

Maguire: Supreme Court Dismiss Article 2 Appeal

Last week the Supreme Court handed down its much anticipated decision in [*R \(Maguire\) v HM Senior Coroner for Blackpool & Fylde and another*](#) [2023] UKSC 20 concerning the engagement of Article 2 ECHR in inquests. The Court unanimously dismissed the appeal, holding that Article 2 was not engaged. Lord Sales gave the leading Judgment and Lord Stephens gave a short concurring Judgment.

Whilst the Court's lengthy decision (77 pages) does not significantly alter the current landscape on Article 2, it does provide a comprehensive overview of both the Strasbourg and domestic authorities and provides much-needed clarity on the scope and extent of the positive obligations imposed on states by Article 2.

References in square brackets are to the paragraphs of the Court's decision.

Facts & Background

The case concerned the tragic death of Ms Jacqueline Maguire (whom the Court referred to as 'Jackie' throughout their judgment at the request of her family). Jackie had Down's Syndrome [63], lacked mental capacity [66], and was subject to a Deprivation of Liberty Safeguard (i.e. a 'DoLS') [65]. She lived in a care home (not a nursing home) where staff had neither medical nor nursing training [64]. Jackie was fearful of medical interventions and sought to avoid them [68].

In February 2017 Jackie began to experience symptoms of a sore throat, diarrhoea, vomiting, and a raised temperature [69 & 70]. On 21 February 2017 Jackie's symptoms worsened to breathing difficulties and stomach pains and she suffered a fit [71]. Staff at the care home contacted Jackie's GP Practice and later NHS 111 [71-74], with the latter arranging for an ambulance to attend the care home [75]. Having reviewed Jackie, the paramedics wanted to take her to hospital for further assessment [78]. However, Jackie refused to go, and the paramedics and care home staff were unable to persuade her [78]. Further medical advice was sought, and it was advised that it would be inappropriate to manhandle her. Instead, Jackie was to be monitored during the night and her GP called in the morning [80]. However, the next morning Jackie was acutely unwell and collapsed shortly after getting out of bed. An ambulance was called [83] but Jackie still resisted attempts to be transported to hospital. This time paramedics decided it was in Jackie's best interests to use light physical restraint to transport her to hospital [84]. On arrival to hospital, Jackie was treated for presumed sepsis, but tragically died later that evening following a cardiac arrest [85]. A post-mortem revealed a 3 cm stomach ulcer which had perforated Jackie's stomach and resulted in peritonitis [86].

As all inquest practitioners will be aware, the question of 'how' the deceased came by their death is to be answered by reference to the phrase 'by what means' (see *Jamieson*).ⁱ However, it is well-established in coronial law that where there has been an arguable breach of the State's substantive obligations under Article 2 (i.e. where Article 2 is 'engaged'), the question of 'how' the deceased came by their death is to be answered by reference to the phrase 'by what means and in what circumstances' (see *Middleton*).ⁱⁱ This is what the Court referred to as the expanded verdict.

At Jackie's inquest, the Coroner initially ruled that Article 2 was engaged. However, at the conclusion of the evidence, and having heard further submissions, he concluded that matters had now been clarified to such a degree that Article 2 was no longer engaged in any relevant way [108]. Consequently, the jury were not required to return an expanded verdict.

Mrs Muriel Maguire, Jackie's mother, challenged the Coroner's determination on this point via judicial review. Her challenge was dismissed by both the High Court and the Court of Appeal. Mrs Maguire subsequently appealed to the Supreme Court.

Obligations imposed by Article 2

In his judgment, Lord Sales provided helpful clarity on the obligations imposed by Article 2. He confirmed that Article 2 imposes a positive obligation on contracting States to take appropriate steps to safeguard the lives of those within their jurisdiction [9]. In doing so, Article 2 imposes two substantive duties and certain procedural duties.

The substantive duties are:

- (1) An obligation to have appropriate legal regimes and administrative systems in place to provide general protection for the lives of citizens and persons in its territory (“the systems duty”) [10]. Referring to the cases of *Humberstone*ⁱⁱⁱ and *Parkinson*^{iv}, the Court confirmed that, in respect of medical services, instances of individual negligence should not be treated as indicating a breach of the systems duty [21].
- (2) An obligation to take operational steps to protect a specific person or persons when on notice that they are subject to a risk to life of a particularly clear and pressing kind (“the operational duty”). The Court noted this duty had derived from *Osman*^v [11] and confirmed that a dimension of this duty includes situations where State authorities have put an individual’s life at risk through the denial of the health care which they have undertaken to make available to the population generally (as per *Fernandes*^{vi}) [22].

Referring to the case of *Fernandes*, the Court confirmed that these two substantive duties are distinct but related positive obligations under Article 2 [11]. The Court further stated that this appeal raised issues about the boundary between the systems duty and the operational duty and the content of both of them [23]. Furthermore, the Court highlighted that, in the field of provision of medical services, Strasbourg has been cautious about implying extensive positive obligations in the application of Article 2 [22].

