

---

# When Are States (Not) Obligated to Save Citizens' Lives? Discovering the 'Restrictive Triage' which Undermines the Operational Duty under Article 2 ECHR

Jordan Briggs\*

---

## ABSTRACT

*According to Article 2 of the European Convention on Human Rights, when states do or should know that an individual is at a real and immediate risk of death, the state has an operational duty to take reasonable steps that might be expected to avoid that risk from materialising. This article explains and analyses interpretations of that duty, both by the European Court of Human Rights and by UK courts. A persistent inconsistency is found. On the one hand, judges in both fora have repeatedly championed Article 2 as a fundamental right enshrining a basic value of democratic societies. However, at the same time, a highly restrictive approach to the operational obligation has been favoured; calibrated first by the European Court of Human Rights and intensified by UK judges. Consequently, and by analysing a wide range of European and domestic case law, this article relates that for UK litigants the obligation's legal tests now comprise a materially compounding 'restrictive triage' of: (1) 'identifiability', (2) 'state knowledge', and (3) 'institutional deference'. Accordingly, and notwithstanding judicial rhetoric, the operational obligation is enforceable in the UK only in vanishingly few circumstances. This reality is criticised, and three reform suggestions are proposed to enable the obligation to most effectively minimise avoidable deaths.*

---

\* LLM (LSE) '21. BA in Jurisprudence (University of Oxford) '20. The author warmly thanks Professor Conor Gearty QC for his guidance and enthusiasm whilst supervising this work.

## INTRODUCTION

Remaining alive should not be taken for granted. All that ever separates life and death is a single moment of unbearable physiological stress. Such moments often arise unforeseeably, from public transport accidents, freak meteorological events, attacks from third persons or from the degradation of our own bodies or minds.

The state's role in protecting us from such threats is unclear. On the one hand, the state may not be the most proximate cause of the threats and, particularly given the large number of competing drains on state attention and resources, it may anyway be quite incapable of providing complete protection to all citizens' lives. On the other hand, if states voluntarily agreed to respect human rights, and have already-established, pervasive and well-resourced protective institutions upon which citizens are invited to depend,<sup>1</sup> then the state might reasonably be expected to vindicate its protective promise and extend assistance to citizens wherever it can.<sup>2</sup>

Such tensions are reflected in the inconsistent judicial interpretation of Article 2 of the European Convention on Human Rights (ECHR). From the bald enjoinder that '[e]veryone's right to life shall be protected by law',<sup>3</sup> the European Court of Human Rights (ECtHR) inferred an 'operational obligation' in 2000 requiring states who knew, or ought to have known, of a real and immediate risk to the life of an identified individual to take positive steps which, judged reasonably, might have been expected to avoid such a risk from materialising.<sup>4</sup> Thereafter, however, the ECtHR developed a strikingly Janus-faced interpretive practice. The ECtHR has often championed Article 2, proudly extolling that it 'ranks as one of the most fundamental provisions in the Convention'<sup>5</sup> and enshrines 'one of the basic values of the democratic societies

---

<sup>1</sup> Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2017) 3.

<sup>2</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 1.

<sup>3</sup> European Convention on Human Rights (ECHR) art 2(1).

<sup>4</sup> *Osman v UK* (2000) 29 EHRR 245.

<sup>5</sup> See *Osman* [88]; *Younger v UK* (2003) 36 EHRR 252, para 20; *Kotilainen v Finland* (2021) 72 EHRR 26, para 65; *Tarariyena v Russia* (2009) 48 EHRR 26, para 73.

making up the Council of Europe.<sup>6</sup> Such statements are not without foundation. After all, Article 2 has primary place as the first substantive right listed in the ECHR and, along with Article 3, is one of the two ‘absolute rights’ which, when engaged, cannot be overridden in any circumstances.<sup>7</sup> Accordingly, the ECtHR has avowed to subject complaints about loss of life to ‘the most careful scrutiny’<sup>8</sup> and, particularly in cases involving vulnerable women,<sup>9</sup> stressed that Article 2’s safeguards must be ‘practical and effective’.<sup>10</sup>

Yet, even whilst professedly championing Article 2, the ECtHR has quietly but deliberately limited the operational obligation by taking an avoidably restrictive view of its legal tests. Importantly, when the operational obligation descends from the ECtHR into the hands of United Kingdom (UK) judges, the restrictions only increase. The operational obligation enters the UK jurisdiction by virtue of the Human Rights Act 1998 (HRA 1998), which requires judges only to ‘take into account’ ECtHR judgments<sup>11</sup> and keep domestic law ‘compatible’ with ECHR law insofar as is possible.<sup>12</sup> As will be demonstrated, UK courts have generally exercised this latitude to further restrict the operational obligation by increasing the onerousness of its legal tests and deferentially refusing to impugn decision-makers’ omissions as unlawful.

Accordingly, the central argument of this work is that contrary to Article 2’s normative and judicially recognised importance, the ECtHR’s and UK courts’ restrictive interpretations of the operational obligation have produced materially compounding barriers to its enforcement. These barriers can be understood as a ‘restrictive triage’, comprising: (1) ‘identifiability’, (2) ‘state knowledge’, and (3) ‘institutional deference’. Further, even if these barriers are overcome, the obligation in the UK may entitle claimants only to meagre and reducible damages. Thus, in place of the readily available and robust obligation

---

<sup>6</sup> *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 28, para 164; *Mastromatteo v Italy* App no 37703/97 (ECtHR, 24 October 2002) para 67.

<sup>7</sup> Natasha Mavronicola, ‘What is an ‘absolute right’? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) 12(4) *Human Rights Law Review* 729.

<sup>8</sup> *Kotilainen* (n 5) 84; *Banel v Lithuania* App no 14326/11 (ECtHR, 24 February 2013) para 67.

<sup>9</sup> *Tkbelidze v Georgia* App no. 33056/17 (ECtHR, 8 July 2021) para 48.

<sup>10</sup> *Osman* (n 4) para 88; *Kotilainen* (n 5) para 65; *Tarariyeva* (n 5) para 73.

<sup>11</sup> Human Rights Act (HRA) 1998, s 2(1).

<sup>12</sup> *ibid*, s 3(1).

one would expect to manifest such an important right, one finds only its restricted and unproductive counterpart.

To so argue, this work takes five parts. First, the operational obligation is located and specified within Article 2 generally, before overviews of its factual applicability and normative weight are provided. Second, discussion of the 'restrictive triage' begins by illustrating how 'identifiability' acts as a bottleneck to restrict the pool of potential litigants. In light of that finding, reforms to the 'identifiability' criterion are proposed. Third, the 'state knowledge' requirement is disaggregated to demonstrate that the nature of the mortal risk and the limited methods of evidencing state awareness of it, together comprise a significantly obstructive criterion. Reform suggestions are proposed to widen the circumstances in which courts can hold that the state 'ought to have known' a person was at risk of death. Fourth, the final 'institutional deference' element is explored to illustrate how UK courts abandon the Article 2 inquiry if the case is deemed 'political', or otherwise implicates some technical decision. Reforms to that species of deference are duly suggested. The fifth section mobilises these findings to demonstrate the gulf between the ECtHR's statements about Article 2 and the highly specified UK legal reality.

In so doing, this work addresses a literary lacuna. In 2016, Lavrysen recognised that even within the scarcity of positive obligations literature generally,<sup>13</sup> there exists especially little work on: (i) absolute rights, (ii) whether domestic constitutional concerns affect positive obligations adjudication, and (iii) how, in light of any constitutional concerns, courts approach obligations' 'qualifying terms' like 'reasonable steps'.<sup>14</sup> This work responds by viewing the (absolute) Article 2 through a domestic lens, and finding that constitutional concerns *do* modify courts' approaches by producing deferentially non-interrogative approaches to the 'reasonableness' inquiry.

---

<sup>13</sup> As Lavrysen recognises (Lavrysen, *Human Rights in a Positive State* (n 1) 17), although several articles provide overviews of the ECtHR's positive obligation case law, many are now outdated and few involve theoretical analysis. That outdatedness charge could now also be applied to the first three of the four existing books on positive obligations (Alastair Mowbray, *The Development of Positive Obligations European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Cordula Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Springer 2003); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, (Routledge 2013), 4; Lavrysen, *Human Rights in a Positive State* (n 1).

<sup>14</sup> Lavrysen, *Human Rights in a Positive State* (n 1) 348-9.

Thus, this article begins by locating and specifying, cataloguing, and weighting the operational obligation, before demonstrating the inconsistency in and normative undesirability of its extreme specification.

## LOCATING AND SPECIFYING, CATALOGUING AND WEIGHTING THE OPERATIONAL OBLIGATION

### A) Location and Specification

Views differ on how to properly categorise different types of human rights obligations.<sup>15</sup> Consequently, scholars may disagree on where precisely the operational obligation sits within the matrix of obligations imposed by Article 2.<sup>16</sup> However, as the present work focuses on ECHR jurisprudence, it is suitable and convenient to adopt the ECtHR's understanding. Three doctrinal distinctions are used by the ECtHR which, together, illuminate the operational obligation's position within Article 2.

First, the distinction between 'negative' and 'positive' obligations. 'Negative obligations' prohibit unlawful interferences in a right-bearer's affairs. For example, the Article 2 negative duty generally bans state agents from using lethal force against citizens.<sup>17</sup> 'Positive obligations', by contrast, require the State to take action.<sup>18</sup> The operational obligation is a positive obligation because,

---

<sup>15</sup> Keir Starmer, for example, breaks from the ECtHR's positive/negative taxonomy (above) and proposes a five-fold categorisation of positive obligations: (1) obligations to establish a legal framework providing effective protection for ECHR rights; (2) obligations to prevent breaches of ECHR rights; (3) obligations to provide information and advice relevant to a breach of ECHR rights; (4) obligations to respond to breaches of ECHR rights; and (5) obligations to provide resources to individuals to prevent breaches of ECHR rights: Keir Starmer, 'Positive Obligations under the Convention' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing 2001), 146-7. For alternative taxonomising systems, see Lavrysen, *Human Rights in a Positive State* (n 1), ch 2.

<sup>16</sup> For example Starmer (ibid) may describe the *Osman* duty not as the ECtHR does (as above) as a positive, substantive, operational obligation, but—perhaps less precisely—as an obligation, imposed by Article 2, to 'prevent breaches of Convention rights'.

<sup>17</sup> *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004)

<sup>18</sup> Lavrysen, *Human Rights in a Positive State* (n 1) 11.

when engaged, it compels the state to take steps to protect right-bearers against mortal risks. It should be recognised, however, that whilst the positive/negative distinction is helpful and seemingly intuitive,<sup>19</sup> many Article 2 cases could reasonably be construed either way; either as involving positive acts *or* as failures to act. For example, in *Rabone*,<sup>20</sup> the granting of home leave to a voluntary inpatient of moderate to high suicide risk could be characterised as involving the hospital's action (i.e. interrupting hospital residence by releasing the patient into the community) or inaction (i.e. failing to retain her within the hospital). Similarly in *Mitchell*,<sup>21</sup> the local authority's reprimanding of a problematic tenant who consequently became enraged and killed his neighbour could be construed as action (i.e. by reprimanding and triggering a bout of rage in the tenant, the state had endangered the neighbour) or inaction (i.e. failing to protect the neighbour after rage had begun). Whilst both cases were argued as involving inaction, their ability to be characterised either way implies that, as Lavrysen argues, the categories of acts and omission 'are not natural facts but legal constructs'. This is significant because if, as Lavrysen considers,<sup>22</sup> positive obligation cases attract less-intense scrutiny than their negative obligation counterparts, a case's construction may determine the intensity of its review and perhaps even its outcome. For example, Lavrysen might argue that had *Mitchell*<sup>23</sup> been construed as a negative obligation case (i.e. involving a direct interference with the deceased neighbour's Article 2 rights) and not a positive one (i.e. involving a failure to avoid the risk that the enraged tenant posed to the neighbour's life), scrutiny of the local authority's actions may have been stricter and, in the final analysis, liability may have attached. Nonetheless, whilst remaining mindful of slippage between the categories, we may proceed with the positive/negative obligation distinction because, helpfully, it highlights that the operational obligation requires action rather than demanding forbearance.

