2. The Court's assessment

(a) General principles

1. The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see the Osman judgment, cited above, § 115).

2. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that 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 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 (see the Osman judgment, cited above, § 116).

3. In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (see e.g. *Salman v. Turkey* [GC] no. 21986/93, ECHR 2000-VII, § 99). It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on prison authorities in respect of those detained in their custody.

THE PROCEDURAL OBLIGATION TO CARRY OUT EFFECTIVE INVESTIGATIONS

(a) General principles

4. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 22 September 1995, Series A no. 324, p. 49, § 161; and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 63).

5. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Öğur v. Turkey*, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, the Ergı v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84, and the recent Northern Irish cases, e.g. *Hugh Jordan v. the United Kingdom* [Section 3], no. 24746/94, § 120, and *Kelly and Others v. the United Kingdom* [Section 3], no. 30054/96, § 114, judgments of 4 May 2001).

6. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. the Kaya v. Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible (*Öğur v. Turkey*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see, for example, *Salman v. Turkey,* cited above, § 106; *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 109; *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see the recent Northern Irish cases concerning the inability of Inquests to compel the security force witnesses directly

involved in the use of lethal force, e.g. *Hugh Jordan v. the United Kingdom*, cited above, § 127).

7. A requirement of promptness and reasonable expedition is implicit in this context (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, §§ 102-104; *Cakıcı v. Turkey,* cited above, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, [Section I] ECHR 2000-III, §§ 106-107). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see e.g. *Hugh Jordan v. the United Kingdom*, cited above, at §§ 108, 136-140).

8. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see Güleç v. Turkey, cited above, p. 1733, § 82; *Öğur v. Turkey*, cited above, § 92; *Gül v. Turkey*, cited above, § 93; and recent Northern Irish cases, e.g. *McKerr v. the United Kingdom* [Section 3], no. 28883/95, ECHR 2000-III, § 148).

CASE OF CALVELLI AND CIGLIO v. ITALY

17 January 2002

Applicability of Article 2 of the Convention

9. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see, among other authorities, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, § 147), enjoins the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, § 36).

10. Those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among authorities, *Eriksson v. Italy* (dec.), no. 37900/97, 26 October 1999; and *Powell v. the United Kingdom* (dec.), no. 45305/99, 4 May 2000; see also application no. 20948/92, Commission decision of 22 May 1995, DR 81-A, pp. 35 and 40).

11. The Court therefore considers that Article 2 is applicable. It must now determine what judicial response was required in the specific circumstances of the present case.

C. Compliance with Article 2 of the Convention

12. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said on a number of occasions that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law (see, among other authorities, *Kiliç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III). Accordingly, the respondent Government's preliminary objection, which the Court has joined to the merits (see paragraph 38 above), must be dismissed. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.

13. In the instant case, it was not contested that legal provisions, including criminal-law measures, existed for protecting patients' lives. The applicants' complaint was essentially that no criminal penalty was imposed on the doctor found liable for the death of their child in the criminal proceedings at first instance because of the operation of the time bar. Nor do the applicants in any way suggest that their child's death was intentional.

14. The Court notes that, in cases of death through medical negligence, the Italian legal system affords injured parties both mandatory criminal proceedings and the possibility of bringing an action in the relevant civil court (see paragraphs 32 and 33 above). The Government also affirmed, and the applicants did not deny, that disciplinary proceedings could be brought if the doctor was held liable in the civil courts. Consequently, the Italian system offers litigants remedies which, in theory, meet the requirements of Article 2. However, that provision will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice within a time-span such that the courts can complete their examination of the merits of each individual case.

