THE LAW AND PRACTICE OF HUMAN RIGHTS

Editors:
David Blundell KC
Miranda Butler
Alistair Mills

LexisNexis

Table of Contents

Table of Statutes

Article 2: Right to life

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.

INTRODUCTION: THE NATURE OF THE RIGHT TO LIFE

7.1 The right to life is the most fundamental of all human rights. Considered 'the supreme right',[1] it is 'basic to all human rights'[2] and 'the prerequisite for the enjoyment of all other human rights'.[3]

1 UN Human Rights Committee, General Comment No 6, 1982, para 1; General Comment No 14, 1984, para 1; General Comment No 36, 3 September 2019, para 2. Further, '[t]he right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.': General Comment No 36, para 2, footnote omitted. General Comment No 36 replaces General Comments Nos 6 and 14: para 1.

2 UN Human Rights Committee, General Comment No 14, para 1.

3 UN Human Rights Committee, General Comment No 36, para 2.

Historical development: the right to life at common law

7.2 The protection of the right to life in the European Convention on Human Rights is part of a long history of international protection. It is often said that the right was first recognised by the Fifth Amendment to the US Constitution.[1] While that provision certainly enshrined the right in a recognisably modern form, its antecedents reach much further into the past. Magna Carta in 1215 did not contain any express protection for the right to life as such, but clause 39

did guarantee that '[n]o free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land'. Edward Coke considered that 'in any other way ruined' included a prohibition on killing, maiming and torturing.[2] On any analysis, Magna Carta established a number of procedural rights that would be important for the protection of life, such as the right to trial by jury and the prohibition on the use of force without judicial authority, even if those protections were not, at that time, articulated by reference to that objective per se.[3]

1 The Fifth Amendment provides inter alia that no person shall 'be deprived of life . . . without due process of law'. It was first proposed as a constitutional amendment by Congressman James Maddison in a speech to the House of Representatives on 8 June 1789. The text was edited by Congress and, after approval by Congress, was ratified by the states on 15 December 1791. However, the recognition of a fundamental or inherent right to life was already established in other important, early US constitutional documents, which influenced the drafting of the Fifth Amendment. For example, Art 1 of the Virginia Declaration of Rights, drafted by George Mason between around 20 and 26 May 1776, and adopted by the Fifth Virginia Convention on 12 June 1776, provided that 'all men are by nature equally free and independent, and have certain inherent rights of which . . . they cannot deprive or divest their posterity; namely, the enjoyment of life and liberty'. The US Declaration of Independence, of 4 July 1776, itself recognised in the famous terms of its preamble that '[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'.

2 Coke, 2 Inst. 48. The words in the original text of clause 39 were '*aliquo modo destruatur*'.

3 Article 39, Magna Carta; concluded at Runnymede, England, 15 June 1215. See: S Casey-Maslen 'An Historical Introduction to the Right to Life' in *The Right to Life under International Law: An Interpretive Manual* (2021, CUP). Likewise, the 1689 Bill of Rights in England did not refer to the right to life per se but did prohibit the infliction of 'cruel and unusual punishments'.

7.3 In England, the reign of Edward III saw the enactment of legislation directly linking those procedural protections to the right to life. Chapter 9 of 5 Ed. III in 1331 provided that 'no Man from henceforth shall be attached by any Accusation, nor forejudged of Life or Limb, nor his Lands, Tenements, Goods, nor Chattels seised into the King's Hands, against the Form of the Great Charter, and the Law of the Land'. In this way, it introduced express procedural guarantees to the right to life by reference to Magna Charter. The Liberty of Subject 1354 was more direct and provided that 'no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law'.[1]