Second, we may burrow deeper into Article 2 by distinguishing between the different types of positive obligation it imposes. Following the ECtHR, we may distinguish between 'procedural' and 'substantive' positive obligations. 'Procedural' obligations require the state to hold an effective official

---

<sup>19</sup> Frank Cross, 'The Error of Positive Rights' (2001) 48 UCLA Law Review 857, 864.

<sup>20</sup> *Rabone and another v Penine Care NHS Trust* [2012] UKSC 2.

<sup>21</sup> *Mitchell and another v Glasgow City Council* [2009] UKHL 11.

<sup>22</sup> Lavrysen, *Human Rights in a Positive State* (n 1) 264.

<sup>23</sup> *Mitchell* (n 21).

investigation after individuals are killed.<sup>24</sup> For example, under the Article 2 procedural obligation, investigations into fatal police shootings may require, *inter alia*, staged reconstructions and testing officers' hands for gunshot residue.<sup>25</sup> 'Substantive' obligations, by contrast, oblige the state to safeguard the lives of those within its jurisdiction. The operational obligation is substantive because it requires protection of individuals' lives whilst they are alive, rather than requiring an investigation afterward. Yet, there exists one further important distinction, and so we burrow down once more.

At this third level of depth, we must distinguish between two substantive positive duties. On the one hand, there is the duty 'to adopt and implement a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'<sup>26</sup> (what we may call the 'legal and administrative duty'). This requires, for example, establishing regimes to safely regulate firearm possession.<sup>27</sup> On the other hand, there exists the 'obligation to take positive operational measures to protect an identified individual.'<sup>28</sup> This was first articulated in *Osman*,<sup>29</sup> where the ECtHR described that it engages if:

---

<sup>24</sup> *McCann v UK* (2008) 47 EHRR 40.

<sup>25</sup> *Ramsabai v Netherlands* (2008) 46 EHRR 43.

<sup>26</sup> *Osman* (n 4) [156].

<sup>27</sup> *Kotilainen* (n 5).

<sup>28</sup> *Osman* (n 4) [156].

<sup>29</sup> For completeness it ought to be acknowledged that even the 'operational' and 'legal and administrative' categories may sometimes blur together. (This was recognised by Lord Walker in *R (L(A Patient)) v Secretary of State for Justice* [2009] 1 AC 588 [89] and, more recently, by Popplewell LJ in *R (Morahan) v HM Assistant Coroner for West London* [2021] EWHC 1603 (Admin) [30(2)(b)].) Namely, endangerment of a person engaging the 'operational' duty might imply a defect in the 'legal and administrative duty', given that the latter was evidently inadequate to protect against harm in the endangering circumstances. Conversely, failures in the 'legal and administrative duty' may exist unnoticed for years, requiring that some person becomes dramatically endangered, engaging the 'operational' duty, before the putatively risk-detering framework is scrutinised and the failure identified. For example, consider *Kemaloğlu v Turkey* App no. 19986/06 (ECtHR, 10 April 2012): after a blizzard forced a school's early closure and the state failed to arrange municipal school buses to take children home, one schoolboy attempted the journey by foot and fatally froze. Attributable to that outcome were both the school's lack of (administrative) provision for safe transport in adverse weather for all students, and the failure to foresee and deter that specific schoolboy from walking home alone. Indeed, the ECtHR impugned both factors (respectively, at [41] and [47]) and did not clearly specify which failure triggered liability. The same occurred in *Öneryıldız v*

...the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

As Lord Brown recognised in *Van Colle*, each ingredient in this test is important.<sup>30</sup> There are four legal issues. Three comprise the necessary (and collectively sufficient) conditions for the duty to be owed: (1) there must exist a 'real and immediate risk' to an individual's life; (2) authorities must possess actual or constructive knowledge of that risk; and (3) the subject of the risk must be 'identified' to the authorities at the time. If these three issues are satisfied, then the obligation is owed and authorities must (4) take *intra vires* measures which, judged reasonably, could be expected to avoid the risk.

Issue (4) is crucial. For, as McBride recognises, it illuminates that the operational obligation does not require authorities to actually save life,<sup>31</sup> but only modestly requires that the authorities 'try to save us from harm'.<sup>32</sup> It follows that Article 2 does not confer a right on the individual to be kept alive but, as Wicks observes, instead an obligation that authorities show 'respect for all human life' through trying to protect it.<sup>33</sup> Two important consequences follow. First, if Article 2 enshrines a right to have one's life respected, then good reasons should exist before anybody is denied Article 2 entitlements outright. Such exclusion

---

*Turkey* App no. 48939 (ECtHR, 30 November 2004), concerning a mismanaged rubbish dump which detonated due to expanding methane gases, killing nearby residents. The ECtHR both deployed the *Osman* test (para 101) and impugned the 'defective' regulatory system (para 109), but failed to clearly specify which produced liability. Accordingly, there exists some conceptual overlap between the 'legal and administrative' and 'operational' duties, notwithstanding that the distinction is useful for taxonomic purposes.

<sup>30</sup> *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50 [30].

<sup>31</sup> Indeed, death is not necessary for invoking Article 2: *Makaratzis* (n 17).

<sup>32</sup> Nicholas McBride, 'Michael and the future of Tort Law' (2016) 32 *Journal of Professional Negligence* 14, 28.

<sup>33</sup> Elizabeth Wicks, 'The Meaning of Life': Dignity and the Right to Life in International Human Rights Treaties' 12(2) *Human Rights Law Review* 199, 219.

from Article 2 would, contrary to the Article's supposedly indiscriminate application, denigratingly imply that some people's lives are not worthy *even of our respect* and, by so doing, would legally sanction a divide between two classes of citizens: those whose lives the state must respect and those who are not even entitled to that. Second, and connectedly, the obligation that authorities *try* seemingly imposes no great burden. That obligation could be discharged in any number of more or less burdensome ways, so long as in the final analysis authorities made an attempt, which could fairly be expected to ameliorate the level of endangering risk. These observations combine to suggest that the operational obligation could feasibly be owed to very many, levying not some unbearable expectation of omniscience and omnipotence, but rather an expectation that authorities respect human life by (at least) *trying* to assist when particular citizens are demonstrably endangered.

Consequently, it is regrettable that a causation requirement has crept into interpretation of the operational obligation.<sup>34</sup> Properly construed, assessing whether authorities have tried to avoid mortal risks does not involve analysing whether the authorities themselves caused that risk. Rather, as Morawska recognises, a mortal risk is only an 'external fact that *gives rise to another unlawful act, effected by the state itself* and stemming from failure to comply with the obligation to prevent such actions' [sic].<sup>35</sup> Thus, the ECtHR errs when asking whether the mortal risk is 'attributable' to the state,<sup>36</sup> or whether there exists a 'direct causal'<sup>37</sup> or 'strong enough'<sup>38</sup> link for liability imposition. UK courts similarly stumble when inquiring whether authorities' omissions caused the 'loss of a substantial chance' of avoiding the mortal risk.<sup>39</sup> Whilst thankfully, as Lavrysen recognises, causation plays only a 'relatively minor role in the overall

---

<sup>34</sup> In this comment disregard class (2) of emergency care cases, where causation features expressly.

<sup>35</sup> Elżbieta Hanna Morawska, 'The preventative dimension of the protection of the right to life under the European Convention on Human Rights' (2019) 20(2) *Espaço Jurídico Journal of Law* 233, 238. (Emphasis added).

<sup>36</sup> *Vilnes and Others v Norway* App nos 52806/09 and 22703/10 (ECtHR, 24 March 2014) para 158.

<sup>37</sup> *Dodov v Bulgaria* App no 5948/00 (ECtHR, 17 January 2008) para 97.

<sup>38</sup> *Dubetska v Ukraine* App no 30499/03 (ECtHR 10 February 2011) para 92.

<sup>39</sup> *Van Colle* (n 30) [138].

normative structure of State liability',<sup>40</sup> it nonetheless misrepresents what is the liability-producing act (i.e. it is the state's omission, and not whatever external fact that originally produced the danger). Accordingly, the causation requirement should be abandoned as the operational obligation matures.

At this juncture we may clearly define the operational obligation. It is 'positive', 'substantive' and 'operational', and paradigmatically engages to compel the state to try and save the lives of certain individuals who the state knows, or should know, are at risk of death. Against that background, we may catalogue the factual contexts in which the obligation has arisen.

## **B) Factual Application of the Obligation**

In principle, the scope of the obligation has no conceptual limits,<sup>41</sup> and may arise in relation to any activity, whether public or not, in which the right to life may be at stake.<sup>42</sup> Nonetheless, the obligation is most often invoked in four categories of cases, albeit, importantly, displaying slightly different legal tests in each. Each category will now be considered in turn.

The first involves protection of persons from lethal use of force by non-state actors. Herein, as explained in *Osman*, if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual, the authorities must take *intra vires* steps which, judged reasonably, might be expected to avoid the risk.<sup>43</sup> An exemplar ECtHR case is *Osman* itself in which a schoolteacher developed an attachment to one of his pupils and, after becoming sufficiently obsessive to merit a short police investigation, fatally shot the schoolchild's father (and one other person) and shot and wounded the schoolchild (and one other person). The ECtHR held that no operational duty was owed because at no stage before the killings could the police have known that the schoolteacher posed a real and immediate homicide risk to the victims.<sup>44</sup> The UK House of Lords reached the same conclusion in *Van Colle* where an ex-employee, facing charges of stealing from

---

<sup>40</sup> Laurens Lavrysen, 'Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova' (2018) 18(4) Human Rights Law Review 705, 717.

<sup>41</sup> Xenos (n 13) 4.

<sup>42</sup> *Valentin Câmpăneanu v Romania* App no 47848/08 (ECtHR, 17 July 2014) para 130.

<sup>43</sup> *Osman*, (n 4) [156].

<sup>44</sup> *ibid* [121].

his old employer, fatally but unforeseeably shot the latter to prevent his provision of incriminating evidence.<sup>45</sup>

The second category involves protection of persons from self-harm. Accordingly, if the authorities knew or ought to have known that an individual posed a real and immediate risk to their own life, the authorities must respond appropriately to ameliorate that risk. It is not clear precisely to what standard the authorities will be held. The ECtHR sometimes asks minimally whether the authorities ‘[ook] measures which could reasonably be expected of them’,<sup>46</sup> and sometimes maximally whether the authorities did ‘all that could reasonably be expected of them’.<sup>47</sup> An example from the ECtHR is *Hiller*, in which the authority granted community leave to an involuntarily hospitalised paranoid schizophrenic person who thereafter fatally jumped in front of a train. The authority was not found to be liable because it was deemed impossible for hospital authorities to have known about the deceased’s suicidal intent.<sup>48</sup> The UK Supreme Court (UKSC) found the opposite in *Rabone*, where the respondent hospital was impugned for failing to foresee and ameliorate the risk of suicide attendant upon granting a psychiatric patient weekend leave.<sup>49</sup>

The third class involves protection against environmental or industrial disasters, including mudslides,<sup>50</sup> state-mandated deep sea diving missions,<sup>51</sup> and injuries sustained on state-authorized construction sites.<sup>52</sup> As explained above, the significance of the operational obligation reasoning in these cases is unclear, as the ECtHR often invokes both the operational and ‘legal and administrative’ duties together without clearly specifying which most materially determines state liability. Whilst no UK case has squarely involved an environmental disaster, *Plan B Earth* is the closest analogue.<sup>53</sup> Therein Supperstone J, who was invited to find that alleged defects in UK climate change mitigation policy comprised a breach of the state’s operational obligation to protect human life, deferentially

---

<sup>45</sup> *Van Colle* (n 30) [40].

