

STEVE FOSTER

# HUMAN RIGHTS & CIVIL LIBERTIES

THIRD EDITION

# Human Rights and Civil Liberties

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- An examination of the state's procedural obligation under the Convention and the Act to conduct effective investigations into deaths in their jurisdiction.
- An examination of the permitted exceptions to the right to life and the circumstances in which it is lawful to take life, including the legality of the death penalty.

All sections of the chapter will be illustrated by an analysis of the relevant case law both of the European Court of Human Rights and cases decided under the Human Rights Act 1998 and a critical evaluation of their effectiveness in protecting the right to life.

## The right to life and Article 2 of the European Convention

Although the right to life has always been recognised and protected in English domestic law, since the passing of the Human Rights Act 1998 the focus has largely been on Article 2 of the European Convention on Human Rights. This right is given effect to in domestic law by the 1998 Act and the courts are bound to take into account the relevant case law of the European Court of Human Rights. Our domestic law in this area will, therefore, be shaped by Article 2, its principles and Convention case law. Article 2 of the European Convention provides as follows:

Everyone's right to life should be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law. Deprivation of life shall not be regarded as inflicted in violation of this article when it results from the use of force which is no more than absolutely necessary:

- a in defence of any person from unlawful violence
- b in order to affect a lawful arrest or to prevent the escape of a person lawfully detained
- c in action lawfully taken for the purpose of quelling a riot or insurrection.

Similar provisions and protection are provided by other international instruments. For example, Article 3 of the Universal Declaration of Human Rights 1948 provides simply that everyone has the right to life, liberty and security of the person. However, Article 6 of the International Covenant on Civil and Political Rights 1966 bestows a more positive duty on the state by providing not only that every human being has the inherent right to life, but also that the right shall be protected by law and that no one shall be arbitrarily deprived of his life. Nevertheless, it will be Article 2 of the European Convention that will most influence domestic law and shape the content of this chapter.

### The importance of the right to life under Article 2

Article 2 of the Convention protects the most fundamental of human rights, the right to life.<sup>1</sup> This right must, of course, be respected if any other human rights are to be enjoyed and can thus be regarded as the most basic of civil and political rights.<sup>2</sup> Further, its violation by the state represents the most serious of human rights breaches, consistent with arbitrary and uncivilised government and the lack of basic respect for the sanctity of life. Thus, the

<sup>1</sup> In *Pretty v United Kingdom* (2002) 35 EHRR 1, the European Court held that the right to life under Article 2 did not guarantee the right of self-determination so as to allow a person the right to die.

<sup>2</sup> The UN Human Rights Committee described it as the basic precondition of the enjoyment of other rights: (1991) IHRR 15–16.

European Court has noted that Article 2 and the exceptions listed in Article 2(2) rank as the most fundamental provisions in the Convention, and enshrine one of the basic values in the democratic societies of the Council of Europe.<sup>3</sup>

The right is absolute in the sense that it cannot be derogated from even in times of war and other public emergency, except in respect of deaths resulting from lawful acts of war.<sup>4</sup> However, the Convention recognises that even the fundamental right to life may be compromised in exceptional circumstances and thus provides a number of express exceptions, above, which, although narrowly construed, provide justification for the taking of a person's life.

## ■ Scope of the right to life under Article 2

Article 2 imposes a *negative* obligation not to intentionally deprive a person of their right to life. Additionally, as the article talks of an individual possessing a right to have his life protected by law, it also imposes a *positive* obligation on the state to preserve individual life.

Article 2 thus firstly applies to deliberate acts of ill-treatment committed by the state, usually via state officials, for example on persons in detention and via unnecessary and disproportionate acts of violence by state officials in the course of public protection.<sup>5</sup> Further, to augment this negative duty the European Court has also made it clear that in many cases, such as where the person is in the detention of the state, the burden of proof in relation to such deaths will be on the state authorities.<sup>6</sup> Thus, in *Salman v Turkey*<sup>7</sup> it was stated that where a person is brought into state custody in good health and then dies, there is a particularly stringent obligation placed on it to provide a satisfactory account of that death. Accordingly, in that case it was held that there had been a violation of Article 2 when the victim had been arrested and then died on arrival at hospital. The state argued that he had died of a heart attack, but evidence of ill-treatment contradicted this and thus the state was held in violation of Article 2. Equally, in certain cases of disappearances, the Court is prepared to assume the state liable in the absence of a body.<sup>8</sup> More recently, in *Tais v France*<sup>9</sup> the European Court found a violation of Article 2 when the applicant had been found dead in a police cell in a pool of his own blood and excrement, allegedly having been beaten with police batons the previous evening. The Court held that the state had failed to provide a satisfactory explanation for his death and thus were liable under Article 2.<sup>10</sup>

Equally the state's liability under Article 2 may be engaged with respect to acts of private individuals that the state authorities should have prevented and which have threatened the victim's life.<sup>11</sup> In such a case the state has a positive, albeit limited, duty to safeguard the lives

<sup>3</sup> *McCann v United Kingdom* (1995) 21 EHRR 97, at para 147.