15. In the instant case, the Court notes that the criminal proceedings instituted against the doctor concerned became time-barred because of procedural shortcomings that led to delays, particularly during the police inquiry and judicial investigation. However, the applicants were also entitled to issue proceedings in the civil courts and that is what they did (see paragraph 29 above). It is true that no finding of liability was ever made against the doctor by a civil court. However, the case file shows that in the civil proceedings in the Cosenza Court of First Instance, the applicants entered into a settlement agreement with the doctor's and the clinic's insurers and voluntarily waived their right to pursue those proceedings (see paragraphs 30 and 31 above). This could have led to an order

against the doctor for the payment of damages and possibly to the publication of the judgment in the press (see paragraph 35 above). As the Government have indicated (see paragraph 45 above), a judgment in the civil court could also have led to disciplinary action against the doctor.

16. The Court accordingly considers that the applicants denied themselves access to the best means – and one that, in the special circumstances of the instant case, would have satisfied the positive obligations arising under Article 2 – of elucidating the extent of the doctor's responsibility for the death of their child. In that connection, the Court reiterates, *mutatis mutandis*: "where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim" (*Powell v. the United Kingdom* (dec.), cited above).

17. That conclusion makes it unnecessary for the Court to examine, in the special circumstances of the instant case, whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2.

18. The Court therefore holds that no violation of Article 2 has been established in the instant case.

CASE OF POWELL

THE LAW

1. The applicants maintain that the circumstances surrounding the alleged falsification of their son's medical records and the authorities' failure to investigate this matter properly give rise to a breach of Article 2 § 1 of the Convention, which provides as relevant:

"Everyone's right to life shall be protected by law. (...)"

In the applicant's submission the first paragraph of Article 2 places on the State a positive duty to protect life. With reference to the Court's Osman v. the United Kingdom judgment (*Reports of Judgments and Decisions* 1998-VII), the applicants assert that this duty requires the agents of the State to do "all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge" (*ibidem*. p. 3159-60, § 116). Since their son's death was caused by the negligence of State agents, it must be concluded that there was a breach of the State's obligation to protect life.

The applicants further contend that Article 2 requires that whenever a State agent is responsible for a death, there must be some form of effective official investigation to ensure public accountability and to inform the deceased's next of kin about how and why the death occurred. Accordingly, deliberate and dishonest provision of false information – extending to falsification of official records – is in breach of the procedural obligations under Article 2. The duty to investigate would be rendered worthless if State agents could, without violating Article 2, lie about the circumstances of a death and falsify official records. The applicants maintain that for procedural obligations to be practical

and effective, they must include a duty to provide an honest account of the circumstances surrounding the death.

The applicants allege that, in the instant case, State agents falsified their son's medical records to protect themselves from civil and criminal liability. The failure of the authorities to provide them with an honest account of the death is a procedural violation forming part and parcel of the State's duty to investigate.

The Court observes that the applicants do not in any manner allege or imply that their son was intentionally killed by the doctors responsible for his care and treatment at the material time. They aver, on the other hand, that the responsible doctors knew or can be considered in the circumstances to have known that their son's life was at immediate risk but failed dismally to take the necessary measures to treat him. In the Court's opinion, the reasoning employed by the applicants in support of their argument that the doctors' inadequate response to their son's condition at the time amounted to a breach of the State's duty to protect the right to life cannot be sustained. The reasoning they advance is derived from the above-mentioned Osman judgment. However, the Court was addressing in that case the circumstances in which a duty may devolve on law enforcement agencies to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of a third party. The issue before the Court in the instant case is an entirely different one in terms of both the context and scope of the obligation.

Admittedly the first sentence of Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June1998, *Reports* 1998-III, p. 1403, § 36). The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.

In the Court's opinion, the events leading to the tragic death of the applicants' son and the responsibility of the health professionals involved are matters which must be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events, allowing the facts of the case to be exposed to public scrutiny – not least for the benefit of the applicants.

The Court has attached particular weight to the procedural requirement implicit in Article 2 of the Convention. It recalls that the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention",

requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (see the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, pp. 322, 324, §§ 78, 86). This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. The mere knowledge of the killing on the part of the authorities gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death (see the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82).