1 Liberty of Subject 1354, 1354, Chapter 3 28 Ed 3.

7.4 Following those early references, it was not until the late seventeenth century that philosophers such as John Locke first began to speak about the right to life as an express concept.[1] The following century, the great English jurist Sir William Blackstone articulated in some detail, as one of the three absolute rights of the people of England, the 'right of personal security' as it arose from the English common law system, being the right to a person's 'legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation'.[2] This concept entailed protection from both 'civil or natural death' and so went much wider than the right to life as formulated in the modern age, encompassing issues of banishment and alienation of the person from the social

context (issues which would be dealt with in the context of Art 8 of the Convention today). He described life as 'the immediate gift of God, a right inherent by nature in every individual'. As the gift of 'the great Creator', natural life 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority'. Blackstone went on to recognise, however, the possibility that a natural life might be forfeited for the breach of those 'laws of society' which were enforced by capital punishments. He continued the emphasis in English commentary on the enforcement of this right against arbitrary or 'tyrannical' action to interfere with that right without basis in law.

1 In his *Two Treatises of Government* (1689), ch VII, para 87, Locke wrote that every individual, irrespective of his circumstances, possesses: ' . . . a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature equally with every other man or number of men in the world and has by nature a power not only to preserve his property – that is his life, liberty and estate – against the injuries and attempts of other men, but to judge and punish breaches of that law in others.': P Laslett *Locke: Two Treatises of Government* (1988, CUP). Even such enlightened thinking, however, did not at the time extend the same rights to women. That would be taken up by the leading thinkers of the following century: see, for example, M Wollstonecraft *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects* (1792).

2 Blackstone's *Commentaries on the Laws of England*, Book 1, ch 1, p 125 (written c.1765).

7.5 While the Enlightenment saw constitutional developments in the New World producing constitutional guarantees of the right to life to match the significance attributed to the right by Blackstone and Locke, the same was not true in the Old World. By contrast with the references to the right to life in the Virginia Declaration and the American Declaration of Independence, the great constitutional document of the late seventeenth century in England, the Bill of Rights 1689, contained no equivalent guarantee. Later prominent English jurists such as Dicey were generally sceptical about the need for such declarations of rights within the British constitution, preferring instead to focus on the means of securing them.[1] The focus on the importance of securing rights, might be thought to be redolent of the later principle that Convention rights must be interpreted so as to be practical and effective.

1 See, for example, Dicey in his *Introduction to the Study of the Law of the Constitution* (1885), pp 198–199: ' . . . most foreign constitution makers have begun with declarations of rights. For this they have often been in no way to blame . . . On the other hand, there remains through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation. The law *ubi jus ibi remedium* [where there is a right, there must be a remedy], . . . means that the Englishmen whose labours gradually framed the completed set of laws and institutions which we call the Constitution, fixed their minds more intently on providing the remedies for the enforcement of particular rights . . . than upon any declaration of the Rights of Man or of Englishmen'. See, more generally, ch 2.

7.6 Thereafter, however, the right to life became recognised as a peremptory norm of customary international law, making an appearance in all major intentional conventions on human rights of the post-World War II period and the use of the term 'right to life' per se became more commonly used in the domestic context and in the modern sense of the term (ie, the right not to be killed or put at risk of death). The right is now protected internationally by Art

3 of the UN Declaration of Human Rights[1] and Art 6 of the International Covenant on Civil and Political Rights.[2] It is also protected by a range of regional and national constitutional and human rights documents.[3]

1 UN Declaration of Human Rights 1948, Art 3: '*Everyone has the right to life, liberty and security of person*'.

2 International Covenant on Civil and Political Rights 1966. Article 6(1) provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The remainder of Art 6 deals with the death penalty and the crime of genocide.

3 See, for example, Art 4.1 of the American Convention on Human Rights 1969, Art 7 of the Canadian Charter of Fundamental Rights and Freedoms and Art 21 of the Indian Constitution.