<sup>46</sup> *Younger* (n 5) para 17.

<sup>47</sup> *Renolde v France* App no 5608/05 (ECtHR, 16 October 2008).

<sup>48</sup> *Hiller v Austria* App no 1967/14 (ECtHR, 22 November 2016) paras 51-4.

<sup>49</sup> *Rabone* (n 20) [43].

<sup>50</sup> *Budayeva v Russia* App no 15339/02 (ECtHR, 20 March 2008).

<sup>51</sup> *Vihes* (n 36).

<sup>52</sup> *Cevrioğlu v Turkey* App no 69646/12 (ECtHR, 4 October 2016).

<sup>53</sup> *Plan B Earth v Secretary of State for Transport* [2018] EWHC 1892 (Admin).

refused to scrutinise the matter because ‘the executive has a wide discretion’<sup>54</sup> in setting environmental policy.<sup>55</sup> Industrial disaster cases in the UK may be taken to include *Smith*,<sup>56</sup> in which the UKSC found the operational duty in principle applicable to the allegedly defective training and equipment of the UK’s armed forces.<sup>57</sup>

The final class involves provision of emergency medical care. Herein, differing entirely from other categories of case, liability may arise only in two ‘very exceptional’ circumstances: (1) where a patient’s life was ‘knowingly put in danger by the denial of access to life-saving emergency services’; or (2) where, in addition to satisfying the *Osman* test, there existed a ‘systemic or structural dysfunction in hospital services’ that foreclosed access to emergency care.<sup>58</sup> As an example of the first category, take *Mehmet Şentürk*,<sup>59</sup> where the ECtHR found liability when a pregnant woman, harbouring and becoming increasingly endangered by her baby who was known to have died *in utero*, was turned away from an emergency hospital because she lacked funds to pay for a caesarean extraction. As an example of the second category, consider the UK case of *R (Maguire)*.<sup>60</sup> Therein liability was not found in respect of a disabled woman who, having developed a gastric ulcer, was permitted by paramedics to remain in her residential care facility overnight until, by morning, her condition had fatally deteriorated. Whilst the *Osman* test was satisfied, Supperstone J found no liability because the ‘systemic failure’ element could not be evidenced.<sup>61</sup>

From this study emerges an outline of the relationship between UK courts and the ECtHR in Article 2 operational obligation cases. UK courts generally follow ECtHR case law, despite not being mandated to do so by the HRA 1998.

---

<sup>54</sup> *ibid* [49].

<sup>55</sup> *Plan B Earth* will re-emerge in the analysis of judicial deference, below (n 181).

<sup>56</sup> *Smith v The Ministry of Defence* [2013] UKSC 41.

<sup>57</sup> *ibid* [80]-[81].

<sup>58</sup> *Lopes de Sousa* (n 6) para 190.

<sup>59</sup> *Mehmet Şentürk v Turkey* App no 13423/09 (ECtHR, 9 April 2013), especially at para 97.

<sup>60</sup> *R (Maguire) v HM Senior Coroner for Blackpool and Fylde* [2020] EWCA Civ 738.

<sup>61</sup> *ibid* [106]. An example of ‘systemic failure’ was found in *Aydoğdu v Turkey* App no 40448/06 (ECtHR, 30 August 2016) where, after a baby was born prematurely and with a respiratory problem due to the negligence of doctors, the baby was transferred to another hospital which also lacked space and equipment, with the result that the baby died soon after admission to the latter. A ‘systemic failure’ was found in the region housing those hospitals (paras 55, 76), and Article 2 liability followed.

Indeed, UK courts have never denied the existence of an *Osman* duty in facts where the ECtHR has found one and, on two occasions, have gone further than the ECtHR by accepting *Osman* as applicable in fact patterns where the ECtHR had not yet done so.<sup>62</sup> When reasoning cases UK courts tend not to engage with the whole corpus of relevant Article 2 jurisprudence,<sup>63</sup> instead generally perceiving Grand Chamber judgments to have established the authoritative principles<sup>64</sup> which other Sections' judgments are taken to express.<sup>65</sup> Connectedly, when interpreting discrete ECtHR maxims and concepts (e.g. 'reasonable steps' or 'real and immediate risk'), UK courts generally form concrete domestic understandings rather than trying to harmonise all relevant ECtHR jurisprudence.<sup>66</sup>

Yet, perhaps, there is little unusual in UK courts extending the operational obligation's factual reach and forming domestic understanding of its legal tests. For, while it has long been clear that ECtHR judgments generally form a floor below which UK adjudication cannot sink, it has not been so clear that those judgments comprise a ceiling.<sup>67</sup> That is, UK courts are feasibly at domestic legal liberty to extend and clarify the applicability of ECHR rights beyond ECtHR interpretations, so long as no inconsistencies are thereby introduced.<sup>68</sup>

---

<sup>62</sup> *Rabone* (n 20); *Smith* (n 56).

<sup>63</sup> Such selectivity is customary in UK ECHR adjudication: Conor Gearty, 'It's Harder Than It Looks!: Unpicking three complicated threads in recent UK human rights law' (Matrix Chambers Staff Seminar, London, 9 October 2019) para 19.

<sup>64</sup> *Osman* is the runaway favourite, having been cited 130 times across the five House of Lords/UKSC cases involving the Article 2 duty (*In re Officer L* [2007] UKHL 36; *Savage v South Essex Partnership NHS Trust* [2008] UKHL 74; *Van Colle* (n 30); *Rabone* (n 20); *Smith* (n 56)).

<sup>65</sup> E.g. *Rabone* (n 20) (15-6: Grand Chamber's *Osman dictum* taken as exemplified by other Sections' suicide-related jurisprudence); (23: Grand Chamber statement of 'vulnerability's materiality accepted without discussion by UKSC); *Van Colle* (n 30), (31: Grand Chamber's *Osman ratio* taken as expressed in *Kontrová v Slovakia* App. No. 7510/04 (ECtHR, 31 May 2007).

<sup>66</sup> See, for example, the UK interpretation of 'state knowledge', below: (n 102-154).

<sup>67</sup> See *R v Special Adjudicator ex. P. Ullah* [2004] UKHL 26 where Lord Bingham [20] held that whilst ECtHR judgments do not strictly bind UK courts, HRA 1998 obliges UK courts 'to keep pace with the [ECtHR] Jurisprudence ... no more but *certainly no less*.' (emphasis added).

<sup>68</sup> This is not to say that exercises of this liberty are universally welcome. For example, the UK Government's consultation paper to reform the Human Rights Act alleges that the very 'structure of the Human Rights Act is flawed [due to its permitting] ... the

Furthermore, the ECtHR, being a supranational court, has reason to adjudicate conservatively to avoid perceived overreach and losses of credibility affected by, or the outright secession of, signatory states.<sup>69</sup> Whilst UK courts may be charged with overreach,<sup>70</sup> the impossibility that those in their jurisdiction may secede feasibly permits them to interpret the operational obligation more adventurously than the ECtHR. Consequently, UK courts' extension and concretisation of the obligation's legal tests is not inconsistent with what one might expect from domestic courts transposing an international legal norm.

What is agreed upon by both ECtHR and UK judges, however, is the normative weight of Article 2 and the operational obligation. This will now be considered before examining the manner in which, despite its importance, the Article 2 operational obligation is now almost inoperable because its tests have been deliberately interpreted so narrowly that they comprise a materially compounding and preclusive 'restrictive triage'.

### **C) Weight**

Philosophically and normatively, the Article 2 operational obligation has special weight. Philosophically, Article 2 is the bedrock of the entire human rights edifice for, without being alive, one cannot enjoy any other protected interest. To understand this point, consider that, as Möller argues,<sup>71</sup> human rights protect exercises of autonomy, and positive obligations mandate the supply of conditions in which autonomy can be exercised. For example, imagine that an individual makes an autonomous choice to enter a homosexual relationship. Article 8 would be engaged (as the matter falls within the ambit of

---

expansive role taken by the Strasbourg Court being mirrored, and sometimes surpassed, in the UK'. Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights' (*Gov.uk*, 14 December 2021) para 112; see also para 194 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040409/human-rights-reform-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)> accessed 8 January 2022. For a suggestion that such an 'expansive role' was permitted or even encouraged before HRA 1998 was passed, see n 207 below.

<sup>69</sup> Molly Land, '4 – Justice as Legitimacy in the European Court of Human Rights', in Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal and Geir Ulfstein, *Legitimacy and International Courts* (Cambridge University Press 2018) 83-113.

<sup>70</sup> Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights' (n 68).

<sup>71</sup> Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 28.

the individual's private life)<sup>72</sup> and would supply a positive obligation that the state adopts measures 'designed to secure respect for private life' such that, 'even in the sphere of the relations of individuals between themselves',<sup>73</sup> individuals exercising Article 8 rights are not abused by other private persons for doing so. So, if homosexual persons were abused on account of their sexuality, and the state did nothing, the state would likely have failed in its positive obligation to ensure that homosexual individuals could enjoy exercising their Article 8 rights. However, the present point is that if one wants to enter into a homosexual relationship, quite apart from the sort of society in which one lives, it is necessary first that one is *alive*. Consequently, one might say that the Article 2 positive obligation has singular importance: in mandating that the state tries to keep individuals alive, it protects the precondition (i.e. being alive) for experiencing the preconditions (i.e. living in a tolerant society) for valuable exercises of autonomy (e.g. entering into a homosexual relationship).

Normatively, positive obligations have unique importance because they extend special support to victims and the vulnerable. That is, positive obligations ensure that states ameliorate the disadvantages affected by vulnerability, by obliging states to lift vulnerable people up to a standard of well-being considered sufficient for the enjoyment of human rights.<sup>74</sup> Indeed, given extant social inequalities, as Dickson rightly observes, it is 'patently absurd' to consider that human rights would otherwise be enjoyed equally by all, with states merely 'content[ing] themselves with standing by and doing nothing.'<sup>75</sup>

Reflecting this importance, the ECtHR champions the Article 2 operational obligation and grants it a wide scope of applicability. That is, as recognised above, the ECtHR has before<sup>76</sup> and since<sup>77</sup> *Osman* stated that Article 2 comprises 'one of the most fundamental provisions in the Convention' and 'one of the basic values of the democratic societies making up the Council of

---

<sup>72</sup> As confirmed by *Dudgeon v UK* App no 7525/76. (ECtHR, 22 October 1981).

<sup>73</sup> *Von Hannover v Germany* App no 8772/10 (ECtHR, 24 June 2004) para 57.

<sup>74</sup> Keir Starmer, 'Human rights and victims: the untold story of the Human Rights Act' (2014) 3 European Human Rights Law Review 215, 221.

<sup>75</sup> Brice Dickson, 'Positive obligations and the European Convention of Human Rights' (2010) 61(3) Northern Ireland Legal Quarterly 203, 204.

<sup>76</sup> *McCann* (n 24) para 147.

<sup>77</sup> *Mastromatteo* (n 6) para 67.

