

Claimant Strategy

by
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Human Rights Act duties to Inquire

- The Inquiries Act Power to Hold a Public Inquiry
- Articles 2, 3, 4 ECHR
- Investigative duties arising under articles 2, 3, 4
- The function of those duties
- The purpose of the investigation/inquiry
- Whether a bespoke inquiry is required
- Respective Functions of State and Investigator
- The Brook House Inquiry

Inquiries Act 2005

1 Power to establish inquiry

(1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that—

- (a) particular events have caused, or are capable of causing, public concern, or
- (b) there is public concern that particular events may have occurred.

R (Keyu) v SSFCA [2016] AC 1355 (Supreme Court)

127 There is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions. Where a member of the executive, such as the respondents in this case, is given a statutory discretion to take a particular course or action, such as ordering an inquiry under section 1 of the 2005 Act, the court has jurisdiction to overrule or quash the exercise of that discretion.

Article 2 (HRA 1998, Schedule 1, part 1: The Convention)

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Articles 3 and 4

Prohibition of torture

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Prohibition of slavery and forced labour

Article 4

- 1. No one shall be held in slavery or servitude.
- 2. No one shall be required to perform forced or compulsory labour.
- 3. For the purpose of this Article the term “*forced or compulsory labour*” shall not include [exceptions then set out].

ECHR Investigative Duties

- The primary duty upon the state is not to breach the rights guaranteed by these articles
- The investigative duties are parasitic upon that primary duty and in order to arise there must be an arguable breach of the substantive duty
R (Gentle) v Prime Minister [2008] UKHL 20; [2008] 1 AC 1356 at [6]
- The nature and scope of the obligation is dependent on the nature of the alleged breaches (*R (AM) v SSHD* [2009] EWCA Civ 219 at [91]).

Function of Investigative Duty

- “Its purpose is to inform the public and the government about what may have gone wrong in relation to an important civic and international obligation and about what can be done to stop it happening again”

R (AM) v SSHD [2009] EWCA Civ 219 at [57] per Sedley LJ.

- The duty includes ensuring as far as possible that:
 - the full facts are brought to light; and that
 - lessons will be learned.

R (Amin) v Home Secretary [2004] 1 AC 653, 668.

Article 2 and 3 Investigative Duty

In R (Margaret Wright) v SSHD [2001] EWHC Admin 520 Jackson J set out the state's obligation in the following terms (para. 43)

- “1. Articles 2 and 3 enshrine fundamental human rights. When it is arguable that there has been a breach of either article, the state has an obligation to procure an effective official investigation.*
- 2. The obligation to procure an effective official investigation arises by necessary implication in articles 2 and 3. Such investigation is required, in order to maximise future compliance with those articles.*
- 3. There is no universal set of rules for the form which an effective official investigation must take. The form which the investigation takes will depend on the facts of the case and the procedures available in the particular state.”*

Purpose of the Investigation

R (Amin) v Home Secretary [2004] 1 AC 653, 668

Lord Bingham of Cornhill approved Jackson J's judgment as a succinct and accurate description of the features which an investigation had to have "to satisfy Article 2"

Held at [31] to be effective an inquiry must fulfil the following purposes:

- To ensure the full facts are brought to light;
- To ensure that culpable and discreditable conduct is exposed and brought to light;
- That suspicion of deliberate wrongdoing if unjustified is allayed;
- That dangerous practices and procedures are rectified. In ***R(Wright) v Home Secretary*** [2001] UKHRR 1399 (endorsed in ***Amin***) Jackson J said that the purpose of an article 3 inquiry is to "maximise future compliance with those articles"

Effectiveness

Further, to be effective, as set out in *Vasilyev v Russia* [2009] ECHR 2078 at [100] the investigation:

- Must be initiated by the state promptly and with expedition (see also *R (AM) v SSHD* [2009] EWCA Civ 219 and *Jordan v UK* [2001] 37 EHRR 2 at [105].
- be capable of leading to the establishment of the facts of the case;
- the authorities must have taken reasonable steps available to them to secure the evidence concerning the incident including eyewitness testimony, forensic evidence and so on.

Whether A Bespoke Inquiry is Required

- Not every breach or alleged breach of article 3 requires that there be an independent inquiry, in some cases extant legal mechanisms may suffice

R (MM and AO) v SSHD [2012] EWCA Civ 668 at [57]

Yarl's Wood Protests: one child claimant was separated from his family for nine days and alleged he was bruised when officers sought to disperse a protest in a detention centre. The patchwork of investigations undertaken was on the facts sufficient. Wider issues as to detention of children were matters for public and political debate

Whether A Bespoke Inquiry is Required (2)

R (AM) v SSHD [2009] EWCA Civ 219 Involved a fire being started in a detention centre such that detainees were left in some cases soaking wet and without food and water for up to 12 hours (see paragraph [7])

Per Elias LJ at [112]

- in many cases a combination of civil and criminal proceedings will discharge the duty.
- Held Article 3 duty did, on facts, require a distinct investigation because of the detention context; the allegations of systemic ill-treatment; and the need to identify who was responsible for what actions [116]-[118]

Whether A Bespoke Inquiry is Required (3)

R (AM) v SSHD [2009] EWCA Civ 219 [59]-[60]:

Sedley LJ: the scope of this investigative duty goes “markedly beyond the identification and punishment of those responsible” and may “reach questions of system management and institutional culture” (a comment with which Longmore LJ agreed at [82], though Longmore LJ dissented on the facts).

