

## Right to life: duty to undertake effective investigation

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This article is concerned with the procedural obligation to investigate effectively the use of force which results in death under [art.2](#) of the 1950 European Convention on Human Rights (ECHR) (as opposed to the substantive right to life under [art.2](#)). I therefore distinguish [art.2](#) substantive from [art.2](#) procedural.

### Overview of Topic

1. [Article 2\(1\)](#) of the ECHR, given further effect in domestic law through scheduling to the [Human Rights Act 1998](#) (HRA), now reads effectively (given implied amending and rules on derogation): “Everyone’s right to life shall be protected by law”.
2. [Article 2\(2\)](#) continues to read as effectively a defence: “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”.
3. [Article 2\(1\)](#) has vertical effect, with positive as well as negative obligations imposed upon the state vis-a-vis a person.
4. A strand of case law from the European Court of Human Rights in Strasbourg, predominantly emanating from events which occurred during the Troubles in Northern Ireland (1968 - 1998), established a concomitant procedural obligation on public authorities to investigate effectively where the use of force results in death. Query whether it is all deaths or only state killings? Query whether Strasbourg has even given any thought to terrorist killings? The effect of Strasbourg’s intervention has been a rewriting of history. The 90 per cent of terrorist killings (all unlawful) has been obscured by the 10 per cent of state killings, most of which were lawful by Strasbourg standards: *Da Silva v United Kingdom* (5878/08), ECtHR (Grand Chamber), 30 March 2016 (the John Charles de Menezes case).

### Prelude to legal change

5. On 11 January 2000, Strasbourg decided: *Caraher v United Kingdom* (24520/94) (2000) 29 E.H.R.R. CD119. Here, the applicant’s husband had been killed by two soldiers in Co. Armagh in 1990 (they were later acquitted of his murder). She relied upon the [art.2](#) substantive right. She lost on admissibility as no longer a victim, because she had settled a civil action in Northern Ireland for £50,000.
6. While this decision did not relate directly to the procedural obligation, *Caraher* was to be relied upon by the United Kingdom subsequently, and to inspire domestic courts to limit historical investigations on the basis of remedies obtained.

### The Northern Ireland art.2 procedural obligation cases

7. These may be listed by date of judgment at Strasbourg, indicating the circumstances of the deaths:
  - (1) *Jordan v United Kingdom* (24746/94) (2003) 37 E.H.R.R. 2, 4 May 2001, concerning Pearse Jordan, a IRA member, who was shot by a police officer after a car chase in Belfast in November 1992;
  - (2) *McKerr v United Kingdom* (28883/95) (2002) 34 E.H.R.R. 20, 4 May 2001, concerning Gervaise McKerr (driving a car with two others), all being killed as suspected terrorists by pursuing police officers in Lurgan in November 1982;
  - (3) *Kelly v United Kingdom* (30054/96) [2001] *Inquest L.R.* 125, the eight IRA members killed by the SAS defending Loughall police station in May 1987;
  - (4) *Shanaghan v United Kingdom* (37715/97) [2001] *Inquest L.R.* 149, probably a IRA member, who was killed by loyalists while driving his van near Castleterg in August 1991;
  - (5) *McShane v United Kingdom* (43290/98) [2002] 35 E.H.R.R. 23, 28 May 2002, killed by an army vehicle during a late-night riot in Londonderry on 13 July 1996;
  - (6) *Finucane v United Kingdom* (29178/95) [2003] 37 E.H.R.R. 29, 1 July 2003, the killing of catholic solicitor Patrick Finucane in Belfast in 1989 by loyalists;
  - (7) *Brecknell v United Kingdom* (32457/04) [2007] 11 WLUK 675, 27 November 2007, one of three customers killed in a loyalist attack upon a bar in Silverbridge, Co. Armagh in 1975;
  - (8) *McCaughy v United Kingdom* (43098/09) (2014) 58 E.H.R.R. 13, 16 July 2013 (a much later case), two IRA members killed at a suspected arms dump by soldiers near Loughall in 1990. This was essentially a delayed investigation case.
  - (9) *Hemsworth v United Kingdom* (58559/09), 16 July 2013 (also a much later case), a person assaulted by police in July 1997 who died months later (in January 1998).
8. The key cases are (1) to (4), decided jointly on 4 May 2001. Strasbourg, avoiding substantive violations, fashioned a new procedural obligation. (The court did not rise to the occasion jurisprudentially on the issue of non-state actors having perpetrated the killings in cases (4), (6) and (7).) There are other cases emanating from Northern Ireland, including deaths in custody, but the above nine cases establish the procedural obligation. Strasbourg, which tried to discourage repeat cases, arguably acted counter-productively by awarding damages in each individual application (when, in the case of *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R. 97, which dealt with the shooting of unarmed IRA members planning a bombing in Gibraltar in 1988, it had reasoned that a substantive violation did not warrant an award given the intentions of the victims). Surely that applies more so to a procedural obligation, and especially the applicants in *Kelly's* case.
9. It could be argued that there is an initial legal problem with cases (1) to (4) above. Strasbourg made clear it was not making any findings of facts, about the original killings or the subsequent investigations, whether satisfactory or not. How then could it fashion a procedural obligation based upon an apparent finding of inadequacy?
10. There is a bigger legal problem with cases (1) to (4). The procedural obligation is, in the case of Northern Ireland, largely retrospective. There had been no such law during the Troubles. Subsequently, this obligation was imposed on the United Kingdom. It follows that the conduct of state agencies was to be assessed by judges using standards developed in 2001 and subsequently.