The Court confirmed that Article 2 imposes certain procedural obligations regarding investigations of potential breaches of the substantive obligations, including the opportunity to call State authorities to account for such breaches. This procedural obligation varies according to the context with there being no simple ‘monolithic’ form of procedural obligation applying in every case. Instead, the procedural obligation applies “*in a graduated way depending on the circumstances of the case and the way in which in a particular context the state may be called upon to provide due accountability in relation to the steps taken to protect the right to life under article 2. The graduated way in which the procedural obligation applies reflects the fact that this obligation, like the substantive positive obligations under article 2, is an implied positive duty which is not to be taken to impose an unreasonable or disproportionate burden upon the state.*” [12]

Lord Sales outlined three different levels of procedural obligation. These are:

- (1) Firstly, at the most basic level, State authorities should take some steps to establish whether the cause of death is from natural causes rather than, for example, criminal means such as violence or other foul play (“the basic procedural obligation”). This obligation arises immediately upon death and will inform whether other procedural obligations come into play [14].
- (2) Secondly, in particular contexts, a State may be required to take the initiative to take further steps to investigate possible breaches of the substantive obligations imposed by Article 2 with a view to ensuring appropriate accountability and redress and, as appropriate, with a view to punishing persons responsible for the death (“the enhanced procedural obligation”). This obligation applies where there is a particularly compelling reason why the State should be required to give an account of how a person came by their death (for example, the use of lethal force by State agents) [15 & 16]. The Court referred to the first instance decision of *Morahan*,^{vii}

which outlined categories of cases where the application of the enhanced procedural obligation is automatic [17]. The Court confirmed this obligation does not apply to cases where there is merely arguable medical negligence [20].

- (3) Thirdly, in certain other cases where a relevant compelling reason is not present as the foundation for an enhanced procedural obligation, but there is still a possibility that the substantive obligations in Article 2 have been breached, there is an obligation to provide a means by which a person complaining of such possible breaches may ventilate that complaint, have it investigated and obtain redress (“the redress procedural obligation”). The Court noted this obligation has typically been applied in cases relating to the provision of medical services [19].

The Appeal

Mrs Maguire brought her appeal on three grounds, as outlined at paragraph 135 of the Court’s decision. In summary, the appellant submitted that there was (at least) an arguable breach of the systems duty in Jackie’s case and/or a breach of an operational duty owed to her, with the result that the enhanced procedural obligation applied [138].

Within its analysis of the issues, the Court broke down the issues into the following four headings [143]:

- (1) Was there an arguable breach of the systems duty on the part of the care home, so as to trigger the enhanced procedural obligation?
- (2) Was there an arguable breach of the systems duty on the part of any of the healthcare providers, so as to trigger that obligation?
- (3) Was there an arguable breach of the operational duty on the part of the care home, so as to trigger that obligation?
- (4) Was there an arguable breach of the operational duty on the part of any of the healthcare providers, so as to trigger that obligation?

Issue 1 - Was there an arguable breach of the systems duty on the part of the care home, so as to trigger the enhanced procedural obligation?

The Court noted that there is a regulatory regime in place to ensure high standards in care homes which is enforced by the CQC. In respect of cases concerning medical negligence, the Court referred to the case of *Fernandes*, noting that it indicated that the “*systems duty in this area operates at a high level, is relatively easily satisfied, and it will only be in rare cases that it will be found to have been breached*” [145]. Later in his judgment, Lord Sales provided some insight into how State authorities can discharge this duty when stating that “*the view of a domestic regulator such as the CQC or the bodies responsible for oversight of the healthcare providers that suitable systems are in place will usually be powerful evidence that the systems duty has been satisfied*” [159]. The Court also stressed that “*individual lapses in putting a proper system into effect are not to be confused with a deficiency in the system itself*” [146].

The Court confirmed that there “*is no sound basis for adopting a different approach to the provision of care in a care home as distinct from in a hospital or other healthcare environment*”, stating that, if anything, higher standards (or at least equivalently high standards) are required under the systems duty as it applies to healthcare providers [147]. The Court explained that “*in the healthcare context the scope of the systems duty is modulated to take account of the specific type of risk in relation to which the state has assumed a responsibility to protect the individual in the light of his or her specific circumstances, and there is no good reason to adopt any different approach in the ordinary care context*” [147].

The Court stated that Jackie’s position was very different from a prisoner subject to incarceration or detention by the police. In the latter scenarios, there is a heavy onus on the authorities to account for their actions where a death occurs. However, in a care or nursing home, loss of liberty is “*an incidental feature of the vulnerability of the individual resident, and it is the vulnerability and the assumption of responsibility of care in the light of it which is the fundamental basis for the duties owed under article 2*” [148(4)].

The Court also cautioned against trying to reverse engineer obligations under the umbrella of the systems duty, stating that the case law shows that a forward-looking approach is the proper approach to the systems duty and requires an “*assessment of the systems which it is generally reasonable to expect the relevant body to have in place in advance of any particular incident*” [159]. Whilst arguments can always be advanced that a system could be improved by dedicating more resources to it, it is for the relevant authorities of the State, not the court, to be considered how to allocate their limited resources [160].