7.7 Against that background, and towards the end of the twentieth century, the right received a renewed focus in the domestic UK courts with the enactment of the Human Rights Act 1998 on the horizon. The right to life became understood as the most fundamental common law right for every individual, the engagement of which in any case required the most anxious scrutiny by the domestic courts.[1]

1 See, for example, the comments of the House of Lords in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531G. By way of contrast, however, see the Court of Appeal's decision *in R (B) v Cambridge Health Authority* [1995] 1 WLR 898, [1995] 2 All ER 129, where it was held that even though the common law right to life was engaged (and describing it in the same fundamental terminology as the House of Lords) it was not the role of the courts to interfere in decisions about the funding of life-saving medical treatment. See also the comments made as to the status of the common law right to life in *Airedale NHS Trust v Bland* [1993] AC 789, [1993] 1 All ER 821; *R (A) v Lord Saville of Newdigate* [2000] 1 WLR 1855, [1999] 4 All ER 860. At the time of the enactment of the Human Rights Act, the most senior British judges, in the House of Lords, also had significant experience in matters concerning the right to life generally, and constitutional exceptions to it, through their work on death penalty appeals in the Privy Council.

The right to life in the Convention

7.8 In the Convention, the right to life is protected by Art 2, the first of the substantive provisions. As such, it holds a structural significance in the Convention system: it sits at the head of the Convention system of protection; implying that all other rights follow from there. Its importance is reflected in the fact that it is one of only four Convention rights[1] from which no derogation is permitted in time of war or other public emergency threatening the life of the nation.[2] Its centrality in the Convention system of human rights protection has long been recognised by the Court, which has described it as 'one of the most fundamental provisions in the Convention' whose provisions must be 'strictly construed'.[3] Its interpretation is guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[4]

1 The others are Arts 3, 4(1) and 7: see Art 15(2).

2 '*[E]xcept in respect of deaths resulting from lawful acts of war*': Article 15(2). See also *Giuliani and Gaggio v Italy* (23458/02), (2012) 54 EHRR 10, [174].

3 *McCann v United Kingdom* (A/324), (1996) 21 EHRR 97, [147].

4 *McCann v United Kingdom* (A/324), (1996) 21 EHRR 97, [147], citing, in n 41, *Soering v United Kingdom* (14038/88), (1989) 11 EHRR 439, [87]; and *Loizidou v Turkey* (15318/89), (1995) 20 EHRR 99, [72].

Scope

7.9 Article 2(1) contains two fundamental express obligations, one positive and one negative.[1] The positive obligation is to ensure that everyone's life is protected by law. The negative obligation is not to take life. Despite the undoubted significance of Art 2, it is not, however, an absolute right. The negative obligation is subject to an exception for the lawful death penalty. The significance of that carve-out is, though, reduced following the coming into force of Art 1 of Protocol 13 which provided for the abolition of the death penalty. The negative obligation is also subject to a series of exhaustively defined exceptions in Art 2(2), relating to the use of force 'which is no more than is absolutely necessary' in three situations.[2]

1 *Boso v Italy* (50490/99), 5 September 2002.
2 Self-defence; making an arrest or preventing an escape from lawful custody; and to quell a riot or insurrection: Art 2(2).

7.10 In addition to the express obligations, a very significant feature of the protection offered by Art 2 is the implied procedural obligation to investigate the loss of life.[1] This is one of the most important of the developments in relation to Art 2 and one that has had far-reaching impacts on systems of all the Contracting States, including the United Kingdom in relation to inquests.[2]

1 Also known as the 'adjectival' obligation.
2 See, for example, *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653.

Jurisdiction

7.11 Jurisdiction for Art 2 is, like all the substantive Convention provisions, established by the rules in Art 1. However, in respect of the adjectival obligation to investigate under Art 2, the Court has adopted an expansive approach to jurisdiction under Art 1.[1] This includes establishing a special rule of jurisdiction, derived from its case-law on 'special features' jurisdiction under Art 1. The Court's approach reflects the very high significance placed on Art 2 by the Court and the central role of the procedural obligation in achieving the full scope of respect for the right to life.

