



Neutral Citation Number: [2021] EWHC 1603 (Admin)

Case No: CO/4994/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice,  
Strand, London, WC2A 2LL

Date: 11/06/2021

**Before:**

**LORD JUSTICE POPPLEWELL**  
**MR JUSTICE GARNHAM**  
and  
**HIS HONOUR JUDGE TEAGUE QC,**  
**CHIEF CORONER OF ENGLAND AND WALES**

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**Between:**

**THE QUEEN on the application of**  
**JESSICA MORAHAN**

**Claimant**

- and -

**HER MAJESTY'S ASSISTANT CORONER FOR**  
**WEST LONDON**

**Defendant**

- and -

**(1) CENTRAL & NORTH WEST LONDON NHS**  
**FOUNDATION TRUST**  
**(2) THE COMMISSIONER OF POLICE OF THE**  
**METROPOLIS**

**Interested Parties**

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**Paul Bowen QC and Paul Clark** (instructed by **Leigh Day**) for the **Claimant**  
**Alison Hewitt** (instructed by **the Head of Legal Services at the London Borough of**  
**Hammersmith and Fulham**) for the **Defendant**  
**The Interested Parties did not participate in these Judicial Review proceedings**

Hearing dates : 18 and 19 May 2021

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**Approved Judgment (Rev1)**

## Lord Justice Popplewell:

### Introduction

1. The issue in this case is whether there is a duty to hold a *Middleton* inquest following the death of a voluntary in-patient of a psychiatric rehabilitation unit due to an overdose of recreational drugs when she was at home in the community. “*Middleton* inquest” is here used as a shorthand for an inquest which fulfils the enhanced investigative duty required by article 2 of the European Convention on Human Rights, as originally explained in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.
2. Tanya Morahan was aged 34 when she died. The pathologist’s autopsy concluded that she had died of cocaine and morphine toxicity. She had a history of mental illness, since the age of 24, and had been diagnosed with paranoid schizophrenia and harmful cocaine use. From mid-May 2018 she was an in-patient at Colham Green Rehabilitation Unit (“CGR”), a community based open rehabilitation unit operated by the First Interested Party (“the Trust”), initially as a detained patient under s. 3 Mental Health Act 1983 (“MHA”) following transfer from an acute psychiatric ward. On 25 June 2018 her s. 3 MHA detention, which was due to expire three days later, was rescinded and she became a voluntary in-patient. On 30 June 2018 she left the unit, with her clinicians’ agreement, but failed to return as required that evening. She returned the following evening 1 July 2018. On the afternoon of 3 July 2018, again with her clinicians’ agreement, she left the ward, but failed to return. The Second Interested Party (“the police”) were asked by the Trust to trace her, and visited her flat on 4 July 2018, where there was no answer to repeated knocking. She was found dead there on 9 July 2018.
3. The Defendant (“the Coroner”) opened an inquest and conducted pre-inquest reviews at which, following written and legal argument, she held that there was no *Middleton* investigative duty, although she said would keep the question under review. Those rulings are challenged in these judicial review proceedings brought with the permission of Arnold LJ by the Claimant, Tanya’s cousin, representing the interests of her family. On behalf of the Claimant Mr Bowen QC argues that the circumstances of Tanya’s death fell within a class which gives rise to an automatic duty to conduct a *Middleton* inquest; alternatively that such duty arose because there were arguable breaches of a substantive operational duty owed by the Trust to take steps to avert the real and immediate risk of Tanya’s death by accidental drug overdose, a risk which was or ought to have been known to the Trust. The three arguable breaches alleged are:
  - (1) a failure to detain Tanya upon her return to the unit on 1 July 2018;
  - (2) a failure to take more active steps to locate Tanya after her failure to return to the unit on the evening of 3 July 2018; and
  - (3) a failure on 25 June 2018, when her s. 3 detention came to an end, to put in place an after care plan in accordance with s. 117 MHA.
4. The Coroner has been represented by Ms Hewitt who has taken a neutral stance and assisted the court on factual and legal matters. The Trust and the police played an active role before the Coroner in resisting the Claimant’s application for a *Middleton* inquest,

but have not participated in these judicial review proceedings. Mr Bowen's submissions have not, therefore, been subjected to adversarial argument.

