 the Grand Chamber concluded that a slap by a police officer of a young person who attended a police station for an interview breached

article 3. In *Hovhannisyan v. Armenia* (18419/13) 19 October 2018 the applicant complained that she was subjected to violence by her superiors at work. The violence was not particularly serious, but left her with bruises. The court concluded that this disclosed an arguable breach of article 3, and an effective official investigation was required. It held: "Irrespective of whether treatment contrary to article 3 has been inflicted through the involvement of State agents or by private individuals, the requirements as to an official investigation are similar": §55.

The protection of trafficking victims

43. The caselaw on article 4 (the protection from slavery) is less developed than that on articles 2 or 3. Equivalent principles apply in each context (see, for example, *Rantsev v. Cyprus* (2010) 51 EHRR 1, §286), and the authorities about the latter provisions may be helpful in respect of the former.

44. *Chowdury v. Greece* (21884/15) 30 March 2017 is an important case regarding the positive obligations within article 4 to protect people from being trafficked. The applicants were from Bangladesh and had no work permits or residence permits. They were housed in deplorable conditions, subjected to threats, and worked extremely long hours under the supervision of an armed foreman. They were not forcibly detained, but were vulnerable, in part because if they stopped working they would not receive their salary arrears. The ECtHR concluded that this was "forced labour" and human trafficking. The fact that the victims had initially consented to the work did not preclude that conclusion. The authorities breached article 4 of the ECHR, because they had:

    a. failed to implement adequate operational measures to prevent the mistreatment and protect the victims; and

    b. breached the investigative duty by (1) the prosecutor failing to properly investigate the allegation of human trafficking; (2) acquitting the defendants based on a narrow interpretation of what amounted to trafficking, and (3) imposing insufficient criminal sanctions on those who were convicted.

45. In *R (TDT (Vietnam)) v. Secretary of State for the Home Department* [2018] 1 WLR 4922 the Claimant was a Vietnamese child, released from immigration detention

without any safety measures being put in place. His judicial review claim was, in the Court of Appeal, successful. The court concluded that:

a. A duty to protect individual victims of trafficking was triggered when authorities know or ought to have known of a credible suspicion that the individual was at real and immediate risk of being trafficked.

b. The "credible suspicion threshold" was a relatively low one. It had been crossed where the victim's account of having been trafficked was not inherently implausible. It may be crossed if the individual fell into a class known to be particularly vulnerable to being trafficked (such as young Vietnamese males).

c. The authorities must conduct a careful assessment of whether a past victim of trafficking remained at risk.

d. The Secretary of State's failure to put in place adequate measures to protect the claimant from being re-trafficked upon his release from detention, violated the article 4 protective duty.

e. The Court of Appeal also gave guidance on the inter-relationship between the state's obligations under article 4, the CoE Convention on Action against Trafficking in Human Beings, and Parliament and Council Directive 2011/36/EU.

46. **Leigh Day Lithuania case 8.4.19.**

47. If your claim for breach of article 4 is likely to involve a significant dispute of fact, it may be better to bring it as a civil claim rather than judicial review. A judicial review claim that there had been a failure to provide medical assessment and treatment to a victim of trafficking in *H v. Secretary of State for the Home Department* [2018] EWHC 2191 (Admin) was dismissed, because the court did not consider itself able to resolve the material factual disputes.

Private bodies and vicarious liability

48. Private companies increasingly carry out public services, with some pretty horrendous results in some cases, such as the management by G4S of some prisons or detention centres. This raises the question of whether a private company can be held liable for a breach of ECHR rights. *LW v. Sodexo,* considered above, is an example of some of the ways of securing accountability. If the private body performs a public function, it is required by s.6 HRA 1998 to act compatibly with Convention rights.

49. There have been important fairly recent decisions expanding the circumstances in which vicarious liability for torts exists (e.g. *Armes v. Nottingham CC* [2017] UKSC 6; 3 WLR 1000). For example, a prison was liable for the negligent acts of a prisoner working in a kitchen in *Cox v. Ministry of Justice* [2016] AC 660; and in *Mohamud v. WM Morrison Supermarkets Plc* [2016] AC 677 Morrisons was held to be liable for a racist attack committed by one of its staff.

50. Whether one body will be liable in respect of the acts of independent contractors is complex, and depends on the law, policy and contracts which defines the functions of the relevant parties. The Home Office owes a non-delegable duty of care to an immigration detainee in respect of medical care provided to her from an independent contractor at a removal centre which was run by Serco (*GB v. Home Office* [2015] EWHC 819 (QB*).* In *Nyang v. G4S* [2013] EWHC 3946 (QB) G4S accepted it owed a non-delegable duty to the claimant in respect of medical care provided by an independent contractor at a removal centre (§96).

51. By contrast, *Razumas v. Ministry of Justice* [2018] EWHC 215 (QB) decided that, while the Ministry of Justice was probably under a non-delegable duty of care to those in custody in respect of *access to* healthcare, that duty did not extend to *the conduct of* healthcare. The decision is difficult to reconcile with the other authorities set out above.

52. A broadly similar approach is taken by Strasbourg. In *V.K. v. Russia* (68059/13) 7 June 2017, the ECtHR considered a complaint about the mistreatment of a child by teachers at a nursery school. The court said that whether the state is responsible for the violations of Convention rights of an individual, depends on:

> "a multitude of factors, none of which is determinative on its own. The key criteria used to determine whether the State is responsible for the acts of a person, whether formally a public official or not, are as follows: manner of

appointment, supervision and accountability, objectives, powers and functions of the person in question…" §175

53. The court concluded the state was directly responsible for the ill-treatment inflicted by the teachers, and in consequence the state had violated article 3: §184. In short, the circumstances the state will be liable under the Convention are likely to mirror those in respect of tort law. This may be helpful if you want to issue a civil claim, but do not want the cost risk of listing an extra defendant.