1 See further CHAPTER 6, 'The Obligation to Respect Human Rights: Article 1'.

7.12 The Court's approach to jurisdiction in respect of the procedural obligation was reviewed in detail in *Güzelyurtlu v Cyprus and Turkey*.[1] The case concerned the murder of a family in Cyprus. The suspected murderers fled from part of Cyprus which is under the control of Cypriot authorities to the 'Turkish Republic of Northern Cyprus' ('the TRNC'). Both Cyprus and the de facto authorities of the TRNC (which were closely aligned with and supported by Turkey itself) conducted investigations into the murder but ultimately reached an impasse: Cyprus sought the extradition of the suspects from the 'TRNC', while the 'TRNC' authorities insisted on the transfer of Cyprus' file of evidence so that the suspects could be prosecuted by its courts. The victims' relatives argued that both Cyprus and Turkey had breached their procedural obligations under Art 2 on account of their failure to conduct effective investigations into the murders and their failure to cooperate with each other in relation to that investigation.

1 *Güzelyurtlu v Cyprus and Turkey* (36925/07), (2019) 69 EHRR 12.

7.13 The Court proceeded to identify a range of situations in which jurisdiction to carry out an investigation under Art arose:

(1) In the vast majority of cases involving complaints under the procedural obligation under Art 2, the death occurred within the jurisdiction of the Contracting State at issue, either within its national territory, in an area under the effective control of that state, or on board craft and vessels registered in, or flying the flag of, that stage.[1]
(2) There were also cases where the death had occurred in another state's territory or in a neutral zone but had allegedly been caused by an agent of the Contracting State at issue, through the exercise of that agent's authority and control.[2]

1 *Güzelyurtlu v Cyprus and Turkey* (36925/07), (2019) 69 EHRR 12, [180].
2 *Güzelyurtlu v Cyprus and Turkey* (36925/07), (2019) 69 EHRR 12, [180].

7.14 The Court noted that hitherto there had been very few cases in which it had had to examine complaints under the procedural limb of Art 2 where the death occurred in a different jurisdiction from that of the state in which the procedural obligation was said to arise.[1] Having reviewed its case-law, it concluded that if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that state, by virtue of their domestic law, 'the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court'.[2]

1 *Güzelyurtlu v Cyprus and Turkey* (36925/07), (2019) 69 EHRR 12, [181].
2 *Güzelyurtlu v Cyprus and Turkey* (36925/07), (2019) 69 EHRR 12, [188].

7.15 Even where no investigation or proceedings have been instituted in a Contracting State, it may still be necessary to determine whether a jurisdictional link can be established. The Court stated that while the procedural obligation will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was found at the time of death, 'special features in a given case will justify a departure from this approach'. This was said to be according to the principles developed in *Rantsev*.[1] The Court did not define such special features in the abstract since they would necessarily depend on the particular circumstances of the case in question and could vary considerably from one case to another.[2]

1 *Rantsev v Cyprus* (25965/04), (2010) 51 EHRR 1, [243]–[244]. The only special feature on which the applicant relied in *Rantsev* to assert an investigative obligation against Russia was his deceased daughter's Russian nationality. The Court rejected the argument, on the basis that Art 2 did not require Contracting States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals.
2 *Güzelyurtlu v Cyprus and Turkey* (36925/07), (2019) 69 EHRR 12, [190].

7.16 In the particular circumstances of *Güzelyurtlu*, the Court found that jurisdiction was established in two ways, either of which would suffice in itself to establish a jurisdictional link to Turkey.[1] First, the fact that the TRNC authorities had commenced an investigation was sufficient to establish a jurisdictional link with Turkey, which was responsible for the acts and omissions of the TRNC's authorities.[2] Secondly, Turkey's procedural obligation was

relevant domestic procedures existed and were followed, the applicant was unable to follow or understand those procedures owing to language barriers.

1 *RS v Hungary* (65290/14), (2020) 70 EHRR 15.
2 *Jallob v Germany* (54810/00), (2007) 44 EHRR 32.

