

Written Evidence from Dr Elizabeth Stubbins Bates, University of Oxford (COV0250)*

Question addressed: What steps need to be taken to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant?

Executive Summary: I consider the positive obligations under Article 2 of the ECHR as they apply to the current stage of the pandemic, delineating the necessary steps which the government must take under Article 2's preventive operational obligation and its investigatory obligation.

1. Introduction:

1.1 Article 2 of the European Convention on Human Rights (which protects the right to life) is non-derogable in peacetime, so its positive obligations continue to bind states parties during the Covid-19 pandemic.

1.2 ECHR states parties have framework obligations to protect life by law and regulation, and operational obligations (since the case of *Osman v UK*) 'in certain well-defined circumstances... to take preventive operational measures to protect an individual whose life is at risk...' ⁱ where the state has actual or constructive knowledge of that risk; and investigatory obligations: to conduct a prompt, independent and impartial investigation which is sufficiently open to public scrutiny to enable victims or their relatives to participate.

1.3 These positive obligations must not impose an 'impossible or disproportionate burden' on the national authorities: ⁱⁱ a narrow margin of appreciation, but one which allows states to invoke priorities and resources, and which gives them a 'choice of means'. The measures taken must not breach other Convention rights, so calling for an emphasis on these positive obligations is fully consistent with scrutiny of the necessity and proportionality of public health measures which might interfere with qualified rights. The obligations intersect; they are not necessarily in tension.

2. What steps need to be taken now to implement Article 2's operational obligation?

2.1 The operational obligation now applies to 'any activity, whether public or private' where the right to life is at stake. ⁱⁱⁱ It applies to "'dangerous" situations of specific threat to life which arise exceptionally from risks posed by ... [inter alia] natural hazards' ^{iv} In more recent case law, the obligation applies not only to defined individuals, but also to 'general protection to society'. ^v Generally protecting 'society' from the 'exceptionally' "'dangerous"' situation... of the Covid-19 pandemic is within the scope of the operational obligation.

2.2 In one strand of case law, where the state has used force in counter-terrorist operations, the operational obligation requires planning to avoid and minimise incidental loss of life. While these cases (like most situations pre-pandemic) are distinguishable on the facts, there is time to plan the lifting of lockdown measures while avoiding and minimising loss of life. Such a construction of the operational obligation is far from a 'impossible or disproportionate burden'. At present, the lifting of lockdown without a viable test, trace, and isolate system, and amid concerns that local testing data was not promptly shared with local authorities suggests a failure of planning.

2.3 Other cases have found Article 2 violations where the state has failed to implement expert advice, including on scientific and environmental matters where lives have been lost. ^{vi} Such cases might be invoked by claimants in the UK, notwithstanding domestic courts' autonomous interpretations of positive obligations, ^{vii} and their concern for deference to the executive.

2.4 The government should therefore plan its pandemic response to protect both individuals and society as a whole from the ‘real and immediate risk’ to their lives from an increased transmission of Covid-19. The government has both actual and constructive knowledge of a real and immediate threat to life to society as a whole. It must plan its pandemic response to ensure that government policies do not endanger life, and implement scientific advice to reduce that risk to the greatest extent possible.

2.5 Expert advice includes a Zero Covid (elimination) response,^{viii} and an advanced testing, contact tracing and isolation system; plus personal protective equipment (PPE) including simple masks for any location where physical distancing is impossible. While domestic courts might be unwilling to adjudicate between *competing* scientific evidence, these public health principles have a broad degree of scientific support. The UK government needs to address the concerns of many dozens of scientists that its relaxation of lockdown measures will lead to increased community transmission and deaths from Covid-19.^{ix}

2.6 States’ operational obligations change according to the data available and the rapidly changing context. The operational obligation might include re-introducing lockdown measures which have already been reversed. Where data suggest a local or national surge in Covid-19 cases, the state is put on notice again of a threat to life, and the operational obligation is intensified.

2.7 Government guidance should implement expert public health advice, on testing, contact tracing, support for isolation, and PPE and social distancing for any businesses or organisations such as schools which are permitted or required to open while community transmission is ongoing. Guidance for schools stipulates that staff should only wear masks while caring for a symptomatic child. This fails to implement scientific advice on presymptomatic transmission.