Europe'.<sup>78</sup> Consequently, the ECtHR purports to subject breaches of Article 2 to 'the most careful scrutiny'<sup>79</sup> and requires Article 2 safeguards to be 'practical and effective'.<sup>80</sup> UK courts share the ECtHR's view of Article 2's importance. Article 2 was described by Lady Hale in *Rabone* as 'the most fundamental right of all'<sup>81</sup> and by Lord Rodger in *Van Colle* as 'fundamental in the scheme of the Convention'.<sup>82</sup> Concurrently, as McFarlane LJ acknowledged in *Sarjantson*, UK courts accept that Article 2's safeguards 'should be interpreted and applied in such a way as to make its safeguards practical and effective'.<sup>83</sup>

In those circumstances, one might expect the operational obligation to be readily available to a broad class of litigants and sufficiently operable to impose liability in a range of cases. That is not at all what one finds when analysing the case law. Indeed, and having now established the relevant content of Article 2, the argument may begin that in the UK the operational obligation's incidents comprise a 'restrictive triage'; duplicitously erected and significantly impeding litigants' abilities to enforce the operational obligation in the majority of factual situations. To build that argument, the analysis begins by considering the first element in the triage: that to be available, the operational obligation requires that at-risk persons are 'identifiable' to the state prior to a risk arising (i.e. 'identifiability'). As will now be demonstrated, and contrary to the professed importance and ubiquity of Article 2, the 'identifiability' criterion that has been wrought into a 'bottleneck', duplicitously absolving the operational obligation from applying in respect of certain classes of demonstrably endangered person who we might reasonably expect it to protect.

## **ELEMENT 1: THE 'IDENTIFIABILITY' BOTTLENECK**

'Identifiability' may be characterised as a 'bottleneck' because the criterion permits only a few classes of persons to qualify for enforcing the operational

---

<sup>78</sup> *Kotilainen* (n 5) para 65; *Kurt v Austria* App no 62903/15 (ECtHR, 15 June 2021) para 80.

<sup>79</sup> *Bljakaj and Others v Croatia* App no 74448/12 (ECtHR, 18 September 2012) para 112.

<sup>80</sup> *Younger* (n 5) 20; *Tarariyeva* (n 5) para 73.

<sup>81</sup> *Rabone* (n 20) [108].

<sup>82</sup> *Van Colle* (n 30) [30].

<sup>83</sup> *Sarjantson v Humberside* [2013] EWCA Civ 1252 [23].

obligation. As Chamberlain J explained in *First-Tier Tribunal*,<sup>84</sup> both at the ECtHR and in UK law, ‘identifiability’ includes only (1) ‘an identified individual (*Osman*)’;<sup>85</sup> (2) a ‘category of individuals (*Öneriyıldız*)’;<sup>86</sup> and (3) ‘unidentified class[es] of individuals... tightly confined by reference to a specific location or dangerous [industrial]<sup>87</sup> situation (*Cevrioglu*)’.<sup>88</sup> Whilst few cases fail at this stage, ‘identifiability’ contributes to the ‘restrictive triage’ because it excludes categories of persons whom Article 2 might reasonably be expected to protect. Consider two such categories.

First, take geographically disparate classes of similarly vulnerable people. Consider, for example, homeless persons at risk of dying during winter storms or care home attendees nationwide who, during the coronavirus pandemic, were at an acute risk of fatal infection.<sup>89</sup> As *First-Tier Tribunal* indicates, as members of these classes are not specifically known to authorities and are not geographically proximate, on current law they cannot be considered ‘identifiable’.<sup>90</sup> Yet—being at appreciable but avoidable mortality risk—members are suffering from precisely the sort of vulnerabilities which Article 2 can address (by obliging states to intervene and try to ameliorate individuals’ endangerment). The fact that geographically disparate classes of similarly vulnerable people cannot enforce Article 2 on account of their membership is, inferably,<sup>91</sup> attributable to the longstanding ECtHR fear of imposing on states impossible or disproportionate protective burdens.<sup>92</sup> Yet that reason is unconvincing. Even if individually vulnerable members were considered ‘identifiable’, arisal of the duty would remain contingent upon satisfaction of the remaining incidents of the

---

<sup>84</sup> R (*Home Secretary*) v *First-Tier Tribunal* [2021] EWHC 1690 (Admin) [108].

<sup>85</sup> *Osman* (n 4).

<sup>86</sup> *Öneriyıldız* (n 29).

<sup>87</sup> If the hazard is *non-industrial* (e.g. emanating from homicidal ex-prisoners) states owe unknown individuals not the operational duty but a laxer duty to ‘afford general protection to society’: *Mastromatteo* (n 6) para 69.

<sup>88</sup> *Cevrioglu* (n 52).

<sup>89</sup> Mary Daly, ‘COVID-19 and care homes in England: What happened and why?’ (2020) 54(7) *Social Policy & Administration* 985-998.

<sup>90</sup> *Bljakaj and Others* (n 79).

<sup>91</sup> *First-Tier Tribunal* (n 84) [110]: Chamberlain J observed that if duties *are* owed widely (e.g. duty owed to the public to establish hospitals) their requirements are ‘framed at a high level of generality and c[an] be discharged in many different ways’ (inferably, to minimise states’ burdens).

<sup>92</sup> See, for example, *Osman* (n 4) para 116; *Younger* (n 5) 18; *Kurt* (n 78) para 64.

'restrictive triage', and so the duty might still only sparingly be owed in the final analysis. Furthermore, the duty asks merely for 'reasonable' attempts—a 'reasonableness' which, as the latter part of this article will demonstrate, would in the UK be scrutinised only deferentially and laxly.<sup>93</sup> Nonetheless, Article 2 presently imposes no obligation for states to respect the lives of geographically disparate classes of similarly vulnerable people, notwithstanding the fact that those members might be clearly and avoidably endangered. This reality undermines the ECtHR's statements that Article 2 is of 'fundamental' importance and ought to generate 'practical and effective' safeguards against avoidable mortal risks.<sup>94</sup>

Second, consider groups of persons whose identities and at-risk statuses were reasonably inferable from facts known to the authorities prior to the risk arising. To illustrate such persons, consider *Kotilainen*.<sup>95</sup> Therein a 22-year-old man lawfully acquired a firearm and, after convincing police to let him retain it, notwithstanding disquieting behaviour meriting a short police investigation, committed several fatal shootings in a school. Those victims' identities (as schoolchildren) and at-risk statuses were reasonably inferable from the killer's actions, which included participating in an online forum celebrating an American school shooting, praising video footage of that shooting as 'entertainment at its best', and uploading a video of himself clearly imitating the behaviour of a previous Finnish school shooter whilst reciting verses about war and dying.<sup>96</sup> Indeed, the Finnish police *themselves* suspected that the killer would commit a school-shooting on the basis of these materials.<sup>97</sup> Yet the ECtHR, disagreeing with the police, held that the schoolchildren were not inferably 'identifiable' and considered the shootings entirely unforeseeable.<sup>98</sup> Instead, the court dispensed with the case by expanding the *ex-ante* 'legal and administrative' duty requiring firearm regulation to require perpetual *ex-post* police sensitivity to whether firearm dispoonees remained regulation-compliant after receiving their weapon. Similarly in *Bljakaj*, the ECtHR held that a deceased wife could not be considered 'identifiable' notwithstanding that, prior to a risk arising against her, the authorities knew very well that her husband had been convicted for violence

---

<sup>93</sup> See below n 180 – n 185.

<sup>94</sup> Per *Osman* (n 4) para 88.

<sup>95</sup> *Kotilainen* (n 5) para 13.

<sup>96</sup> *Kotilainen* (n 5) para 13.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*, paras 80-1.

against her<sup>99</sup> and had that morning publicly screamed that he had ‘problems in his family’, which he would ‘solve himself’ by doing ‘something which would be talked about’.<sup>100</sup> Inferably, then, the ECtHR is set against accepting as ‘identifiable’ persons whose identities and at-risk statuses were reasonably inferable from facts known to the authorities prior to the risk arising, notwithstanding that, as a matter of logic, they reasonably might be so considered.

Whilst spatial constraints preclude further examples, the foregoing analysis evidences the ECtHR’s deliberate retention of a restrictive ‘identifiability’ bottleneck by excluding groups who require state protection, and individuals who inferably need the same. This restriction in the pool of potential applicants chafes against the ECtHR’s statements that Article 2 protects a ‘fundamental’ and ‘basic value’ warranting protections across every conceivable factual matrix. If the ECtHR wishes to truly vindicate those sentiments, the ‘identifiability’ bottleneck should be widened, to permit ‘identifiable persons’ to include geographically disparate classes of vulnerable people (e.g. homeless persons at risk of freezing during a winter storm and care home residents during the coronavirus pandemic) and persons whose identities and at-risk statuses were reasonably inferable from facts known to the authorities prior to the risk arising (i.e. victims whose killers evidenced intentions to harm them prior to doing so). Indeed, those are arguably the paradigm cases in which legally-mandated state intervention is appropriate because, without some protections, deaths will foreseeably and avoidably occur.

Considering those groups ‘identifiable’ is not proscribed by the *Osman dicta* and would be supported by the Article 2(1) enjoinder that ‘*everyone’s* right to life shall be protected by law’.<sup>101</sup> It is no answer to exclaim that such an extension would impose an intolerable burden on the state. For, as will be recalled, the obligation only requires that states respect the lives of individuals by *attempting* to ameliorate mortal risks endangering them. The form and burdensomeness of those attempts would remain for states to decide, with judicial oversight remaining mindful of whether any greater an effort would have been prohibitively expensive or impractical. Accordingly, expanding ‘identifiability’ to

---

<sup>99</sup> *Bjakeaj* (n 79) para 20.

<sup>100</sup> *ibid*, para 120.

<sup>101</sup> Emphasis added.

embrace 'geographically disparate classes of similarly vulnerable people' would bring normative coherence to the operational obligation, and ought to be strongly considered.

Nevertheless, presently, the 'identifiability' bottleneck excludes those groups. Yet those restrictions, whilst material, pale in comparison to those imposed by the 'state knowledge' criterion, to which we now turn.

## **ELEMENT 2: 'STATE KNOWLEDGE' OF A 'REAL AND IMMEDIATE RISK'**

State knowledge is a critical element in establishing liability.<sup>102</sup> Claimants routinely fail at this stage, both before UK courts<sup>103</sup> and at the ECtHR.<sup>104</sup> It should immediately be recognised that the criterion comprises two discrete elements—(1) the existence of a 'real and immediate' risk, and (2) state knowledge of it—notwithstanding that courts often consider both elements as one. For example, in *Savage*, Mackay J asked only 'whether the defendant had the requisite knowledge, actual or constructive, of a "real and immediate risk"', rather than separately analysing the existence of the threat, and any state knowledge thereof.<sup>105</sup>

Yet it is important to disaggregate the 'real and immediate risk' and knowledge issues. So doing illuminates that each poses an independent and material hurdle to establish liability.

### **A) 'Real and immediate risk'**

Whilst the ECtHR and UK approaches to 'real and immediate risk' affect different outcomes, the material difference lies not at the 'immediacy' limb, which is understood similarly in both fora. The ECtHR has interpreted it elastically to cover both those risks which may manifest in moments (e.g.

---

<sup>102</sup> *Xenos* (n 13) 3.

<sup>103</sup> *Mitchell* (n 19) [34]; *Van Colle* (n 30) [39]; *R (AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin) [81].

<sup>104</sup> *Osman* (n 4) para 121; *Hiller* (n 48) para 54; *Kotilainen* (n 5) para 69.

