

# The Scope of the Inquiry: Advocating for individuals, pressure groups and other potential core participants



**Alex Goodman**

## Inquiries Act 2005

Section 1 provides:

- (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.

Sections 4 and 5 of the Inquiries Act 2005 then provide for the Minister to appoint a chair of the inquiry, and that before doing so, the Minister must set the terms of reference.

## Possible issues for consideration- Poll Results

Please select what you would rank as the most important three areas for the inquiry:

- **Deaths**: causes, culpability; preparedness.
- **Care Homes**: deaths; moving patients from hospitals; detention; visitation restrictions.
- **Detention environments**: immigration detention centres; mental hospitals.
- **Education**- schools, children's learning, school meals, what happened, what lessons.
- **NHS**: resilience and preparedness; PPE; staff deaths; lessons for the future.
- **Mitigating the Pandemic**: Test, track and trace system; International arrivals and quarantine; lockdowns; vaccines.
- **Fiscal and social measures** e.g. the furlough scheme, 'Eat Out to Help Out'; suspension of evictions.
- **Government messaging**.
- **Economic impacts** – aviation; hospitality; the arts etc.
- **Procurement decisions**: lawfulness; effectiveness, value for money.

## European Convention on Human Rights

Article 2(1) ECHR provides:

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.

Article 3 ECHR provides:

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

# *R (Middleton) v HM Coroner for Western Somerset* [2004] 2 A.C. 182

Lord Bingham:

- 2. The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.  
...
- 3. The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.

## *R (Amin) v SSHD* [2004] 1 A.C. 653

Lord Bingham at [31]:

“The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others”

## *MA and BB v SSHD* [2019] EWHC 1524 (Admin)

May J at [38]:

“ECHR Article 3 imposes a negative duty on the state to prevent individuals from being subjected to inhumane or degrading treatment. There is a corresponding positive obligation to investigate when the substantive prohibition has arguably been breached.”

## *MA and BB v SSHD* [2019] EWHC 1524 (Admin)

May J at [41]-[42]:

Lord Bingham's statement of the purpose of an Article 2 inquiry, with appropriate adaptations, has been held also to apply to the investigatory duty arising upon an arguable breach of Article 3 rights. – see *AM v Secretary of State for the Home Department* [2009] UKHRR 973 per Sedley LJ at [4] and Elias LJ at [86]

Synthesising the principles to be derived from the above authorities, an effective Article 3 inquiry must:

- (1) Be conducted by a person/body that is both institutionally and practically independent from the person(s) involved in events.
- (2) ensure, so far as possible, that the full facts are brought to light, so as to uncover and expose culpable and discreditable conduct to public view and allay any unjustified suspicions of wrongdoing,
- (3) permit effective access to the investigatory procedure for complainants,
- (4) discover and rectify processes which have caused or contributed to Article 3 breaches (if established), in order that
- (5) lessons may be learned, the better to minimise the risk of recurrence.

## Article 2 Obligations

- Deaths: What might be the true toll; why did deaths happen on the scale they did; who is culpable; what could have been done to avoid them and what lessons can be learned?
- Should care home deaths be treated as a specific issue?
- Deaths of state employees attract a particular investigative obligation: doctors, nurses, administrative staff, particularly where shortcomings in state action may have contributed, for example through an absence of protective equipment.

## Article 3 ECHR Obligations

- Inhuman and degrading treatment: What might count towards that:
  - Treatment of care home residents:
    - Allegations that large numbers of infected people were moved out of hospital and into care homes without a proper regime for testing or safeguarding
    - Well established that there does not have to be an intentional element in article 3 mistreatment: see *Limbuela* [2006] 1 A.C. 396 which was concerned with the inhuman effects of street homelessness on vulnerable people.
  - Subsequent coercive measures in care homes:
    - Residents being denied contact with their friends and family;
    - Many held effectively in detention for most of the duration of the pandemic.

# Transparency and Fact-Finding Function

## Operation Cygnus

- Dr Qureshi has been seeking disclosure of the government’s “Operation Cygnus” documents. Operation Cygnus was a pandemic planning exercise modelled in 2016. The Information Commissioner has very recently ordered that the findings of this exercise be disclosed pursuant to the Freedom of Information Act stating:

“50. The Commissioner recognises that there is a very strong public interest in understanding how effectively the Government prepared for and has handled, the pandemic. Exercises like Cygnus were designed to test capability and to identify areas of weakness. Therefore it is important to understand whether lessons from Cygnus were properly learned and where appropriate, developed or addressed.

51. Furthermore, the Commissioner notes that the second of the two reports relates to proposals for population triage. This relates to a situation whereby the NHS becomes overwhelmed and is unable to treat all those requiring treatment. At that point, tough decisions have to be made as to who will receive treatment (and what treatment they will receive) and who doesn’t. These are literally life and death decisions.

52. If clinicians (or even politicians) are being asked to make such decisions, it is vital that they are supported by a clear framework and that framework has been the subject of public debate. Any framework must be seen to be fair if it is to demand public confidence. The Commissioner therefore considers that there is a very strong public interest in understanding what considerations the Government has made about how a triage system would operate, when it would be triggered and by whom. This would inform the public and enable them to participate in the debate.”

## Other means of discharging investigative obligations

Well established that the investigative duty does not need to be discharged per se by a public inquiry. Alternatives which may, depending on context, discharge (or partially discharge) the ECHR duties include:

- An Inquest;
- A civil claim for damages
- A prosecution
- Other forms of investigation:
  - The National Audit Office has undertaken at least 17 separate investigations – into issues ranging from financial support for charities to the extension of free school meals
  - The House of Lords has a dedicated Covid-19 select committee,
  - The House of Commons apparently has at least 20 committees running separate, targeted inquiries
  - Judicial Review: *R (Good Law Project Ltd & ors) v Secretary of State for Health and Social Care* [2021] EWHC 346 (breach of procurement regulations and policy)

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# Thank you for listening

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