### Non-UK cases developing the procedural obligation

11. It is necessary to mention two non-United Kingdom cases at Strasbourg regarding procedural art.2, developing the obligation.
12. *Silih v Slovenia* (71463/01) (2009) 49 E.H.R.R. 37 is a medical negligence case, which makes the procedural obligation seemingly dependent upon a violation of the substantive right (para.194).
13. *Janowiec v Russia* (55508/07) (2014) 58 E.H.R.R. 30 (concerning the Katyn forest killings in Poland during the second world war, by the Soviet Union and not Germany); in this case, the court came up with a three-stage test permitting retrospectivity of up to ten years - drawing upon *Silih's* case (plus *Varnava v Turkey* (16064/90) (2010) 50 E.H.R.R. 21) - namely:
  - first, “a “genuine connection” with the death as the triggering event consisting of ... a reasonably short period of time between the death as the triggering event and the entry into force of the Convention (not in excess of 10 years)”;
  - second, “a requirement that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention” or
  - third, “in extraordinary situations which did not meet the “genuine connection” test but raised a need to

ensure that the guarantees and the underlying values of the Convention are protected, for such cases as war crimes, genocide or crimes against humanity. Although the present case potentially fell within this latter category, the “Convention values” clause could not be applied to events which occurred prior to the adoption of the Convention in 1950” (headnote).

14. The killings had taken place in 1940, in Poland. In 1943, an international commission exhumed bodies, blaming the Soviet Union correctly. Russia, the successor state, accepted responsibility in 1990, and conducted a criminal investigation until 2004. No one was left alive to prosecute. Russia ratified the European Convention on Human Rights in May 1998. According to the headnote: “The events capable of triggering an obligation to investigate took place in 1940, more than 10 years before the Convention came into existence [on 4 November 1950] and the “Convention values” standard could not be applied. The [Russian] Government’s objection *ratione temporis* was upheld and the Court was not competent to examine the complaint under [art.2](#).”
15. This is truly extraordinary jurisprudence. In international law, a state is bound by what it agrees to, under the law of treaties. In *Janowiec’s* case, without being any help to the applicants, Strasbourg invented a “genuine connection” test, creating international obligations 10 years before they were agreed, and also a “Conventions values” test, which started in 1950 - a date of signing not of ratification.

#### Article 2 in UK law

16. The Strasbourg case law has been considered by the House of Lords/Supreme Court in the following leading cases:
  - (1) *R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 A.C. 653, a prisoner in custody killed by another, Lord Bingham deciding on 16 October 2003 to follow Jordan’s case in Strasbourg;
  - (2) *R. (on the application of Green) v Police Complaints Authority* [2004] UKHL 6; [2004] 1 W.L.R. 725, a cyclist hit by a police car, Lord Bingham deciding on 26 February 2004 to dismiss an appeal concerning disclosure of police investigation material;
  - (3) *R. (on the application of Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; [2004] 2 A.C. 182, a prisoner committing suicide, Lord Bingham deciding again on 11 March 2004 to follow Jordan’s case in Strasbourg;
  - (4) *McKerr’s Application for Judicial Review, Re* [2004] UKHL 12; [2004] 1 W.L.R. 807, the McKerr above in Strasbourg (who had been awarded £10,000 damages there), with Lord Nicholls deciding also on 11 March 2004 that the Human Rights Act 1998 did not apply to deaths before 2 October 2000, when it entered into force; (*R (Amin)* and *R (Middleton)*) were held in McKerr’s case to have been decided *per incuriam* the question of retrospectivity (para 23);
  - (5) *Jordan v Lord Chancellor* [2007] UKHL 14; [2007] 2 A.C. 226 (being the Jordan and McCaughey in Strasbourg above), where Lord Bingham applied McKerr’s case, the second appeal being allowed regarding police disclosure to a coroner;
  - (6) *R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 A.C. 1, a British soldier dying of hyperthermia off an army base in Iraq, where Lord Phillips (with a court of nine) held on 30 June 2010 (on the assumption that human rights law applied in Iraq in this case, which it did not) then do, that, on these assumed facts, the possibility of a substantive violation of [art.2](#) triggered the procedural obligation;
  - (7) *McCaughey’s Application for Judicial Review, Re* [2011] UKSC 20; [2012] 1 A.C. 725 (being the McCaughey in Strasbourg above again), where the Supreme Court held that, once the UK decided to hold an inquest, then the [art.2](#) procedural obligation might apply. The domestic court arguably responded too precipitately to Silih’s case in Strasbourg (which was remember a medical negligence case), before the international court further considered temporal jurisdiction in Varnava’s case and Janowiec’s case;
  - (8) *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] A.C. 1355, regarding a refusal to hold a statutory inquiry into the killing of 24 persons by the British army in Malaya in 1948, where Lord Neuberger held on 25 November 2015 that, as regards the [art.2](#) procedural obligation, Strasbourg jurisprudence now permitted retrospectivity (if there was a continuing breach) of up to ten years, between the date of death and 1966, when the UK first permitted individual petition. Lord Neuberger, considering *McKerr’s* case after *McCaughey’s* case, decided to leave open whether the UK had to follow Strasbourg (para 98). Lord Kerr, however, explained his thinking: Silih’s case detached the procedural duty from [art.2](#) for the first time (paras 247-9). But he left open whether