2.8 To implement expert public health advice would not constitute an ‘impossible or disproportionate burden’ on the national authorities, and would be an appropriate use of the government’s priorities and resources.^x

3. The Investigatory Obligation

3.1 There is by now ample evidence of the gradualist shortcomings in the UK government’s delayed adoption of public health measures in relation to Covid-19, and tens of thousands of families have been bereaved. There is at least ‘arguable case’ (currently subject to a judicial review application) that patients were discharged from hospitals to care homes with Covid-19 (knowingly or unknowingly) and that this caused further transmission within care homes.

3.2 The jurisprudence on the investigatory obligation obliges a state to conduct a prompt, independent and impartial investigation of its own motion, into any arguable breach of Article 2. The European Court of Human Rights requires that state authorities initiate investigations of their own motion as soon as they are aware of an ‘arguable case’ that Article 2 has been breached (in either its negative or positive obligations).^{xi}

3.3 The government’s plan to wait for a public inquiry at some stage after the pandemic is therefore inconsistent with the investigatory obligation.^{xii} Nor is a public inquiry (with the appointment of a potentially contested chair and counsel) foreseen by the investigatory obligation. Instead, judicial investigations are the default assumption. Concerns have been raised about directions to coroners not to consider systemic matters, such as the provision of personal protective equipment (PPE) to health and social care workers.^{xiii}

3.4 Public scrutiny is an essential part of the investigatory obligation, and alleged victims and their relatives should be able to participate to the extent to safeguard their legitimate interests.^{xiv}

4. Conclusion

4.1 The UK is bound to follow necessary steps to prevent avoidable loss of life under Article 2's operational obligation. This includes planning its pandemic response to minimise the threat to life, and following expert evidence in so doing. Government guidance should implement expert public health advice, on testing, contact tracing, support for isolation, and PPE and social distancing for any businesses or organisations such as schools which are permitted or required to open while community transmission is ongoing.

4.2 If the government were to wait until after the pandemic to begin an effective investigation into arguable breaches of Article 2, this would breach the requirement of a *prompt* investigation. Lessons can begin to be learnt while the pandemic is ongoing, to inform the government of the necessary steps which it should take under the ongoing operational obligation while the Covid-19 pandemic continues.

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* Junior Research Fellow in Law, Merton College, University of Oxford; Early Career Fellow, Bonavero Institute of Human Rights; Research Fellow, Oxford Institute for Ethics, Law and Armed Conflict; expert on the implementation and enforcement of international humanitarian law, and on the positive obligations in Articles 2 and 3 of the European Convention on Human Rights. [Publications](#)

ⁱ *Osman v UK*, (2000) 29 EHRR 245, para 115.

ⁱⁱ *ibid.*, para 116.

ⁱⁱⁱ *Oneriyildiz v Turkey*, (2005) 41 EHRR 20, para 71.

^{iv} *Stoyanovi v Bulgaria* [2010] ECHR 1782 (although no violation was found on the facts of that case).

^v *Tagayeva v Russia*, [2017] ECHR 127, para 482.

^{vi} *Oneriyildiz*, *supra*.

^{vii} J. Wright, 'The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg' (2016) 7 *Journal of European Tort Law* 58.

^{viii} Independent SAGE, 'On Achieving a Zero Covid UK', 7 July 2020.

^{ix} 'UK health leaders urge government to prepare for second wave of covid-19', *British Medical Journal*, 23 June 2020.

^x *Osman*, *supra*, para 116.

^{xi} *McCann and Others v United Kingdom* (1996) 21 EHRR 95, para 161; *Kelly and Others v UK*, (Application No 30054/96 ECtHR, 4 May 2001) paras 94-98..

^{xii} BBC News, 'Coronavirus: PM promises future public inquiry' 15 July 2020.

^{xiii} J Robottom and R Harvey Sullivan R, 'The Chief Coroner's Guidance on COVID-19 and Workplace Deaths: What Role Should Inquests Play?' 5 May 2020.

^{xiv} *Kelly v UK*, para 98; *Tagayeva v Russia*, *supra*, para 530 *et seq.*