The Court concluded that the systems in place in the care home were capable of being operated in a way which would ensure that a proper standard of care was provided, even though there may have been some individual lapses in putting them into effect [146]. The Coroner had examined the care home’s system [157] and was entitled to conclude there was no arguable breach of the systems duty [158].

Issue 2 - Was there an arguable breach of the systems duty on the part of any of the healthcare providers, so as to trigger that obligation?

The Court stated that the analysis of this issue was closely similar to that of the first [182]. Again, the Coroner had examined the systems in place for the various healthcare providers and was entitled to conclude that there was no arguable breach of the systems duty [158]. The Court highlighted that whilst criticisms could be made of individual clinicians, they related to individual performances and not failures as regards to the systems duty [181 & 184].

Issue 3 - Was there an arguable breach of the operational duty on the part of the care home, so as to trigger that obligation?

The appellant argued that there was an arguable breach of the operational duty by reason of the combination of Jackie’s deprivation of liberty, her vulnerability, and the assumption of responsibility by the State for her care. The Court held that Jackie’s DoLS and vulnerability did not distinguish this case from the context of the allegations of medical negligence where the procedural obligation does not arise [185].

In respect of the issue of ‘assumption of responsibility’, the case law showed that “*the degree to which assumption of responsibility is a factor relevant to the operational duty under article 2 depends upon the specific risk to life of which the authorities were aware and which they understood had to be guarded against*” [186].

In addressing this, the Court held that “[w]hen an individual is placed in a care home, a nursing home or a hospital, the state’s operational duty... does not involve an assumption of responsibility extending to taking responsibility for all aspects of their physical health, with the consequence that if he or she dies from some medical condition which was not diagnosed and treated in time the state’s duty is engaged and the enhanced procedural obligation in terms of accountability is triggered. Even though the individual may not be at liberty, the state is not for that reason made the guarantor of the adequacy of healthcare provided to them in all respects, with an enhanced obligation to account if things go wrong.” [190]

The Court upheld Popplewell LJ’s comment in *Morahan*, namely that the Article 2 operational duty is “*not one to take steps in the abstract, but rather to take steps to avert a specific risk to life*”.

Consequently, until the specific risk to life has been identified, it is impossible to answer the duty question. [191]

The Court confirmed the correct approach was to focus on the specific risks to Jackie’s health of which the authorities were aware. [192] In this case, the Court observed that “*the operational duty applied to the staff at the care home in a graduated way, depending on their perception of the risk to Jackie*”, noting that the care home staff were not medically trained so were tasked with ensuring she could have access to healthcare, and that staff sought to do this [199 & 200]. Therefore, there was no arguable breach of the operational duty by the care home. Interestingly, the Court noted that if the care home had not sought medical advice, that might have constituted a breach of the Article 2 operational duty. [204]

Issue 4 - Was there an arguable breach of the operational duty on the part of any of the healthcare providers, so as to trigger that obligation?

The Court noted that the paramedics and GPs did not consider that Jackie’s life would be in danger if she was not taken to hospital [205] and that none of the healthcare professional involved were on notice that Jackie’s life was in danger [208]. The paramedics had given proper consideration to whether Jackie ought to have been forcibly removed and taken to hospital and made a reasonable assessment that the risk to her was not so great as to make that appropriate [208]. Accordingly, the Court held that the case did not fall within the “*very exceptional circumstances*” referred to in *Fernandes* and there was no arguable breach of the operational duty [209].

Lord Stephens gave a brief concurring judgment, where he stated, on the issue of the operational duty, that a “*real risk is one that is objectively verified and an immediate risk is one that is present and continuing*” [241].

Comment

The Supreme Court’s decision is now of course the leading authority on Article 2. It appears to have confirmed the recent trend of Divisional Court decisions restricting the circumstances in which Article 2 can be breached in the context of healthcare.

Considering that the healthcare industry in the UK is already heavily regulated and policed, the Court’s decision suggests that it will be very difficult for bereaved families to successfully argue that there was a breach of the systems duty. Furthermore, in respect of the operational duty, the Court’s decision highlights the importance of identifying the specific risk that the State body was arguably supposed to protect the deceased from.

It will be interesting to see whether the clarity provided by the Supreme Court now ebbs the flow of Divisional Court decisions where families challenge a Coroner’s ruling on Article 2. The decision may also have ramifications on funding. Generally speaking, the Legal Aid Agency (‘LAA’) provides funding to families for inquest representation where Article 2 is engaged. In emphasising the high thresholds for breaching the substantive duties, the Court’s decision may affect the LAA’s decisions to award funding.

Written by Carl Rix – Old Square Chambers

ⁱ *R v HM Coroner for North Humberside and Scunthorpe, ex p Jamieson* [1995] QB 1

ⁱⁱ *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182

ⁱⁱⁱ *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479; [2011] 1 WLR 1460

^{iv} *R (Parkinson) v Kent Senior Coroner* [2018] EWHC 1501 (Admin)

^v *Osman v United Kingdom* (1998) 29 EHRR 245

^{vi} *Fernandes de Oliveira v Portugal* (2019) 69 EHRR 8

^{vii} *R (Morahan) v West London Assistant Coroner* [2021] EWHC 1603 (Admin)