Mistreatment abroad, and attacks here by a foreign state

54. The UK's jurisdiction may extend beyond its territorial boundaries. In broad summary, it is often possible to bring a civil action for damages on behalf of someone who was seriously mistreated or killed abroad by British officials, or by foreign state agents with the complicity, connivance or acquiescence of British officials. But these are complex claims and will often be subject to closed material procedures.

55. The domestic courts have been grappling with the extent to which there should be investigations into, or damages awarded to, individuals who claim their relatives were killed, or they were mistreated, by British or US forces in Afghanistan and Iraq (see, for example, *R (Al-Saadoon) v. Secretary of State for Defence* [2017] 2 WLR 219). Three decisions in the Supreme Court considered whether claims for damages for were prohibited by obscure concepts such as 'Crown act of state', 'Foreign act of state', and state immunity (*Rahmatullah v. Ministry of Defence* 1, [2017] 2 WLR 287; *Belhaj v. Straw* [2017] 2 WLR 456; and *Mohammed v. Secretary of State for Defence* [2017] 2 WLR 327).

56. In *Al-Nashiri v. Romania* (2019) 68 EHRR 3 the ECtHR noted that a procedural duty would arise when an individual raises an arguable claim that he suffered treatment infringing article 3 "as a result of acts performed by foreign officials with [the home] state's **acquiescence or connivance**".

57. The court decided that the investigation into the allegations of Romanian government involvement in the CIA High Value Detainee programme failed to comply with the article 3 procedural duty. That was in part because the investigation did not concern "the establishment of possible responsibility of state officials in the event of their

complicity in the CIA scheme". The investigation was also delayed. While it was not possible to say with certainty that this undermined the investigation's results, it was sufficient that the delay was "capable of affecting adversely the process of gathering evidence". The court also held that the "importance and gravity of the issues involved require particularly intense public scrutiny of the investigation…".

58. The *Soering* duty prohibits a state from transferring a person into the custody of another state where substantial grounds are shown for believing that the person concerned, if transferred, faces a real risk of being subjected to torture or to inhuman or degrading treatment: *Soering v. United Kingdom* [1989] 11 EHRR 439, at §91. That duty has been breached by the passive involvement of home officials in the illegal transfer abroad of the applicant by foreign agents: *El-Masri v. FYR of Macedonia* [2013] 57 EHRR 25; and *Dzhurayev v. Russia* [2013] 57 EHRR 22.

59. Cases in the domestic courts about connivance or acquiescence in mistreatment abroad have been less successful. They include challenges: (1) to a decision to licence the sale of arms to Saudi Arabia: *R (Campaign Against Arms Trade) v. Secretary of State for International Trade* [2018] EWCA Civ 1010 (an appeal is pending); (2) to a failure to provide legal aid to a woman on death row in Indonesia (*R (Sandiford) v. Foreign Secretary* [2014] 1 WLR 2697; (3) to a refusal to prevent the export of a substance that could be used in lethal injections in the US (*R (Zagorski) v. Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin)); and (4) to legal assistance given by the British authorities to a US criminal investigation which may lead to the imposition of the death penalty (*R (Gizouli) v. Secretary of State for the Home Department* [2019] EWHC 60 (Admin)).

60. Another question is whether the Convention may be violated by, and whether there is a duty on the UK to investigate, an attack on UK soil by a foreign state. An example is whether the UK is under the procedural duty to investigate the Novichok poisoning by Russian officials of Sergei Skripal and others. Recent caselaw indicates that the UK is required by articles 2 and 3 to bring about an effective inquiry into the poisonings.

61. In *Guzelyurtlu v. Cyprus and Turkey* 36925/07, 4 April 2017 the applicants' relatives were found murdered in territory controlled by the Republic of Cyprus. The court noted

that generally the procedural obligation under article 2 falls on the respondent state under whose jurisdiction the victim was at the time of death. However, where there are "cross-border elements" to an incident of unlawful violence leading to loss of life, the State to which the suspected perpetrators have fled and in which evidence of the offence could be located, must also conduct an effective investigation.

62. As the killings took place in Cyprus, Cyprus was subject to a procedural obligation under article 2 to investigate it. However, the court held that Turkey was also subject to the procedural obligation. That was because the suspected murderers were thought to be within Turkey's jurisdiction, and Turkey was aware of that.

63. The ECtHR held that this obligation may require the authorities to try to secure relevant evidence located in other jurisdictions, or where the perpetrators are outside its jurisdiction, to seek their extradition. The duty may be violated by a failure by one state to co-operate with another's investigation, or by a failure by one state to transfer a criminal case to another state where a more effective investigation would occur: *Huseynova v. Azerbaijan* 10653/10, 13 April 2017.

64. *Mazepa v. Russia* (15086/07) 17 July 2018 involved the investigation of the killing of Anna Politkovskaya, the journalist who was a prominent critic of the Russian government. The court noted that where the victim of a killing is a journalist, it is of the utmost importance for the investigation to examine any possible connection of the crime to the journalist's professional activity.

65. The criminal investigation in that case led to the conviction of five people directly responsible for the killing. However, the court took the view that the investigation into a contract killing cannot be considered adequate to the extent of discharging the obligation of means implicit in the procedural limb of article 2 in the absence of genuine and serious investigative efforts taken with the view to identifying the person or people who commissioned the assassination. The applicant had alleged that FSB officials or those involved in the administration of the Chechen Republic were involved, and the domestic authorities had failed to explore those allegations. The government did not provide the court with documents from its investigation into those who had

commissioned the crime. In those circumstances there was a breach of the procedural duty within article 2.

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26 February 2019