<sup>4</sup> Article 15(3) of the European Convention and Article 14(2) of the International Covenant on Civil and Political Rights 1966.

<sup>5</sup> *McCann v United Kingdom* (1995) 21 EHRR 97.

<sup>6</sup> See, for example, the case of *Jordan and Others v United Kingdom* (2003) 37 EHRR 2.

<sup>7</sup> (2002) 34 EHRR 17.

<sup>8</sup> *Timutas v Turkey* (2001) 33 EHRR 121. Alternatively, in the absence of evidence of a definite death the Court might find the state to be in violation of Article 5 – guaranteeing liberty and security of the person: *Kurt v Turkey* (1999) 27 EHRR 373.

<sup>9</sup> Decision of the European Court of Human Rights, 1 June 2006.

<sup>10</sup> In many of these cases, including the present one, the Court will probably find a violation of the duty to conduct a proper investigation into the death, see below.

<sup>11</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

of its citizens, and may be held liable if it has failed to take appropriate action with respect to a relatively real risk to life. Further, this liability may be owed with respect to the deliberate acts of the victims themselves: the state having a duty to take reasonable steps to avoid suicides, particularly where the victim is in detention or under the control of state authorities.<sup>12</sup> Thus, in *Kilinc v Turkey*,<sup>13</sup> the European Court found a violation of Article 2 when the applicant had committed suicide whilst carrying out military service. The applicant had long-standing psychiatric problems and was deemed fit for military service. The next day he shot himself in the head with a rifle. The Court found that there was inadequate guidance given to the authorities to decide whether a person was fit for service and if so which tasks they should be allocated. Accordingly, the authorities had not done everything in their power to prevent the risk of suicide and were in violation of Article 2.

#### Question

Why is the right to life regarded as so fundamental in modern democracies and under the European Convention on Human Rights?

### Territorial liability for deaths

As Article 1 of the Convention imposes a duty on member states to secure Convention rights to everyone within their jurisdiction, the state can be liable for deaths of foreign citizens occurring in their country. As we have seen in chapter 2, the European Convention can in certain circumstances impose an obligation on member states with respect to violations occurring in another state, even where that state is not a party to the Convention.<sup>14</sup> That principle and the relevant case law will be explored in the next chapter, dealing with the prohibition of torture and inhuman and degrading treatment or punishment, but its application to Article 2 can be illustrated in the case of *Bader v Sweden*.<sup>15</sup> In this case the European Court found a violation of Articles 2 and 3 when the applicant had been denied asylum and faced the death penalty in Syria, having been found guilty of murder in his absence. The government had not received any assurance from the Syrian authorities that his case would be reopened or that he would not face the death penalty. The applicant had, thus, been subjected to a real risk that he would be executed in violation of Article 2. Further, given the unfairness of the proceedings and the anxiety surrounding such lack of due process, there was also a violation of Article 3.

Equally, liability may be engaged where the member state has sufficient control of that territory or part of the territory in which the death has taken place. Generally, member states owe an obligation, under Article 1 of the Convention, to protect the rights of those 'within its jurisdiction'. However, the European Court has been cautious in extending liability in this area. In *Bankovic v Belgium and the United Kingdom*<sup>16</sup> the European Court held that it would only be in very exceptional circumstances that acts performed outside the territory of the state, or otherwise taking effect beyond the territories, would constitute an exercise of jurisdiction under Article 1. In this case the European Court declared inadmissible a claim by a

<sup>12</sup> *Keenan v United Kingdom* (2001) 33 EHRR 38.

<sup>13</sup> Decision of the European Court, 9 June 2005.

<sup>14</sup> *Soering v United Kingdom* (1989) 11 EHRR 439.

<sup>15</sup> Decision of the European Court, 8 November 2005.

<sup>16</sup> (2007) 44 EHRR SE5.

relative that his daughter's death at the hands of a NATO attack in Serbia had engaged Article 2. In the Court's view extra territoriality would occur when there was a military occupation or where the government of the state concerned had consented to the occupation. Neither of those circumstances applied in the present case and thus Article 1, and Article 2, did not apply.