The Court considers that the procedural obligation as described cannot be confined to circumstances in which an individual has lost his life as a result of an act of violence. In its opinion, and with reference to the facts of the instant case, the obligation at issue extends to the need for an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter.

The Court stresses that its examination of the applicants' complaint must necessarily be limited to the events leading to the death of their son, to the exclusion of their allegations that, following his death, the doctors responsible for his care and treatment fabricated his medical records to exonerate them of any blame. In the Court's opinion, that latter issue falls to be determined from the angle of their complaint under Article 6 that they were unable to secure a ruling on the doctor's post-death responsibility. However, the alleged post-death offences committed by the doctors did not alter the course of events which led to the death of the applicants' son.

The Court observes that it was conclusively established that the applicants' son died of Addison's disease. The applicants do not contest this. They maintain that his life may have been saved had his condition been treated as soon as Dr Forbes first suspected in December 1989 that his symptoms could be consistent with Addison's disease. The proceedings which they initiated before the Medical Services Committee of the West Glamorgan Family Health Authority were intended to establish that their son died as a result of medical negligence. The scope of the proceedings was then broadened to include their complaint that there had been a cover-up in regard to the precise circumstances surrounding their son's death. The Medical Services Committee found that one of the five doctors concerned had failed to comply with the terms of her service in treating their son. The applicants subsequently appealed to the Welsh Office, contending that there had been a conspiracy among the doctors involved to falsify their son's medical records so as to shield them from liability for their clinical errors. However, the applicants' solicitor withdrew the appeal in the belief that they were unlikely to obtain justice.

Given the applicants' decision to abandon their appeal to the Welsh Office, the Court cannot speculate on whether the appeal would have provided the applicants with a full account of the doctors' handling of their son's condition, whether the doctors' response was inadequate in the light of the information available to them and whether

steps could have been taken to avoid his death. It confines itself to noting that by withdrawing their appeal the applicants closed one of the options which may have uncovered the extent of the lack of co-ordination among the doctors concerned at the relevant time.

Of greater significance for the Court is the fact that the applicants settled their civil action in negligence against the responsible health authority and did not pursue individual claims against the doctors. In the Court's opinion, the applicants by their decision closed another and crucially important avenue for shedding light on the extent of the doctors' responsibility for their son's death. Had the civil action proceeded the applicants would have been entitled to have a full adversarial hearing on their allegations of negligence, to subject the doctors concerned to cross-examination under oath and obtain discovery of all documents relevant to their claim. The Court also considers that the applicants could have made their grievance about the falsification of their son's medical records a live issue before the court. Indeed, there is no reason to doubt that it would not have dominated the pleadings, having regard to its centrality to the negligence allegation and its relevance to the level of damages which the court may have awarded.

Having regard to the above considerations the Court finds that it is not open to the applicants to complain under Article 2 of the Convention that there was no effective investigation into their son's death. In its opinion, where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim in respect of the circumstances surrounding the treatment administered to the deceased person or with regard to the investigation carried out into his or her death.

The Court concludes therefore that the applicants cannot in the circumstances claim to be victims within the meaning of Article 34 of the Convention. Their complaint under this head is therefore to be rejected as being incompatible *ratione personae*, pursuant to Article 35 §§ 3 and 4 of the Convention.

R (Amin) v Secretary of State for the Home Department; R (Middleton) v Coroner for West Somersetshire

Court of Appeal

Lord Woolf CJ, Laws and Dyson LJJ

27 March 2002

CORONERS- Inquest - Verdict - Death in custody - Whether jury able to return verdict of neglect - Coroners Act 1988, s. 11 - Human Rights Act 1998, Sch. 1, Pt I, Art 2 - Coroners Rules 1984
Human rights - Protection of right to life - Investigation into death in custody- Whether public scrutiny and family participation required - Human Rights Act

A coroner could permit a jury at an inquest to make a finding of neglect if that would serve to identify a failure in the system which could reduce the risk of repetition of the circumstances giving rise to that death. In deciding whether the state had satisfied its procedural duty to investigate a death in custody, which arose from the duty to protect the right to life under the Human Rights Act 1998, Sch. 1, Pt I, Article 2, all the measures taken by public authorities to respond to and investigate the death had to be taken into account. Public scrutiny and family participation were not necessarily discrete compulsory requirements which had to be distinctly and separately fulfilled in every case.