<sup>105</sup> *Savage v South Essex NHS Partnership Trust* [2010] EWHC 865 (QB) [79]. For similar conflation at the ECtHR, see *Tkbelidze* (n 9) para 53.

Hiller)<sup>106</sup> and those which remain extant over several years. Involving such long-enduring risks is *Olewnik-Cieplińska*,<sup>107</sup> where the ECtHR accepted that there existed an ‘immediate’ risk to the life of a kidnapped Polish man throughout the entire two-year period of his entrapment and mistreatment.<sup>108</sup> In the UK the position is the same: ‘immediacy’ connotes a ‘present and continuing’ risk,<sup>109</sup> hence embracing both those which may manifest momentarily and those that endure over a longer period.

Divergences appear in defining ‘real’ risks. Whilst the ECtHR has not defined ‘real’, deliberation on whether a risk was ‘real *and* serious’ suggests that ‘real’ connotes only a risk which actually exists in fact, but implies nothing about its gravity or how likely it is to materialise.<sup>110</sup> UK courts’ test is harder-edged, requiring a ‘substantial or significant risk’ as opposed to a ‘remote or fanciful one’.<sup>111</sup> UK courts have been at pains to stress that this is a ‘high’ threshold,<sup>112</sup> one ‘not readily satisfied’,<sup>113</sup> and certainly ‘harder to establish than ‘mere negligence.’<sup>114</sup> Indeed that threshold which, unlike at the ECtHR, requires specific risks which clearly endanger the applicant, would seem to preclude domestic findings of liability which could succeed at the ECtHR. Consider again *Olewnik-Cieplińska*. Whilst the ECtHR was not troubled by the paucity of evidence relating to the two-year period where the victim was ‘drugged, beaten up on a few occasions, poorly fed and generally badly treated’ before finally being undetectably and fatally shot,<sup>115</sup> that evidentiary absence would seemingly complicate or prevent a UK court’s finding that there was a ‘substantial and significant’ risk. Indeed, UK cases often fail due to an inability to meet this high evidentiary threshold. *R (Wilson)* is one such example, where the lack of a

---

<sup>106</sup> Concerning the undetectable suicidal intention of a schizophrenic patient who one day calmly departed his open-hospital and unforeseeably jumped in front of a train.

<sup>107</sup> *Olewnik-Cieplińska v Poland* App no 20147/5 (ECtHR, 5 September 2019).

<sup>108</sup> *ibid*, para 124.

<sup>109</sup> *Rabone* (n 20) [39].

<sup>110</sup> *Paul and Audrey Edwards v UK* App no 46477/990 (ECtHR, 14 March 2002) para 60.

<sup>111</sup> *Rabone* (n 20) [38].

<sup>112</sup> *Van Colle* (n 30) [30].

<sup>113</sup> *In re Officer L* (n 64) [20].

<sup>114</sup> *Savage* (UKHL) (n 64) [66].

<sup>115</sup> *Olewnik-Cieplińska* (n 107) [10].

'statistically demonstrable' risk of mortality, attendant upon geriatric relocation between care homes, disabled Judge Pelling QC from finding that it was 'real'.<sup>116</sup>

Thus, even before considering 'state knowledge', the UK's strict approach to 'real' risks comprises an impediment to liability that is absent at the ECtHR.

## **B) State knowledge**

As held in *Osman*, state knowledge (of a qualifying risk) may be established either through evidenced actual knowledge, or imputed constructive knowledge (i.e. the state ought to have known that a person was at risk, notwithstanding that they did not know in fact). Importantly, however, only rarely do courts find that authorities had *actual* knowledge of a 'real and immediate risk'.<sup>117</sup> This may be because many mortal risks arise swiftly and invisibly<sup>118</sup> and so are genuinely not comprehended by the authorities before the death occurs, or because in litigation state actors do not comply with their obligations to disclose evidence (i.e. evidence which would, if disclosed, betray that the states had such knowledge after all) meaning that actual knowledge cannot be evidenced in court.

In any event, one observes in the case law that arguing constructive knowledge is the principal route to establishing state knowledge. Indeed, one observes that both the ECtHR and UK courts, unable to safely find actual knowledge alone, sometimes hold chimerically that authorities '*either knew or certainly ought to have known*' about a risk.<sup>119</sup> Thus, constructive knowledge, whether established independently or chimerically, shoulders considerable responsibility for the operability of the 'state knowledge' criterion. Yet what the state 'ought to have known' is, as Stoyanova observes, an entirely normative question.<sup>120</sup> It could be answered restrictively (i.e. assessing only what authorities

---

<sup>116</sup> R (*Wilson*) v *Coventry City Council* [2008] EWHC 2300 (Admin) [26].

<sup>117</sup> A small but firm vein of UK 'actual knowledge' cases involve the '*Venables* jurisdiction' where the court (the relevant 'authority', per HRA 1998, s6) receives, from expert witnesses at trial, actual knowledge that the applicant, who is contesting publication in a newspaper of some compromising information about them, is at 'real and immediate' suicide risk if publication goes ahead.

<sup>118</sup> E.g. undetectable suicidal intentions, see *Hiller* (n 48).

<sup>119</sup> Emphasis added. *Tkbelidze* (n 9) para 53; *Savage* (UKHL) (n 64) [87].

<sup>120</sup> Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the ECHR' (2020) 33(3) *Leiden Journal of International Law* 609.

‘ought to have known’ based on what information was in their lap at the time) or expansively (i.e. also expecting authorities to know about risks whose existence would have been clear from information attainable to authorities, but in fact not possessed due to negligence).

The restrictive interpretation has been consistently favoured by ECtHR and UK courts. Accordingly, as articulated and manifest in cases like *Van Colle*,<sup>121</sup> *Savage*<sup>122</sup> and *Mitchell*,<sup>123</sup> courts ‘place themselves in the chair’ of the authority to ‘assess events as they unfolded through their eyes’ based on what information was in fact possessed.<sup>124</sup> In this exercise, courts ignore information which was possessable but for the authorities’ negligence,<sup>125</sup> and guard anxiously against the ‘dangers of hindsight’<sup>126</sup> by refusing to impugn authorities for ignoring ‘warning signs’ of a death we know followed when, at the time, such events might not have appeared portentous.

Yet, and crucially for present purposes, ‘what information was possessed’ is itself question-begging. Authorities may possess a range of information, from data on a specific individual to background (e.g. scientific or sociological) data indicating that certain circumstances increase mortality risks (e.g. prisons, psychiatric detention).<sup>127</sup> Consequently, courts could feasibly accept that authorities ‘ought to have known’ about a risk if, by aggregating information about the specific individual with background data suggesting that the individual’s circumstances usually heighten mortality risks, the individual’s genuine endangerment was reasonably inferable. For example, if the authorities know that a specific detainee has attempted suicide whilst previously in the community and knows also that detainment normally heightens the risk of suicides, courts could hold that authorities ‘ought to have known’ that their detainee was at a continued risk of dangerous suicidal intentions re-arising.

---

<sup>121</sup> *Van Colle* (n 30).

<sup>122</sup> *Savage* (UKHL) (n 64).

<sup>123</sup> *Mitchell* (n 21).

<sup>124</sup> *Van Colle* (n 30) [32].

<sup>125</sup> *Younger* (n 5) 22.

<sup>126</sup> *Savage* (UKHL) (n 64) [80]; *Mitchell* (n 21) [33]; *Kotilainen* (n 5) para 83.

<sup>127</sup> Seena Fazel, ‘Suicide in prisons: an international study of prevalence and contributory factors’ (2017) 4(12) *The Lancet Psychiatry* 946; John Powell and others, ‘Suicide in psychiatric hospital in-patients: risk factors and their predictive power’ (2000) 176(3) *British Journal of Psychiatry* 266.

No judicial or scholarly guidance exists on what sort of facts are taken as 'possessed' for the purposes of constructive knowledge. Yet, as will be explained below, analysing UK and ECtHR law implies that only a very limited class of facts are relevant. Namely, UK courts seemingly only impute constructive knowledge when *very blatant* indicators of risk exist - facts which any reasonable person might understand to indicate a mortal risk but that, for whatever reason, the authorities failed to recognise as such. Simultaneously, the ECtHR has all but ruled out the use of background data to support an imputation. We shall take these issues in turn.

First, UK courts take a narrower view than the ECtHR towards what facts are deemed 'possessed'. At the ECtHR, knowledge may be imputed if, implying that the state 'possessed' knowledge of the risk, there exists: (i) domestic legislation concerning the risk; (ii) scientific research on the risk; (iii) national reports on the risk; (iv) channels of communication between state institutions about the risk; (v) a requirement that permits are obtained before the risk is confronted.<sup>128</sup>

UK courts treat these factors as of only defeasible relevance, and so are far less easily convinced than the ECtHR that the state 'possessed' information sufficient for an imputation of constructive knowledge. 'Objective scientific research', for example, arose in *R (Wilson)*, concerning whether fiscally motivated care home closures were precluded by the mortality risk attendant on geriatric relocation. Judge Pelling QC held that, because existing scientific research prior to relocation did not firmly establish a 'statistically demonstrable rise in mortality', healthcare authorities could not be expected to have known about the risk, and the operational duty did not preclude closure.<sup>129</sup> Requiring a 'statistically demonstrable' risk is in fact contrary to early Grand Chamber jurisprudence, according to which risks need not be statistically significant<sup>130</sup> or

---

<sup>128</sup> Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligation under the European Convention on Human Rights' (2018) 18(2) Human Rights Law Review 315.

<sup>129</sup> *R (Wilson)* (n 116) [26].

<sup>130</sup> *Öneryıldız* (n 29) para 98: the ECtHR required not a statistically significant risk in an expert report indicating a rubbish dump's detonation risk, but were satisfied when it (only) generally 'referred to the danger'.

consensually scientifically accepted<sup>131</sup> to support an imputation of constructive knowledge. Thus, the UK's demanding approach to statistical information, already controversial in public law adjudication generally,<sup>132</sup> in operational obligation cases materially limits the duty by excluding that disputable data may support an imputation of constructive knowledge.

'Channels of communication between state institutions', too, are less relevant in UK law. Consider *R (AP)*.<sup>133</sup> Therein a disabled man, who the Council and Police knew had been stalked, threatened, and allegedly raped by an aggressor, was eventually killed by the same. There had been some actual communication between the Police and the Council about the aggressor, but Higginbottom J paid it no regard in considering whether the state ought to have known about a risk to the deceased.<sup>134</sup> Connectedly, Higginbottom J rejected the submission that, had there been better communication, death could have been avoided. Rather, Higginbottom J dealt separately with the operational duties putatively owed by the Police and the Council, holding that neither owed the obligation.<sup>135</sup> Thus, UK courts' lesser regard to real or imagined 'channels of communication between state institutions' again renders their approach to relevant 'possessed' information stricter than the ECtHR's.

Indeed, the only facts that appear capable of supporting inferences of constructive knowledge in the UK are very blatant indicators of an individual's at-risk status. For example, in *Rabone*, the UKSC accepted that a hospital 'ought to have known' that their patient was a suicide risk because that was the very diagnosis for which she was being treated.<sup>136</sup> In *Savage*, the High Court held that a hospital 'ought to have known' that their patient was at risk of fatally absconding because she had a consistent history of attempting the same.<sup>137</sup> In *Sarjantson*, the Court of Appeal found that the police 'ought to have known' that

---

<sup>131</sup> *Brincat v Malta* App no 60908/11 (ECtHR, 24 July 2014) para 106: early and developing science on asbestos' dangerousness was permitted to support an imputation of constructive knowledge.