With respect to liability for breaches of Article 2 in domestic law under the Human Rights Act 1998, it has been accepted that the Act's territorial ambit is coextensive with Article 1, so that the failure of parliament to 'incorporate' Article 1 is not fatal. Thus, in *R (Al-Skeini and Others) v Secretary of State for the Defence*<sup>17</sup> it was held that the death of an Iraqi civilian in the custody of British forces in Iraq engaged the Human Rights Act 1998 as the civilian's custody in the hands of British soldiers placed him within the United Kingdom's jurisdiction as required by Article 1 of the Convention, thus imposing a duty to hold a proper investigation into that death as required by Article 2 of the European Convention. However, the Court of Appeal also held that Article 1 did not apply to extend a broad, worldwide extraterritorial jurisdiction arising from the exercise of authority by state agents anywhere in the world. Hence, the shooting of civilians during the hostilities did not engage Article 1. The British forces were not in effective control of that territory despite it being an occupying force.<sup>18</sup> At the time of writing, the Grand Chamber of the European Court is preparing to hear applications brought under Articles 2 and 3 by the victims, who are questioning the British courts' ruling on the question of jurisdiction.<sup>19</sup>

## Article 2 and the Human Rights Act 1998

As Article 2 of the Convention has now been given effect in domestic law by virtue of the Human Rights Act 1998, the domestic courts are bound to apply Article 2 and its case law in relevant domestic proceedings. Thus, under s.6 of the Act it is unlawful for public authorities to violate Convention rights, including the right to life, and any proceedings brought against such bodies may draw on the relevant principles and cases identified in this chapter. However, for Article 2 to apply directly the victim would need to show that the defendant is a public authority. Thus, in *Cameron and Others v Network Rail Ltd*<sup>20</sup> it was held that Railtrack (the company responsible for controlling the infrastructure of the national railway) was not a public authority because although it originally had public law functions, regulations passed in 2000 divested it of those duties. Thus, it was not acting as a public authority at the time of the accident in question. Despite the limits imposed by s.6 of the 1998 Act, Article 2 can be used in private law proceedings and might inform domestic law with respect to the application of such laws and available remedies.<sup>21</sup>

However, it has been established that Article 2 can only be applied in the domestic courts with respect to deaths that occurred after the Human Rights Act 1998 came into force. In *Re McKerr*<sup>22</sup> the House of Lords held that s.6 of the Human Rights Act applied only to an

<sup>17</sup> [2006] 3 WLR 508.

<sup>18</sup> The decision was upheld by the House of Lords: [2007] 3 WLR 33. The fuller implication of this rule for public authorities under the Human Rights Act 1998 is discussed in chapter 3, see pages 120–2. See also the decision of the Court of Appeal in *R (Al-Saadoon and Mufhdi) v Secretary of State for Defence* [2009] 3 WLR 957 and the subsequent decision of the European Court in *Al-Saadoon and Mufdhi v United Kingdom*, *The Times*, 10 March 2010, discussed in detail under the death penalty and protocols 6 and 13, below.

<sup>19</sup> *Al-Skeini v United Kingdom* (Application No 55721/07); *Al-Jedda v United Kingdom* (Application No 27021/08).

<sup>20</sup> [2007] 1 WLR 163.

<sup>21</sup> See, for example, *Venables and Thompson v Newsgroup Newspapers*, discussed below at page 193.

<sup>22</sup> [2004] 1 WLR 807.

unlawful killing which occurred after the Act came into force, and for those purposes it was the death, rather than the refusal to hold an inquiry into it, which triggered the state's liability under Article 2, that was the relevant date for assessing jurisdiction. Their Lordships also held that it would not be appropriate to apply a so-called common law right to an effective investigation into unlawful deaths as such a right would be inconsistent with the existing statutory framework for such investigations.<sup>23</sup>

The ruling in *McKerr* was upheld by their Lordships in *R (Hurst) v HM Coroner for Northern District London*,<sup>24</sup> where it was held that the Court of Appeal in that case had erred in finding that in appropriate circumstances s.3 of the Human Rights Act empowered a domestic court to give a Convention-compliant interpretation to legislation (the Coroners Act 1988), even though the act was committed before the Act came into effect. The Court of Appeal had held that public policy dictated that Article 2 of the Convention should inform the duty of a coroner under the Coroners Act 1988.<sup>25</sup> However, the House of Lords held that it was not necessary to interpret the Coroners Act 1988 in line with Article 2 of the Convention by applying the common law presumption that parliament did not intend to legislate in violation of its international law obligations; there was no ambiguity in the 1988 Act, and even if there was it was not appropriate to hold that it was parliament's intention that coroners be given wider investigative powers in line with Article 2 of the Convention in all cases.

## Positive duty to protect life

Article 2 does not merely impose a negative duty on the state not to interfere with a person's right to life, but also places a positive duty on the state to ensure that an individual's life is not taken unnecessarily.