Sedley LJ found at [67] that in the circumstances of that case the combination of civil litigation, criminal prosecution and a Home Office inquiry were not adequate to discharge the investigative duty.

Longmore LJ considered that the facts in that case did not meet the threshold so as to require an inquiry beyond extant mechanisms [79] but held at [76] that “It is not difficult to imagine cases of alleged Article 3 mistreatment (such as torture or the infliction of serious harm) which would merit a full independent inquiry”.

Whether A Bespoke Inquiry is Required (4)

R (P) v Justice Secretary [2010] QB 317 at [58] [CA]

Claim that there ought to be an art 2/3 inquiry into repeated self harm by teenager held at a young offender institution.

- Whether the Secretary of State is bound to conduct an inquiry depends on the circumstances of the case, including the availability of other means of eliciting the relevant facts, such as civil proceedings and investigation by the Prisons and Probation Service Ombudsman.
- On the facts there had been no real and immediate risk to life, so article 2 not engaged and the relevant facts were all known, so no art 3 obligation arose.

R (D) v SSHD [2006] H.R.L.R. 24

- Held that near-death by suicide in custody engaged art. 2 investigative duty.
- IA 2005 processes can discharge the art 2 duty.
- Investigation of attempted suicide should be in public (oral evidence in public and written submissions and evidence made public).
- A matter for the chairman whether a party would be entitled to ask questions.
- Subsequent inquiry held by Stephen Shaw the PPO who said in his report:

“Indeed, a case could be made for saying that to meet the Article 2 criterion of ‘effectiveness’, the Inquiries Act should routinely be invoked. And, if this is the case, it is surely much better that it should be invoked at the outset rather than half-way through the investigation. My final recommendation reflects the importance I attach to this matter.”

Functions of State/Investigator

- State's role is to set up the inquiry with the powers and resources it needs; it is then up to the investigatory to decide how the inquiry should proceed to achieve the objectives.

R(L) v Secretary of State for Justice [2009] 1 AC 588 at [76] (HL)

Brook House Inquiry

- Common Ground there are credible allegations that the Claimant was, during a three-month period of immigration detention (March-June 2017) subjected to breaches of his rights not to be subjected to inhuman or degrading treatment or tortured
- Claimant released from detention in June 2017 by order of Cranston J. Had alleged article 3 mistreatment in his claim form.
- September 2017 Panorama documentary shows claimant being abused by guards on more than one occasion, including an assault in which he is held to the ground while gasping as he strangled by one guard who threatens to put him to sleep.
- Claimant amended claim to seek an order requiring investigation of the article 3 breaches.
- Claim was due to be heard October 2018, but shortly before Defendant conceded it would hold an inquiry to be overseen by the Prison and Probation Ombudsman
- Claim now listed in May concerning principally powers of inquiry to compel evidence and witnesses; funding for victim participation

Brook House: *R (MA and BB) v SSHD*

- Defendant argues that the patchwork of available investigations means that only a narrow inquiry with limited powers is required.
- Claimant argues patchwork is insufficient and power to compel witnesses and funding of victim participation is required at the outset of the inquiry:
 - Otherwise there will probably not be questioning of wrongdoers and witnesses so as to ascertain the full facts. Compromises independence of the inquiry if the chairman has to apply to the Minister for wider powers.
 - No criminal prosecution is being brought
 - Civil claim may settle and not focused on issues of institutional culture, management, policy
 - Home Office's PSU investigation had no powers to compel witnesses
 - G4S investigation similarly failed to question wrongdoers
 - HMIP; Stephen Shaw; IMB have all done reports, none of which identified what Panorama uncovered, none of which are fact-finding.

Article 4 duty

- In [Rantsev v Cyprus and Russia \(2010\) 51 EHRR 1](#) the ECtHR found that:

[288] ‘Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking.’

Siliadin v France (Application no. 73316/01) ECtHR held

[89] “States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice.”

Article 4 investigative duty

- The state falls under positive obligations as regards trafficking which are binding on public authorities by virtue of section 6 to the Human Rights Act 1998) see *TDT v SSHD* [2018] EWCA Civ 1395 at paragraphs 14-16.
- The obligations inherent within article 4 include
 - (i) an obligation to take comprehensive measures to protect individuals from the risk of trafficking; (ii) to take operational measures to identify and address claims of trafficking; (iii) a procedural obligation to investigate potential situations of trafficking in cases of a credible suspicion that a person is at immediate risk of trafficking: see [*Rantsev v Cyprus and Russia* \(2010\) 51 EHRR 1](#) at paragraphs 86-89.
 - (ii) See also [Directive 2011/36/EU](#) , "on Preventing and Combating Trafficking in Human Beings and Protecting its Victims", articles 11-13
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