<sup>132</sup> Vivien Judith Rose, 'A Numbers Game? Statistics in Public Law Cases' (*Supreme Court ALBA Lecture*, 5 July 2021) <<https://www.supremecourt.uk/docs/alba-lecture-5-July-2021.pdf>> accessed 2 December 2021.

<sup>133</sup> *R (AP)* (n 103).

<sup>134</sup> *ibid* [62].

<sup>135</sup> *ibid* [71].

<sup>136</sup> *Rabone* (n 20) [34].

<sup>137</sup> *Savage* (QB) (n 105) [87].

the victim was at risk of being mobbed by an armed gang because the police received several telephone calls to that effect.<sup>138</sup> Particularly conspicuous is that, in unsuccessfully litigated cases, the absence of such blatant facts is expressly bemoaned. In *Mitchell*, the House of Lords found no constructive knowledge because, after the local authority reprimanded the problematic tenant, he 'did not say or do anything to alert the [authorities that he posed a] risk' to the deceased.<sup>139</sup> Similarly, in *R (AP)*, Judge Pelling QC held that the disabled man's endangerment by his aggressor could not have been known because there was 'nothing in [the aggressor's] history to suggest that [he] might be seriously violent toward [the deceased]'.<sup>140</sup> Thus, the UK courts, in carving out a narrower approach than the ECtHR,<sup>141</sup> appear to downplay statistical information and channels of communication by, instead, imputing knowledge only when there exist blatant facts which would have put a reasonable person on notice of a mortal risk but which, for whatever reason, the authorities overlooked. This demonstrates how the 'restrictive triage', whilst partly attributable to ECtHR adjudication, has largely been erected by UK courts. It is UK judges' choices, including the above tendency to overlook factors which, at the ECtHR, could support an imputation of constructive knowledge, that aggregate to make the operational obligation so onerous domestically.

Moving to the second limb of the analysis that imputations of constructive knowledge are avoidably difficult to achieve, one observes that ECtHR has all but ruled out the use of (sociological or scientific) background knowledge in order to support an imputation that the relevant individual was at-risk. To understand this point, consider first the detainee-suicide situation. Sociological literature (especially as regards prisoners<sup>142</sup> and inpatient hospitals<sup>143</sup>) and indeed the ECtHR itself<sup>144</sup> recognise that detainees are at a greater suicide risk than the

---

<sup>138</sup> *Sarjantson* (n 83) [31].

<sup>139</sup> *Mitchell* (n 21) [33].

<sup>140</sup> *R (AP)* (n 103) [80(iii)].

<sup>141</sup> The author has not found any explanation, provided by any UK court, as to why UK courts take a narrower approach than the ECtHR to the imputation of constructive knowledge.

<sup>142</sup> *Fazel* (n 127).

<sup>143</sup> *Powell* (n 127).

<sup>144</sup> Under Article 2's procedural duty, detainee-vulnerability entails that authorities must account for detainees' injuries sustained whilst under state control: *Slimani v France* App no 57671/00 (ECtHR, 27 July 2004).

general population. Accordingly, the ECtHR could hold that when persons are detained, the authorities ‘ought to know’ about a heightened and continuing self-endangerment risk endangering detainees. Yet, this reasoning was expressly rejected in *Younger*, on grounds that imputing such knowledge would impose intolerable burdens on authorities and, by reducing possibilities for suicides, restrict patient liberty.<sup>145</sup> Second, and connectedly, consider the approach taken to previous suicide attempts in the general population. Beswick accounts that, in the scientific community, ‘a prior history of suicide attempts is considered one of the most robust predictors of eventually completed suicide’.<sup>146</sup> Accordingly, the ECtHR could hold that, when a person has a history of suicide attempts, authorities ‘ought to know’ that a self-endangerment threat could in certain circumstances re-arise. Yet, instead, in *Fernandes de Oliveira*, the ECtHR held that previous suicide attempts are but one (defeasible) factor in a multi-factorial inquiry concerning whether authorities ‘ought to have known’ about a suicide risk endangering the particular person before them,<sup>147</sup> thus reasserting the generally frigid approach to background information.<sup>148</sup>

Finally, consider the approach to homicidal domestic violence cases. As early as 2013, Judge Pinto de Albuquerque professed that ‘the recurrence and escalation inherent in most cases of domestic violence’ meant that the ‘real and immediate risk’ test should be relaxed, and constructive knowledge imputed, to oblige authorities to intervene at an earlier stage and tender helpful protection.<sup>149</sup> However, that reasoning was abandoned in *Kurt*.<sup>150</sup> Therein the ECtHR, reasserting orthodox approaches to the ‘real and immediate’ and constructive knowledge tests, found no liability in respect of an enraged father who, following through with earlier threats, one day fatally shot his son at the son’s school. Thus, once again, the ECtHR stressed the legal immateriality of background (sociological or scientific) information which might reasonably indicate an individual’s heightened at-risk status, notwithstanding that permitting that background information to support an imputation of constructive

---

<sup>145</sup> *Younger* (n 5) para 24.

<sup>146</sup> John Bostwick, ‘Suicide Attempt as a Risk Factor for Completed Suicide: Even More Lethal Than We Knew’ (2016) 173(11) *American Journal of Psychiatry* 1.

<sup>147</sup> *Fernandes de Oliveira v Portugal* App no 78103/14 (ECtHR, 31 January 2019) para 110.

<sup>148</sup> The perversity of this approach to suicide cases, and suggestion for its reform, are detailed over the following two pages.

<sup>149</sup> *Valiulienė v Lithuania* App no 33234/07 (ECtHR, 26 March 2013).

<sup>150</sup> *Kurt* (n 78).

knowledge might engage the operational obligation to helpfully compel lifesaving attempts more frequently.

From this study emerges UK courts' narrow approach to the crucial state knowledge question. Accordingly, out of all the knowledge which authorities possess (or could be expected or taken to possess) as indicating mortal risks to persons, seemingly the only relevant factor is whether there existed very blatant indicators that any reasonable person would understand to indicate a 'substantial or significant' mortal risk but which were, for whatever reason, overlooked by the authorities at the time. Generally, courts ignore that authorities *also* possess background scientific or sociological information, and so exclude the possibility that constructive knowledge may be imputed on grounds that a person's at-risk status was reasonably inferable from the (scientifically or sociologically established) endangering effects of their circumstances. This is an unforgiving standard, and it is not surprising that it is usually passed only by those who existed directly under state control (*Rabone*; *Savage*), where any blatant indicators of at-risk status are easily observable and recordable by detaining authorities. Practically this means that, notwithstanding that Article 2 professedly reflects a 'fundamental'<sup>151</sup> and 'basic value of the democratic societies making up the Council of Europe',<sup>152</sup> its operational obligation is operable in the UK only in the very few circumstances where blatant indicators of at-risk status preceded the mortal risk and can be convincingly evidenced during litigation.

Reform of the 'state knowledge' criterion would be welcome, at minimum to increase legal certainty. Currently, courts' determinations on whether authorities 'ought to have known' about a risk comprise unpredictable conclusory labels, whose antecedent reasoning is only rationalised *ex-post* (and probably imperfectly) by a handful of scholars. Legal certainty would desirably increase if a clearer judicial approach was formulated, such as UK judges conclusively explaining whether it is right that only the above 'blatant facts' are sufficient, and why the criteria used by the ECtHR to impute constructive knowledge<sup>153</sup> are less influential in UK law. Beyond this, it is submitted that the substantive law should develop so that a risk's prior occurrence in materially similar circumstances *should* be independently sufficient to support an

---

<sup>151</sup> *Kotilainen* (n 5) para 65; *Rabone* (n 20) [108].

<sup>152</sup> *Lopes de Sousa Fernandes* (n 6) para 164.

<sup>153</sup> Stoyanova 'Fault, knowledge and risk within the framework of positive obligations under the ECHR' (n 128).

imputation of constructive knowledge. For example, courts should hold that, if a person has previously attempted suicide or if an activity has previously caused deaths, the state 'ought to have known' that those risks may re-arise on a later occasion. After all, on an individual psychological level, past events demonstrably do (and can be expected to) affect how we meet materially similar circumstances thereafter.<sup>154</sup> Imputing the same expectation to the state is therefore not analytically unnatural, and indeed might be considered justified or demanded by the normative importance that, according to the ECtHR and UK courts themselves, Article 2 possesses.

Attractively, this legal development may actually help save lives. For, if authorities are expected to anticipate the re-arisal of risks which have threatened an individual or situation before, authorities may take proactive preventative measures and prevent the risk from ever arising again. For example, psychiatric nurses especially mindful of a patient's history of suicide attempts may give her better care, such that she never psychologically degrades to the critical moment where suicide is an acute 'real and immediate' threat. Preventing critical life-threatening situations from ever arising is, it is submitted, a richer vindication of the Article 2 enjoiner that 'everyone's right to life shall be protected by law' than awaiting fatal risks and trying desperately to foreclose them after they have arisen. That is because, whereas in the latter case mistakes will occur and lives will always be lost, in the former case people will be kept safe and fewer deaths will occur. Consequently, whilst the 'ought to have known' test should certainly be clarified, it is submitted that to vindicate Article 2, the substantive law should also be developed to allow previously arising risks to be independently sufficient to support an imputation of constructive knowledge.

Nonetheless, at present, the UK approach to 'real risks' and the limited methods of imputing constructive knowledge conspire to render the state knowledge question a significant barrier to enforcing the operational obligation and comprise the second incident of the restrictive triage. Against that background, we may consider its final incident: UK courts' deferential approach to the 'reasonable steps' question.

---

<sup>154</sup> Dolores Albarracín and Robert S Wyer Jr, 'The Cognitive Impact of Past Behaviour: Influences on Beliefs, Attitudes and Future Behavioural Decisions' (2000) 79(1) *Journal of Personality and Social Psychology* 5.

### ELEMENT 3: 'INSTITUTIONAL DEFERENCE' AND 'REASONABLE STEPS'

If one passes the 'identifiability bottleneck', establishes exposure to a 'real and immediate risk' and evidences that the state had (real or constructive) knowledge of it, one must finally demonstrate that the authorities failed to take 'reasonable steps' to avoid the risk. As Lavrysen recognised, that question could provoke discomfort in national courts because it invites judicial scrutiny of the adequacy of executive actions.<sup>155</sup> This is not to imply that the ECtHR evinces no deferential attitudes whatsoever. Indeed, one might reasonably argue that the ECtHR 'defers' to authorities' practical capabilities when, out of an unwillingness to impose unreasonable burdens, it constructs 'very limited' scope for emergency healthcare liability and so narrowly construes the 'identifiability' and 'state knowledge' questions elsewhere. However, in view of Lavrysen's call for a domestic analysis and the UK courts' history of deference in administrative law, it is valuable here to focus squarely on how deference features in the UK. For these purposes, 'institutional deference' may be broadly defined as the judiciary considering 'that, in relation to certain questions, the decision-maker should enjoy a degree of latitude on account of its superior democratic credentials'<sup>156</sup> and therefore observing a less-strict standard of judicial review than might occur in other factual contexts.

Some similarities exist between the ECtHR's and UK courts' approaches to the 'reasonable steps' question. For example, in both fora, varying terminology is used to describe the inquiry. The ECtHR, sometimes asking minimally that authorities only take 'reasonable steps',<sup>157</sup> elsewhere asks maximally that the state take 'all reasonable steps',<sup>158</sup> do 'all that could reasonably be expected'<sup>159</sup> or provide 'effective protection'.<sup>160</sup> Similarly, UK courts sometimes ask minimally for 'reasonable measures',<sup>161</sup> but at other times

---

<sup>155</sup> Lavrysen, *Human Rights in a Positive State* (n 1) 348.