8.28 As to the third criterion, the use of force which exceeds the necessary level inherent in the administration of a forced medical intervention will fall foul of Art 3. In *Nevmerzhitsky*,[1] the appellant was subjected to force-feeding in a particularly violent manner in which handcuffs, a mouth-widener and a special rubber tube inserted into the food channel were used. This treatment was of such severity that the Court found the force-feeding in question to amount to torture. In *RS v Hungary*, the Court found a violation of Art 3 when the applicant was subjected to forced catheterisation at a police station in order to obtain a urine sample, causing physical pain and mental suffering. By contrast, in *Schmidt v Germany*,[2] Art 3 was found not to have been engaged by the taking and examination of a sample of the applicant's blood and saliva following a court order.

1 *Nevmerzhitsky v Ukraine* (54825/00), (2006) 43 EHRR 32.
2 *Schmidt v Germany* (32352/02), (2006) 42 EHRR SE19.

Involuntary sterilisation

8.29 Involuntary sterilisation constitutes a breach of Art 3. While sterilisation and abortion may legitimately be performed at the request of the person concerned, where it takes place without the consent of a mentally competent adult, it is incompatible with the fundamental requirement of respect for human freedom and dignity which is central to the Convention. In *VC v Slovakia*,[1] the Court found a breach of Art 3 when the applicant, a Roma woman, was sterilised immediately after she gave birth via Caesarean section. While the applicant had signed a form recording her consent to the procedure, she had signed the form while she was in the final stages of labour, was in pain and after being told, wrongly, that if she had another child, either she or the baby would die.

1 *VC v Slovakia* (18968/07), (2014) 59 EHRR 29.

8.30 The Court accepted the applicant's account, holding that the timing and circumstances of the request for consent did not allow the applicant time to make an informed decision of her own free will or to discuss the matter with her partner. In those circumstances, the Court held that 'the sterilisation procedure grossly interfered with the applicant's physical integrity as she was thereby deprived of her reproductive capability',[1] and 'was liable to arouse in her feelings of fear, anguish and inferiority and to entail lasting suffering'.[2] This met the requisite level of severity to justify a finding that Art 3 had been breached. Similar conclusions were reached in *NB v Slovakia*[3] and *IG and ors v Slovakia*[4] – both cases concerning the unconsented sterilisation of Roma women.

1 *VC v Slovakia* (18968/07), (2014) 59 EHRR 2, [116].
2 *VC v Slovakia* (18968/07), (2014) 59 EHRR 2, [118].
3 *NB v Slovakia* (29518/10), 12 June 2012.
4 *IG and ors v Slovakia* (15966/04), 13 November 2012.

8.31 *VC* is to be contrasted with *YP v Russia*.[1] The applicant underwent surgery to treat an ectopic pregnancy with her informed consent. She subsequently became pregnant again. She sought medical treatment out of concern for her pregnancy and was admitted to hospital, where doctors decided to perform an emergency caesarean section. The applicant signed a consent form specifically for a 'caesarean section without sterilisation'. During the procedure, the applicant's uterus began to rupture and doctors convened a medical panel to decide how to treat the rupture, determining to treat the rupture and sterilise the applicant in order to prevent a future rupture. The Court dismissed the applicant's Art 3 complaint. The Court agreed that the applicant's sterilisation amounted to a major interference her reproductive health status and was 'clearly disrespectful of the applicant's autonomy'.[2] However, the complaint was distinguished from the *VC* line of case law owing to an absence of additional elements to indicate the applicant's particular vulnerability, and thus, the severity threshold was not met.[3]

1 *YP v Russia* (43399/13), (2023) 76 EHRR 27.
2 *YP v Russia* (43399/13), (2023) 76 EHRR 27, [37].
3 *YP v Russia* (43399/13), (2023) 76 EHRR 27, [34].