*McKerr's* case should be overruled;

- (9) In the matter of *Finucane's Application for Judicial Review, Re* [2019] UKSC 7; [2019] 2 WLUK 382, concerning the death of Geraldine Finucane's husband Patrick in 1989. The family remained critical of the 2012 report by the late Sir Desmond de Silva QC. They wanted a public inquiry. Lord Kerr (on behalf of the court) went further than Strasbourg, which had settled the case with the United Kingdom. He picked holes in the de Silva report. But he concluded with this arguably anti-climactic statement: "I would therefore make a declaration that there has not been an [article 2](#) compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of [article 2](#), what form of investigation, if indeed any is now feasible, is required in order to meet that requirement. The appeal should otherwise be dismissed." (paras 153-4).
17. It remains the position that *McKerr's* case in the House of Lords in 2004, is good law as regards the [art.2](#) procedural obligation under the [Human Rights Act 1998](#) (i.e., that it does not apply to deaths which occurred before the legislation came into force). It has not been overruled, especially not in *McCaughey's* case. And *Finucane's* case has not changed that position, despite the de Silva report being found to be non [art.2](#) compliant.
  18. *Smith's* case and *Keyu's* case are (originally) English and United Kingdom law respectively, and both attempt to deal with updating Strasbourg jurisprudence. The former arguably limits the right (relating procedure to substance), while the latter clearly extends retrospectivity.

## Conclusion

19. A number of points needs to be made by way of conclusion to this unsatisfactory and confusing jurisprudence, of effective investigation of deaths occasioned by state agencies:
  - first, the range of deaths is very wide, from alleged medical negligence in a hospital to dealing with a historic insurgency in Northern Ireland;
  - second, Strasbourg has invented retrospective obligations, and been creative about widening state obligations beyond the legal range of the convention;
  - third, there is a real problem as to whether domestic courts may access Strasbourg jurisprudence through the common law (as Lord Kerr did in *Finucane's* 2019 case), or whether the [Human Rights Act 1998](#), from parliament, supercedes that; and
  - fourth, there is a clear line of House of Lords/Supreme Court cases stating that [art.2](#) procedural does not apply to any deaths, including in Northern Ireland, before 2 October 2000.

## Legislation

### Key Acts

[Human Rights Act 1998](#)

### Key Subordinate Legislation

None.

### Key Quasi-Legislation

None.

### Key European Union Legislation

[European Convention on Human Right](#)

## Key Cases

*Caraher v United Kingdom* (24520/94) (2000) 29 E.H.R.R. CD119

*Jordan v United Kingdom* (24746/94) (2003) 37 E.H.R.R. 2

*McKerr v United Kingdom* (28883/95) (2002) 34 E.H.R.R. 20

*Kelly v United Kingdom* (30054/96) [2001] Inquest L.R. 125

*Shanaghan v United Kingdom* (37715/97) [2001] Inquest L.R. 149

*McShane v United Kingdom* (43290/98) (2002) 35 E.H.R.R. 23

*Finucane v United Kingdom* (29178/95) (2003) 37 E.H.R.R. 29

*McCaughey v United Kingdom* (43098/09) (2014) 58 E.H.R.R. 13

*McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R. 97

*Silih v Slovenia* (71463/01) (2009) 49 E.H.R.R. 37

*Janowiec v Russia* (55508/07) (2014) 58 E.H.R.R. 30

*Varnava v Turkey* (16064/90) (2010) 50 E.H.R.R. 21

*R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 A.C. 653

*R. (on the application of Green) v Police Complaints Authority* [2004] UKHL 6; [2004] 1 W.L.R. 725

*R. (on the application of Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; [2004] 2 A.C. 182

*McKerr's Application for Judicial Review, Re* [2004] UKHL 12; [2004] 1 W.L.R. 807

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*R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 A.C. 1

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*R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] A.C. 1355

*Finucane's Application for Judicial Review, Re* [2019] UKSC 7; [2019] 2 WLUK 382

## Reading

### Key Texts

None.

### Further Reading

None.