<sup>156</sup> Mark Elliott, 'Proportionality and Deference: the Importance of a Structured Approach' (2013) Cambridge Legal Studies Research Paper 32/2013 11 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2326987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326987)> accessed 12 February 2022.

<sup>157</sup> *Dordovic v Croatia* App no 41526/10 (ECtHR, 24 July 2012) para 138.

<sup>158</sup> *TM and CM v Moldova* App no 26608/11 (ECtHR, 28 January 2014) para 45.

<sup>159</sup> *Keenan v UK* App no 27229/95 (ECtHR, 3 April 2001) para 93.

<sup>160</sup> *Kohyadenko v Russia* App no 17423/05 (ECtHR, 28 February 2012) para 75.

<sup>161</sup> *Sarjantson* (n 83) [31].

require maximally that authorities do ‘all that can reasonably be expected of them’<sup>162</sup> or take ‘all steps reasonably necessary’ to avoid the risk.<sup>163</sup> Another similarity concerns the factors that are invoked when assessing reasonableness. The ECtHR has regard to ‘public interests – including public policy considerations’, ‘budgetary concerns’ and ‘the rights of others’.<sup>164</sup> UK courts, similarly, consider ‘the resources available’, ‘the ease or difficulty of taking precautions’ and other ‘circumstances of the case’.<sup>165</sup>

Yet the outcomes of the inquiry differ markedly between the ECtHR and UK courts. This is because the ECtHR scrutinises reasonableness very strictly, and UK courts assess it only deferentially and laxly. These approaches will now be considered in turn.

### A) ECtHR strictness

When assessing ‘reasonableness’ the ECtHR putatively affords states a margin of appreciation,<sup>166</sup> recognising that ‘[t]here are different avenues to

---

<sup>162</sup> *Rabone* (n 20) [42].

<sup>163</sup> *In re Officer L* (n 64) [21].

<sup>164</sup> Vladislava Stoyanova, ‘The Disjunctive Structure of Positive Rights under the European Convention on Human Rights’ (2017) 87 *Nordic Journal of International Law* 22.

<sup>165</sup> *In re Officer L* (n 64) [21].

<sup>166</sup> Definitions of the ‘margin of appreciation’ are notoriously elusive (Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe Publishing 2020)). Yet, for present purposes, it suffices to say that the ‘margin of appreciation’ is a legal doctrine developed by the ECtHR, which permits states a degree of discretion in choosing how to fulfil their ECHR obligations. Accordingly, when the ECtHR considers alleged breaches of ECHR, the ECtHR will first consider the respondent state’s legal and cultural traditions. Thereafter the ECtHR may consider that no ECHR breach has occurred if the impugned act/practice is: (i) tolerably respectful of the right given the domestic legal or cultural context (e.g. *İ.A. v Turkey* App no 42571/98 (ECtHR, 13 December 2005), especially paras 29-31, concerning Turkey’s ECHR-compliant restriction of a book which abusively attacked the beliefs of Turkish Muslims), or: (ii) otherwise has domestic significance such that a liability imposition would be inappropriate (e.g. *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005), concerning Turkey’s ECHR-compliant ban of wearing religious headscarves in university in order to uphold the [then] Turkish constitutional commitment to ‘secularism’. Upholding secularism, the ECtHR accepted, was necessary because in Turkey there existed a unique risk of the development of extremist groups who might come to mandate the headscarf and oppress those who refused to wear it.

ensure Convention rights, and even if the State has failed to apply one particular measure ... it may still fulfil its positive duty by other means.<sup>167</sup> However, it is strikingly rare that state failures are ever accepted as 'reasonable'.<sup>168</sup> Rather, if the instant stage is reached, the ECtHR conspicuously frequently dismisses failures as 'unreasonable' and imposes liability.<sup>169</sup>

The reason for this appears to be that, irrespective of ECtHR's shifting descriptors for the inquiry, there exists a concrete and strict understanding of what 'reasonable steps' must comprise in operational obligation cases. Namely, the ECtHR seemingly equates 'reasonable steps' with whatever bespoke protective measures it considers were warranted in light of the perceived causes of the 'real and immediate' risk. For example, in *Renolde*, where a 'real and immediate' suicide risk partially flowed from a patient's failure to take pacifying medication, 'reasonable steps' included 'supervision of [the patient's] daily taking of medication'.<sup>170</sup> Similarly, in *Öneryıldız*, where a rubbish dump's 'real and immediate' detonation risk was attributable to the neglect of a safety-enhancing regulatory regime, 'reasonable steps' included 'conforming to the relevant technical standards'.<sup>171</sup> Again, in *Branko Tomašić*, where the 'real and immediate risk' of interspousal violence was created when a mentally ill and vengeful husband was released from prison, 'reasonable steps' included 'adequate psychiatric treatment' of the husband whilst in prison and 'assessment of his condition immediately prior to release'.<sup>172</sup> This appears somewhat harsh on states – if 'reasonable steps' are constructed with reference to whatever the litigating state omitted to do prior to death then, by definition, states will *always* have foregone 'reasonable steps', and liability will always attach. Nevertheless, that is how the ECtHR appears to formulate the 'reasonable steps' inquiry.

---

Accordingly, the ECtHR considered Turkey's headscarf ban a legitimate product of Turkey's reasonable commitment to 'secularism', and imposed no liability.

<sup>167</sup> *Budayeva* (n 50) para 134.

<sup>168</sup> As what is in issue here is an *absence* (of cases in which state failures were 'reasonable'), this phenomenon cannot be satisfactorily cited in the ordinary way. Yet, what can be stated is that whilst researching this work exposed numerous cases which failed on the 'state knowledge' issue, the author *never* found any case in which the ECtHR accepted that the state had taken 'reasonable steps'.

<sup>169</sup> E.g. *Renolde* (n 47); *Öneryıldız* (n 29); *Branko Tomašić and Others v Croatia* App no 46598/06 (ECtHR, 15 January 2009).

<sup>170</sup> *Renolde* (n 47) para 101.

<sup>171</sup> *Öneryıldız* (n 29) para 109.

<sup>172</sup> *Branko Tomašić* (n 169) para 58.

This phenomenon appears to be overlooked in scholarly discourse. Xenos came close when suggesting that, in positive obligations law generally, the ‘reactive response of the state’ is ‘condition[ed]’ by ‘the element of knowledge’ attributable to the state.<sup>173</sup> However, in Article 2 operational obligations cases, it is not the ‘element of knowledge’ generally but, as explored above, it is more specifically *the ECtHR’s construction of the ‘real and immediate risk’* which ‘conditions’ the preventative measures that authorities are expected to attempt. Indeed, in this approach the ECtHR displays strikingly *little* deference. For, whilst authorities will rarely comprehend and guard against the precise risk that ECtHR later construes, the ECtHR seems unsympathetic and imposes liability for (what it regards as) unreasonable failures in any event.

Thus, whilst authorities are nominally accorded a margin of appreciation, the ECtHR in fact readily pierces through it and impugns failures to extend whatever bespoke protections the ‘real and immediate risk’ putatively required. For that reason, deference appears to play no material role in the ECtHR’s assessment of ‘reasonable steps’.

## **B) UK institutional deference**

In the UK, by contrast, deference can significantly dampen judicial approaches to the ‘reasonable steps’ question. UK courts expressly grant latitude to authorities in operational obligation cases, varyingly described as a ‘margin of appreciation’,<sup>174</sup> a ‘broad area of discretionary judgment’,<sup>175</sup> or ‘broad discretionary area’.<sup>176</sup> Importantly however, that deference differs markedly in practice from the margin of appreciation which the ECtHR (professedly) extends. To appreciate this difference, consider Letsas’ twofold taxonomy of what the ‘margin of appreciation’ can be understood to mean.<sup>177</sup>

The ECtHR often uses what Letsas calls a ‘substantive margin’.<sup>178</sup> Here, ‘margin of appreciation’ is shorthand for a substantive determination that the respondent state has in fact discharged its human rights obligations. Namely it

---

<sup>173</sup> Xenos (n 13) 117.

<sup>174</sup> *First-Tier Tribunal* (n 84) [139(a)].

<sup>175</sup> R (*Margaret Haggerty & Ors*) v *St. Helens Council* [2003] EWHC 803 (Admin) [32].

<sup>176</sup> *First-Tier Tribunal* (n 84) [139(c)].

<sup>177</sup> George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26(4) *Oxford Journal of Legal Studies* 705.

<sup>178</sup> *ibid* 711.

applies when, despite the litigated state conduct, the authorities in the final analysis struck a fair balance between collective and individual interests, so acted lawfully. For example, in *Pretty*, the ECtHR held that the UK's criminal proscription of aiding or abetting another's suicide was not unlawful because that proscription, retained to protect vulnerable persons from feeling pressured toward premature deaths, struck a fair balance between the interests of those vulnerable persons and those who would wish UK law to be otherwise.<sup>179</sup>

UK courts, by contrast, accord what Letsas calls a 'structural margin'.<sup>180</sup> This descriptor applies when courts refrain from determining whether a rights violation has occurred on the facts. Effectively, the nature of the case ousts courts' supervisory jurisdiction, and the case concludes without liability being imposed. We may adopt the 'structural' descriptor and observe that 'structural deference' features in UK courts' operational obligation jurisprudence in two (analytically distinct but overlapping) classes of cases.

First, there are cases involving discrete technical decisions or executive distributive policy. For example, in *Margaret Haggerty*, concerning a local authority decision to move dementia patients between underfunded care homes despite mortality risks, no liability was found partially because 'courts accord a broad area of discretionary judgment to a public authority in deciding what is a fair balance between the interests of an individual and of the community'.<sup>181</sup> Similarly, in *Plan B Earth*, Supperstone J declined to find that alleged defects in UK climate change mitigation policy comprised a breach of the state's operational obligation to protect human life in circumstances that 'the executive has a wide discretion to assess the advantages and disadvantages of any particular course of action' in setting environmental policy, 'not only domestically but as part of an evolving international discussion'.<sup>182</sup> Finally consider *First-Tier Tribunal*, in which Chamberlain J refrained from condemning the Home Secretary's refusal to accommodate failed asylum seekers in the UK during the coronavirus pandemic because it was 'appropriate to accord to the executive a broad discretionary area of judgment' on the issue.<sup>183</sup> In the second class of cases, the nature of the facts alone is sufficient to produce structural

---

<sup>179</sup> *Pretty v UK* (2002) 35 EHRR [29]-[30].

<sup>180</sup> Letsas (n 177) 721.

<sup>181</sup> *Margaret Haggerty* (n 175) [32].

<sup>182</sup> *Plan B Earth* (n 53) [49].

<sup>183</sup> *First-Tier Tribunal* (n 84) [146].

deference. For example, in *Smith*, the ‘essentially political’ nature of the question concerning whether demonstrably feeble ‘Snatch’ Land Rovers should have been procured for deployment in the Afghanistan war would, if litigated at first instance, attract a ‘very wide measure of discretion’ rendering it ‘far from clear’ that liability could ever be established.<sup>184</sup> Similar revulsion from the factual matrix itself occurred in *Bloggs 61*, where the High Court refused to impugn the Prison Service’s fatal decision to transfer a protected witness into a mainstream prison, given the appropriateness of showing ‘some deference to and/or to recognise the special competence of the Prison Service in making a decision going to the safety of the inmate’s life’.<sup>185</sup>

These cases demonstrate that, in the UK, unlike at the ECtHR, a deferential judicial approach to the ‘reasonable steps’ question comprises a further hurdle to establishing liability. Compounding this difficulty is the relative unpredictability in what makes a case relevantly ‘political’.<sup>186</sup> Relevant factors include the nature of the factual context of the case (e.g. whether the respondent is a member of the executive branch of government), the institutional competence of the respondent decision maker, the democratic accountability of the respondent and the efficacy of those and other accountability mechanisms to hold the respondent to account. The problem is that each of those phenomena is scalar, and it is difficult to predict in advance what degree of deference a court will observe in light of its view of the case in the round.<sup>187</sup> Compounding the problem, Lord Reed in *R (SC, CB and 8 children)* recently added that applicants’ motivations are material to the question—that, if judges consider applicants’ litigation to be merely another means of continuing an unsuccessful parliamentary lobbying campaign, judges should adopt only light-touch review out of ‘respect ... [for the] boundaries between legality and the political process’.<sup>188</sup> The unpredictability in when judges will consider applicants’ motivations as such further undermines legal certainty in predicting the degree of deference that may be observed. Further, judges feasibly may be

---

<sup>184</sup> *Smith* (n 56) 80.