Forced abortion

8.32 The Court found a violation of Art 3 in two tragic cases concerning forced abortion. In *SFK v Russia*,[1] the applicant, a 20-year-old woman, was forced by her parents and two medical professionals to have an abortion at five weeks. The abortion was not formally recorded and was performed in the absence of any evidence of the applicant's express, free and informed consent, in breach of applicable laws and procedures. The applicant was also not provided with the necessary medical supervision and care either before or after the invention. The forced abortion, administered without any medical benefit, had caused the applicant distress, anxiety and humiliation, and in those circumstances, the Court found that the minimum severity level had been met.

1 *SFK v Russia* (5578/12), 11 October 2022.

8.33 In *GM and ors v Moldova*,[1] three women, all of whom were disabled and had been institutionalised in a neuropsychiatric residential facility, were subjected to rape by the head doctor at the facility. The applicants were then subjected to forced abortions and had intrauterine contraceptive devices implanted without their consent. The Court held that the hospitals that administered the forced abortions to the applicants had demonstrated 'gross disregard for their right to autonomy and choice as patients'. In the absence of clear evidence that the applicants had provided their free and informed consent, the Court held unanimously that the forced abortions breached each of the applicants' substantive rights under Art 3.

1 *GM and ors v Moldova* (44394/15), [2023] MHLR 171.

Medical treatment upon deportation

8.34 In its landmark judgment in *D v United Kingdom*,[1] the Court held that the expulsion of a critically ill man from the UK to his country of origin would

8.42 The UK Supreme Court considered the effect of *Paposhvili* in *AM (Zimbabwe) v Secretary of State for the Home Department*.[1] The case concerned a Zimbabwean national who was HIV-positive. The appellant sought to rely on Art 3 to challenge the Secretary of State's refusal to revoke an order for his deportation, relying on *Paposhvili*. The appellant had received treatment to manage his HIV diagnosis for several years and had been prescribed an antiretroviral medication that enabled his viral load to become undetectable. However, it was doubtful whether he could access that same medication in Zimbabwe, and without access thereto, his CD4 blood count would fall to dangerous levels, leaving him vulnerable to infections and death.

1 *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, [2021] AC 633.

8.43 The Court of Appeal interpreted *Paposhvili* as establishing that Art 3 would be engaged either by imminent death or imminent, meaning 'rapid', onset of intense suffering in the receiving state.[1] The Supreme Court held that this approach was wrong, finding that the 'significant reduction in life expectancy' referred to in *Paposhvili* could not logically be equated with the imminence of death. A significant reduction in life expectancy, even if serious harm or death could not be expected imminently, was sufficient to engage Art 3. The meaning of 'significant' in this context had to take account of the circumstances of the individual, and effectively meant 'substantial'.[2]

1 *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64, [2018] 1 WLR 2933, [38].
2 *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, [2021] AC 633, [31].

Suicide cases

8.44 In cases where it is alleged that the individual being removed will attempt suicide, the question is whether there is a real risk of suicide, with death by suicide amounting to ill-treatment contrary to Art 3. The leading case in this context is *J v Secretary of State for the Home Department*.[1] The case concerned an asylum seeker from Sri Lanka who left after being tortured by the Sri Lankan army and subsequently detained by the so-called Liberation Tigers of Tamil Eelam (LTTE). The appellant applied for asylum in the UK which was refused despite medical evidence that the appellant suffered from post-traumatic stress disorder (PTSD) and had attempted suicide. The Immigration Appeals Tribunal agreed with the Secretary of State, holding that there was no real risk of a breach of Art 3 because there was no real risk that the appellant would respond to a removal decision by attempting suicide, either before removal, en route to Sri Lanka or following arrival.

1 *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, [2005] Imm AR 409.

8.45 The Court of Appeal clarified the proper approach to be taken in such cases at [26]–[32], which has come to be known as 'the *J* guidance':

(1) Art 3 requires the decision-maker to assess the severity of the treatment that the applicant claims they would suffer if removed.
(2) A causal link must be established between the removal of the person and the ill-treatment in question.