Therefore, the state must take reasonable measures to safeguard a person's life, and this duty applies whether the act is one of a state official or a private individual. The duty involves having in place appropriate laws imposing criminal liability for acts which threaten the right to life and proper procedures to ensure that persons are deterred from committing such acts and are sanctioned for breaches of such laws, thus ensuring that such risks do not materialise.<sup>26</sup>

However, this duty is not absolute and an applicant would need to show that there was a *real risk* of a violation of Article 2, and that the authorities had failed to take the appropriate standard of care in ensuring that the right to life was adequately protected. In *Osman v United Kingdom*,<sup>27</sup> the applicants, Mrs Osman and her son, Ahmet, brought a claim under Article 2 concerning the unlawful killing of Mr Osman by a Mr Paget-Lewis, one of Ahmet's teachers, who had formed an attachment to Ahmet. When the teacher shot dead Mr Osman and another person, the applicants brought an action against the police in negligence. The courts held that the police were protected by legal immunity.<sup>28</sup> The applicants then brought an

<sup>23</sup> The applicants in this case had already brought a successful case before the European Court of Human Rights with respect to the inadequacy of the investigation: *McKerr v United Kingdom* (2003) 37 EHRR 2. See now *Brecknell v United Kingdom* (2008) 46 EHRR 42, where the Court found a breach of Article 2.

<sup>24</sup> [2007] 2 WLR 726.

<sup>25</sup> [2005] 1 3892.

<sup>26</sup> See Mowbray, *The Development of Positive Obligations under the European Convention by the European Court of Human Rights* (Hart 2004), chapter 2.

<sup>27</sup> (2000) 29 EHRR 245.

<sup>28</sup> *Osman v Ferguson* [1993] 4 All ER 344.

action under the European Convention, claiming a violation of Articles 2 and 6 of the Convention. The European Court noted that Article 2 enjoined the state to take appropriate steps to safeguard the lives of those within its jurisdiction and that they had to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. However, the Court noted that that obligation should not impose an impossible and disproportionate burden on the authorities. In this case, although the Court pointed to a series of missed opportunities which could have neutralised the threat imposed by Paget-Lewis, the police could not be criticised for attaching greater weight to the presumption of innocence or failing to use their powers, having regard to their reasonably held view that they lacked the standard of suspicion to use such powers, or that any action taken would not produce concrete results.<sup>29</sup>

The decision and approach in *Osman* was adopted by the House of Lords in the domestic case of *Van Colle v Chief Constable of Hertfordshire*.<sup>30</sup> In this case the victim was due to give evidence at a forthcoming fraud trial. Before the trial the prospective defendant had made several threats to the victim which the latter reported to the police officer in charge of the case. The officer decided not to take any further action in response to the complaints, despite the fact that he was aware of the defendant's interference with other witnesses and one incident where there had been a fire at the property of a witness. The Court of Appeal had held that there had been a violation of Article 2 (and of Article 8 – guaranteeing the right to private and family life) as the authority had taken inadequate steps to safeguard the life (and private and family life) of a prosecution witness from attacks by suspects in a forthcoming trial.<sup>31</sup> In the Court of Appeal's view the murdered witness was in a special category of person worthy of protection under Article 2,<sup>32</sup> and there was a real and immediate risk which the police officer was aware of and had taken inadequate steps to address. Specifically, the officer was not aware of the witness protection scheme and had not responded to a number of threats and incidents which alerted him to those risks. The Court of Appeal also held that it was not necessary for the claimant to prove that the 'but for test' in causation had been satisfied; it being sufficient that there were protective measures open to the officer, and that such measures had a *real prospect* of avoiding the death. On the evidence it was more likely than not that the death would have been avoided.

However, on appeal the House of Lords overturned the decision of the Court of Appeal, finding that the test in *Osman* – that the authorities knew at the time of the existence of a *real and immediate* risk to life – was not present in this case. Their Lordships noted that the murder had been the action of a disturbed and unpredictable individual and it could not be reasonably said that the police should, from the information available to them at the time, have anticipated that the assailant constituted a risk to the claimants' life that was both real and imminent. It was also stressed that the *Osman* test was invariable and did not impose a standard that varied from case to case. Thus in the present case it could not be pleaded that the claimant belonged to a special category where a lower threshold of predictability applied, and the Court of Appeal had thus erred in finding a violation of Article 2 for that reason.

<sup>29</sup> The Court did, however, find that the applicant's right to a fair trial under Article 6 had been violated by their inability to bring civil proceedings against the police.

<sup>30</sup> [2009] 1 AC 225.

<sup>31</sup> [2006] 3 All ER 963.

<sup>32</sup> Contrast with the decision in *R (Bloggs) v Secretary of State for the Home Department*, considered below.