<sup>185</sup> *R (Bloggs 61) v Home Secretary* [2003] 1 WLR 2724 [50].

<sup>186</sup> Trevor Robert Seaward Allan, ‘Human Rights and Judicial Review: A Critique of “Due Deference”’ (2006) 65(3) *The Cambridge Law Journal* 671.

<sup>187</sup> *ibid* 687. Also, Murray Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 344.

<sup>188</sup> *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] 26 UKSC [162].

quicker to find and resile from 'political cases' when facing criticisms for intruding into executive decisions—or 'conduct[ing] politics by another means'<sup>189</sup>—out of a desire to protect their supervisory jurisdiction against legislative curtailment.<sup>190</sup> It may therefore be difficult to predict in advance when a court will assess 'reasonable steps' and when, out of a view that the case is 'political', it will deferentially forbear.

Thus, the 'reasonable steps' stage is a higher hurdle in the UK than it is at the ECtHR. Whilst the ECtHR scrutinises the question strictly, UK courts' approaches are liable to be softened by an amorphous concept of structural deference which, in some cases, triggers abdication of the inquiry and a finding of no liability. In the author's view, UK courts' structurally deferential attitudes require revision. Constitutional arguments justifying present practice do not withstand scrutiny: whilst deference is purported to maintain constitutional peace by respecting the executive-judicial relationship,<sup>191</sup> present practice in fact introduces another species of disquiet by requiring judicial abdication of the supervisory jurisdiction that Parliament expressly conferred through the HRA 1998,<sup>192</sup> thus damaging the legislative-judicial understanding. Against the background that deference is not convincingly legitimised by its own lights because it only replaces one species of constitutional conflict with another, the practice can be positively criticised. Namely, deference precludes conclusive

---

<sup>189</sup> Robert Buckland in Ministry of Justice, 'Government Launches Independent Panel to Look at Judicial Review' (*Gov.uk*, 31 July 2020) <<https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>> accessed 2 December 2021.

<sup>190</sup> For completeness, it should be observed that Lord Reed, current president of UKSC, has denied that his UKSC defers to protect their jurisdiction from curtailment in the manner described above; see Sam Tobin, 'Supreme Court not feeling government 'pressure' over JR – Reed' (*The Law Society Gazette*, 24 January 2022) <<https://www.lawgazette.co.uk/news/supreme-court-not-feeling-government-pressure-over-jr-reed/> 5111259.article > accessed 13 February 2022.

<sup>191</sup> *R (Kebeline) v DPP* [1999] 43 UKHL [93].

<sup>192</sup> That Parliament intended this jurisdiction is evident through Hansard reports of debates preceding introduction of HRA 1998. For example, on 27 November 1997, Mr Robert Maclennan (then president of the Liberal Democrat political party) said, without any opposition afterward, that 'the [then Human Rights] Bill, which secures the European convention in the laws of the United Kingdom to provide effective remedies in our courts for breaches of convention rights by public authorities, including private bodies that exercise public functions, is greatly to the Government's credit' (HL Deb 24 November 1997, vol 583, col 806).

determinations of whether the UK has discharged its black-letter international law obligations under ECHR, and/or whether complainants' dignity has been unjustifiably offended by the state omission.<sup>193</sup> Deference is a thorny topic, and this is not the place for all relevant arguments to be untangled. However, particularly in light of the normative and judicially professed importance of Article 2, UK courts adjudicating the operational limb should strongly consider restraining from structural deference and exhaust the 'reasonable steps' analysis to conclusively determine whether human rights obligations have been discharged. UK courts may of course, where appropriate, afford a substantive margin by finding that the balance struck between individual and collective interests was fair and lawful. But structural deference, by abdicating a delegated judicial function and restricting the operability of the operational duty, comprises an avoidably dysfunctional and oppressive practice, and ought not continue.

## CONCLUSION

A fleeting glance at the Article 2 operational obligation might lead one to believe that UK courts have taken a generous and expansive interpretive approach, given the extensions of its scope in *Rabone*<sup>194</sup> and *Smith*.<sup>195</sup> Yet appearances can deceive, and they would be doing so here. As catalogued, UK courts have in fact tightened the operational obligation by firstly, imposing a more concrete and exclusive 'real risk' test; secondly, taking a more limited view of what facts support imputations of constructive knowledge; and thirdly, adopting amorphous and unpredictable approaches to the 'reasonable steps' question.

Adding insult to injury, should one succeed in one's claim, recoverable damages may be meagre under the HRA 1998.<sup>196</sup> Damages recoverable by a

---

<sup>193</sup> The dignitarian framing applies only if one considers the ECHR parasitic upon human dignity. For such a framing, see Kai Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34(2) Canadian Journal of Law and Jurisprudence 341.

<sup>194</sup> *Rabone* (n 20).

<sup>195</sup> *Smith* (n 56).

<sup>196</sup> This discussion on damages should not distract the reader from the article's central purpose: to show that the operational obligation's legal tests are interpreted so restrictively that it is inoperable to many litigants. Given that our focus is on *ex ante*

victim or their survivors<sup>197</sup> are reducible for reasons including that the applicant themselves has behaved improperly,<sup>198</sup> that the state has already apologised,<sup>199</sup> and if the relevant risk would have pertained anyway even had the state acted lawfully.<sup>200</sup> Prospective applicants thus may be financially better off ignoring human rights law and suing in negligence, given the absence of a cap on public authority liability after *Robinson*,<sup>201</sup> and the near-equivalence<sup>202</sup> between the substance of the human rights and tortious claims.

Thus, the UK operational obligation looks nothing like the progeny of a 'fundamental [human rights] provision' enshrining 'one of the basic values of the [Council of Europe's] democratic societies'.<sup>203</sup> This article has suggested three reforms to bring the obligation in line with its normative and judicially professed importance: (1) relaxing the 'identifiability' bottleneck, to permit 'identifiable persons' to include geographically disparate classes of vulnerable people and persons whose identities and at-risk statuses were reasonably inferable from facts known to the authorities prior to the risk arising, (2) developing the 'state knowledge' criterion through UK judges at least clarifying their approach to how constructive knowledge may be imputed and, preferably, developing the law to allow previously arising risks to be independently sufficient to support an imputation of the same, and (3) UK judges ceasing their practice of 'structural deference' when assessing the 'reasonable steps' question. Clearly these suggestions, whether taken together or individually, would widen the circumstances in which state liability may be found. Importantly they flow not from an unthinking liberalising reflex, nor from a naïve overestimation of

---

inoperability, it would be inappropriate to spend any more time than is spent above considering the *ex post* position of those litigants who *can* enforce the obligation. Nonetheless, consideration of damages is relevant to the article's leitmotif—that the operational obligation is less generous than one might expect in light of its judicially professed importance—so warrants inclusion as a postscript.

<sup>197</sup> *Rabone* (n 18).

<sup>198</sup> *DSD v Commissioner of Police* [2014] EWHC 2493 (QB) [37].

<sup>199</sup> *ibid* [29].

<sup>200</sup> *ibid* [40].

<sup>201</sup> *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, especially at [41].

<sup>202</sup> For a clear account of the modern tortious test: *Michael v Chief Constable of South Wales* [2015] UKSC 2 [197]. That UK courts do not 'structurally defer' in negligence cases further commends negligence, not human rights, as the preferable cause of action.

<sup>203</sup> *Lopes de Sousa Fernandes* (n 6) para 164.

state resources, but from a considered view that the benefits of so doing outweigh the costs.

Namely, one must remember that the costs of greater vigilance and responsiveness to threats fall not on the state as some monolith, but are spread between different public authorities, each of whom already possesses a risk prevention framework. For example, only the psychiatric limb of the health service was called upon to amend their safeguards after *Rabone* (and did so).<sup>204</sup> Similarly, it was for the police alone to reflect upon practices after *Osman* (which they did).<sup>205</sup> Yet, whilst these (bearable) burdens are individuated, their benefits would aggregate. That is, optimising each limb's framework would conspire to produce a spread of (separate but similarly) sensitive and casuistic risk prevention strategies across the entire public sector, with an ever-increasing chance of preventing mortal risks from arising. If, as Gearty considers, the 'official sensitivity to risk' ushered in by *Osman* may have undetectably foreclosed litigation by saving lives,<sup>206</sup> then permitting the operational obligation to identify through litigation precisely which risks exist and require addressing will only optimise its life-saving potential. Indeed if, as the ECtHR wishes, we are to offer genuinely 'practical and effective safeguards'<sup>207</sup> against mortal risks in an ever-changing world, permitting the obligation to identify and require sensitivity towards newly arising risks is a more promising route than retaining the 'restrictive triage' that throttles the obligation today.

Emerging from a public health crisis and reminded of life's precious ephemerality, now is the time to optimise our approach to preventing avoidable deaths. The operational obligation must be permitted to grow. Its expansion will trigger, and will involve interrogating, the fears of state overburdening and constitutional impropriety that have heretofore restricted it.<sup>208</sup> However, when

---

<sup>204</sup> Alec Samuels, 'The liability of the doctor and the health authority when the mental health patient is discharged or released on leave or escapes and something goes amiss' (2019) 87(2) *Medico-Legal Journal* 66.

<sup>205</sup> Starmer (n 74).

<sup>206</sup> Conor Gearty, *On Fantasy Island* (Oxford University Press 2016) 184.

<sup>207</sup> Per *Osman* (n 4) para 88.

<sup>208</sup> The UK Government's consultation paper to reform the Human Rights Act makes one such constitutional impropriety charge (n 68). The paper voices a concern, which expanding the operational obligation would only aggravate, about 'the incremental expansion of rights without proper democratic insight', namely by undermining 'the prerogative of elected representatives to determine [human rights] applicability in areas

one recalls that the operational obligation imposes only disaggregated and light duties to attempt to save lives, one sees that there is little to lose by relaxing its current conscriptions. Yet, when one envisages the sensitive and prospective risk prevention framework that Article 2 could help to catalyse, one begins to comprehend what stands to be gained.

---

involving] ... finely balanced questions of public policy ... [involving] complex, fluid and polycentric values' at 47 [154]. One response to this is that, in debates before HRA 1998 was introduced, it was accepted as quite proper that, under HRA 1998, UK courts could develop ECHR law beyond the ECtHR's jurisprudence. For example, in the House of Lords on 24 November 1997, Lord Irvine (then Lord Chancellor) said, without any opposition afterward, that whilst UK courts should regard ECtHR judgments, 'they must also be free to distinguish them and to *move out in new directions in relation to the whole area of human rights law*' (emphasis added) ((n 191) col 835). Accordingly, the 'incremental expansion of rights' that the current government bemoans might reasonably be understood as an ordinary feature of the jurisdiction that Parliament decided to confer upon courts through HRA 1998.