(3) The threshold to be met is particularly high in the context of removal cases, and even more so where the ill-treatment alleged does not result from the actions of the receiving state.
(4) An Art 3 claim can, in principle, succeed in a suicide case.
(5) In deciding whether there is a real risk of a breach of Art 3 in a suicide case, the critical question is whether the applicant's fear of ill-treatment is objectively well-founded.
(6) The existence or non-existence of effective mechanisms to reduce the risk of suicide in the receiving state is a factor of considerable relevance.

8.46 The J guidance has undergone refinement. The fifth point was reformulated in *Y (Sri Lanka) v Secretary of State for the Home Department*,[1] where the Court of Appeal stated:

> 'The corollary of the final sentence of §30 of J is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened, especially if the same authorities are in charge, notwithstanding that the objective risk of recurrence has gone.
>
> One can accordingly add to the fifth principle in J that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return.'

1 *Y (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362, [2009] HRLR 22, [15]–[16].

8.47 The judgment in *Y*[1] built upon the Court of Appeal's decision in *RA (Sri Lanka) v Secretary of State for the Home Department*,[2] where it was held that the principles applicable to Art 3 cases concerning physical illnesses were of equal application to mental illness cases.

1 *Y (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 362, [2009] HRLR 22.
2 *RA (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1210, [2009] Imm AR 320.

8.48 In *R (Carlos) v Secretary of State for the Home Department*,[1] Sir Duncan Ouseley confirmed that the principles set out in *Paposhvili* and *AM (Zimbabwe)* were of equal application to suicide cases. Thus, the question is whether, if expelled to the destination country, the individual would face a real risk of a substantial reduction in life expectancy occasioned by suicide, having regard to the six factors identified in the *J* guidance. This was followed by the Strasbourg Court's decision in *Savran v Denmark*, where it reaffirmed that the standards and principles established in *Paposhvili* were to be applied generally in cases concerning the removal of a 'seriously ill person', regardless of the type of illness.[2] Similarly, in *MY (Suicide risk after Paposhvili)*,[3] the Upper Tribunal, after considering the issue at length, concluded that the *Paposhvili* test, as explained by the Supreme Court in *AM*, was equally applicable in Art 3 claims based on mental health problems. The Upper Tribunal rejected the contention that the burden is on the applicant in such cases to prove that there were '*substantial grounds for considering that theirs is a very exceptional case*

(i) The positive obligation under Art 3 is to be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.

(ii) Regard must be had to other Convention rights, including in the present context, the right to respect for family and private life guaranteed by Art 8.

(iii) Regard must also be had to the 'difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life'.

(iv) Generally, the test for determining whether a public authority has violated Art 3, by failing to take reasonable measures within its powers to avoid a real and immediate risk of harm of which it knows or ought to have known, is a stringent test that is not readily satisfied.

1 *DP and JC v United Kingdom* (38719/97), (2003) 36 EHRR 14; *O'Keeffe v Ireland* (35810/09), (2014) 59 EHRR 15; *VC v Italy* (54227/14), (2019) 69 EHRR 13; *Oganezova v Armenia* (71367/12), (2022) 75 EHRR 20.
2 *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225; *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196; *Begum v Secretary of State for the Home Department* [2024] EWCA Civ 152, [2024] 1 WLR 4269.
3 *AB v Worcestershire County Council* [2023] EWCA Civ 529, [2023] 2 FLR 795.

8.87 Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. Rather, the state is required to take 'reasonable' steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[1] The protective duty arises once the authorities know or ought to know of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party.[2] Article 3 will be breached in such circumstances where the authorities, with knowledge of that risk, fail to take measures within the scope of their powers which, judged reasonably, might be expected to avert the risk of ill-treatment.[3]

1 *O'Keeffe v Ireland* (35810/09), (2014) 59 EHRR 15, [144].
2 *X v Bulgaria* (22457/16), 2 February 2021, [183]; *Đorđević v Croatia* (41526/10), 24 July 2012, [139]; *Buturugă v Romania* (56867/15), 11 February 2020, [61].
3 *X v Bulgaria* (22457/16), 2 February 2021, [183]; *Đorđević v Croatia* (41526/10), 24 July 2012, [139]; *Buturugă v Romania* (56867/15), 11 February 2020, [61].