The Court of Appeal so held in allowing in part appeals by the Home Secretary against (1) the granting of a declaration by Hooper J [2001] EWHC Admin 719 on 5 October 2001 to Imtiaz Amin that an independent public investigation be held into the death of his nephew, Zahid Mubarek, who was murdered by his cell-mate at Feltham Young Offender Institution, with the family legally represented, in order to satisfy the 1998 Act, Sch. 1, Pt I, art 2; and (2) the granting of a declaration by Stanley Burnton J [2001] EWHC Admin 1043 on 14 December 2001 to Jean Middleton that, by reason of the restriction on the verdict at the inquest of her son, Colin Campbell Middleton, who committed suicide while in custody at Bristol Prison, that inquest was inadequate to meet the procedural obligation in art 2.

LORD WOOLF CJ, giving the judgment of the court, said that a death in state custody, at the hands of another prisoner or at the deceased's own hands excited very anxious public concern. The state owed a pressing duty to minimise the risk of such a calamity, even if it could not be altogether extinguished. When such a death took place, the procedural duty under art 2 to investigate was undoubtedly engaged: Edwards v United Kingdom (Application No 46477/99) (unreported) 14 March 2002, ECHR. What was required would vary with the circumstances. A credible accusation of murder or manslaughter by state agents would call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bore a different quality from a case where it was said the state had laid on lethal hands. Publicity and family participation were not necessarily discrete compulsory requirements which had to be distinctly and separately fulfilled in every case where the procedural duty to investigate was engaged. All the measures taken by public authorities to respond to and investigate the death, whether instituted by central government or otherwise, had to be taken into account in deciding whether the procedural duty was satisfied. In R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1 the Court of Appeal decided that neglect could rarely, if ever, be a permissible free-standing verdict of a jury at coroner's inquests. A verdict of neglect could identify a failure in the system adopted by the Prison Service to reduce the incidence of suicide by inmates.

Alternatively it might do no more than identify a failure of an individual prison officer to perform his duties properly. For the purpose of vindicating the right protected by Article 2 it was more important to identify faults in the system than individual acts of negligence. The inability to bring in a verdict of neglect (without identifying any individual as being involved) significantly detracted, in some cases, from the capacity of the investigation to meet the obligations arising under art 2. Where a coroner knew that it was the inquest which was in practice the way the state was fulfilling the obligation under art 2, it was for the coroner to construe the Coroners Rules 1984 in the manner required by s. 6(2)(b) of the 1998 Act. Rule 42 could and should when necessary be construed (in relation to both criminal and civil proceedings) only as preventing an individual being named, with the result that a finding of system neglect would not contravene that rule. In general Ex p Jamieson continued to apply to inquests but, when it was necessary so as to vindicate art 2 to give in effect a verdict of neglect, it was permissible to do so. The requirements were in fact specific to the particular inquest being conducted and would only apply where in the judgment of the coroner a finding of the jury on neglect could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into at the inquest.

Appearances : *Jonathan Crow* with *Martin Chamberlain* in the first case and with *Rabinder Singh* in the second case (Treasury Solicitor) for the Home Secretary; *Patrick O'Connor QC* and *Martin Soorjoo* (Imran Khan & Partners) for Amin; *Ben Emmerson QC* and *Peter Weatherby* (Howells, Sheffield) for Middleton.

Reported by: Jill Sutherland, barrister.