8.88 Further, in assessing whether there were further reasonable steps that the authorities could have taken in discharging the protective duty, the Strasbourg Court will have regard to the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice.[1] This includes respect for the guarantees in Art 8.[2]

1 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (13178/03), 12 October 2006, [53]; *Members of the Gldani Congregation of Jehovah's Witnesses and ors v Georgia* (71156/01), 3 May 2007, [96]; *Milanović v Serbia* (44614/07), 14 December 2010, [87].
2 *X v Bulgaria* (22457/16), 2 February 2021, [221].

8.89 The Court has also underlined that it is not necessary to show that 'but for' the state's omission the ill-treatment would not have happened. A failure to

take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.[1]

1 *O'Keeffe v Ireland* (35810/09), (2014) 59 EHRR 15, [149]. See further *SZR v Blackburn with Darwen BC* [2024] EWHC 598 (KB), (2024) 27 CCL Rep. 301.

8.90 An enhanced duty to protect arises in the context of vulnerable persons. The Court has held that children and other vulnerable persons in particular are entitled to state protection in the form of effective deterrence against ill-treatment.[1] In *O'Keeffe v Ireland*,[2] the Court held that the positive obligation of protection assumes particular importance in the context of a public service with a duty to protect the health and wellbeing of children, such as primary education, where those children are particularly vulnerable and under the exclusive control of the authorities.

1 *X and Y v Netherlands* (8978/80), (1986) 8 EHRR 235; *Stubbings v United Kingdom* (22083/93), (1997) 23 EHRR 213; *A v United Kingdom* (25599/94), (1999) 27 EHRR 611.
2 *O'Keeffe v Ireland* (35810/09), (2014) 59 EHRR 15.

Duty to put in place an appropriate legislative and regulatory framework

8.91 As a corollary to the duty to protect, Art 3 also entails an obligation to establish a legislative and regulatory framework to shield individuals adequately from breaches of their physical and psychological integrity and punish perpetrators, particularly through the enactment of criminal law provisions and their effective application in practice.[1] For example, in *MC v Bulgaria*,[2] the applicant succeeded in establishing a breach of Art 3 when, aged 14, she was raped by two men and no prosecutions were pursued against the perpetrators. The Court considered that Art 3 entailed an inherent duty 'to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution'.[3]

1 *Söderman v Sweden* (5786/08), 12 November 2013; *SZ v Bulgaria* (29263/12), 3 March 2015; *A and B v Croatia* (7144/15), 20 June 2019.
2 *MC v Bulgaria* (39272/98), (2005) 40 EHRR 20.
3 *MC v Bulgaria* (39272/98), (2005) 40 EHRR 20, [153].

8.92 The Court's focus on the practical effectiveness of such measures may require the existence of useful detection and reporting mechanisms to ensure that authorities are alerted to risks at an early stage and have the opportunity to take appropriate action.[1] However, the requirement to put in place effective measures does not mean that every instance of ill-treatment perpetrated by a private actor entails a breach of Art 3. In *A and B v Croatia*,[2] the Court considered a complaint brought by A, the mother of child B, of a breach of Art 3 after B was sexually abused by her father. The applicants complained about the failure of the Croatian authorities to provide a proper response to the allegations after the State Attorney's Office decided against prosecuting the father.

1 *O'Keeffe v Ireland* (35810/09), (2014) 59 EHRR 15, [148].
2 *A and B v Croatia* (7144/15), 20 June 2019.

8.93 The majority of the Court dismissed the complaint. It was satisfied that an appropriate legal and regulatory framework existed for the protection of Art 3,