## **Narrative**

5. What follows is a fuller narrative of the relevant evidence available to the Coroner when making her rulings, which is also before this Court.
6. The first contact which Tanya had with mental health services was in June 2008 when she was diagnosed with a drug-induced psychosis after reporting a history of heavy use of cocaine and ecstasy. She had a two-week admission to hospital in April 2013, after reporting psychotic symptoms, and again in February to March 2014 when a diagnosis of schizophrenia was made. She was readmitted to hospital in September 2014 after presenting with distressing auditory hallucinations. In August 2015 she was detained under section 2 MHA after presenting at A&E on three occasions reporting hearing voices. She was at this stage seven months pregnant. She was referred to Coombe Wood perinatal service in September 2015 and was detained there under section 3 MHA, where she gave birth to her son Caleb on 24 November 2015. Caleb's father had a history of violent abuse, and from Caleb's birth he was treated by the local authority as a child in need. In July 2016 he was taken into foster care under section 20 of the Children Act 1989. In due course a placement order with a view to his adoption was made.
7. In May 2017, following a disturbance which caused concern to her neighbours, she was detained under section 2 MHA and admitted to a unit, from which she was discharged on 27 June 2017 following a period of home leave. In July 2017 she was again detained under section 2 and admitted to Crane Ward, a secure unit at Riverside, Hillingdon. On 3 July 2017 she was diagnosed with paranoid schizophrenia. Following release she was again detained under section 2 in August 2017 and again in October 2017.
8. On 3 December 2017, again following a call to emergency services by concerned neighbours, Tanya was admitted to A&E where she tested positive for cocaine and opioids. She left the hospital before being reviewed by the mental health team. On 5 December 2017 she was detained under section 2 MHA and moved to Crane Ward on 11 December 2017. On 30 December 2017 she was detained there under section 3 MHA. The s 3 medical recommendation for admission of 28 December 2017 recorded that Tanya 'abuses illicit substances, which is affecting her cognitive ability and she risks long-term cognitive damage'. The AMHP assessments stated that Tanya 'is extremely vulnerable' and 'misuses illicit substances which affect her cognitive ability' and that 'her mental state is compounded by her misuse of illicit substances'.
9. In due course over the following months she responded well to treatment. In April 2018 she was allowed periods of unescorted leave from the acute ward. By May 2018 she was generally doing well with no signs of mood disorder or psychosis, and it was felt that it would be difficult to justify extending her section 3 detention when it was due to expire on 28 June 2018. It was decided that a referral should be made to CGR. CGR is an open rehabilitation unit, to which patients are usually admitted from acute mental health units when they require a further period of rehabilitation after resolution of the acute symptoms of mental illness, and when there are no longer acute risks which would preclude them from being treated in an open environment. It had previously initially been decided that a referral should be made to a locked rehabilitation unit. The OT

report of 23 February 2018 records that ‘Given that Tanya lacks insight into the impact of substances on her mental health it is likely that locked rehabilitation would be the best option’. The recommendation was approved by the Funding Panel on 23 April 2018 which recorded Tanya was a ‘highly vulnerable adult’ and that ‘substance misuse’ was an issue. However, before a transfer was made to a locked ward, Tanya began rehabilitation visits at CGR.

10. From 14 May 2018 Tanya began sleeping at CGR, whilst formally remaining a patient at Crane Ward, pending an assessment for admission to rehabilitation. Her drugs screening was negative, and she participated well in rehabilitation therapy groups during this period, presenting as being in a good mental state with no psychotic or affective symptoms. She continued to use her unescorted leave well.
11. A formal assessment for admission to CGR was carried out on 21 May 2018, which was conducted by Dr Rahim, the consultant psychiatrist in rehabilitation with the responsibility for overseeing the care provided to patients at CGR, and for supervising junior doctors there. Tanya presented as having the capacity to consent to admission to CGR and the capacity to consent to treatment. She said she intended to stay off illicit drugs in order to be able to win back her son. The risk assessment completed on 21 May 2018 recorded:

“7. Deliberate harm to self? None known; 8. Harm to self through neglect? Yes; 9. High risk posed to this person through substance misuse? Yes; 10. Risk to physical health? None known.”
12. Questions 26 and 30 sought context and were answered; “26.Tanya struggles to complete her ADL’s when she is unwell. She takes illicit substances in the community which contributed to a deterioration in mental state... 30.Tanya has a history of substance misuse (cannabis, cocaine and alcohol) which has a detrimental effect on her mental health and poses a potential risk to her physical health.” This was a reference to her history prior to being detained in December 2017.
13. On 23 May 2018 she was visited by her son’s social worker. They discussed her desire to appeal the adoption order. On 27 May 2018 she reported feeling restless and agitated when thinking about her son’s adoption. On assessment she was found to have no mood abnormality, and although she talked about passively wishing she would not wake up in the morning, she had no active suicidal thoughts, plans or intentions. She denied any deliberate self-harm. She continued to make good use of unescorted leave and following one such leave, breathalyser and urine drugs screening on 29 May 2018 was negative of all substances. That remained the position throughout June with drugs tests negative. On 13 June 2018 she visited her flat with the occupational therapist in order to take steps to clean and tidy it in preparation for moving back there.
14. Her six-month detention under s. 3 MHA was due to expire on 28 June 2018. A multi-disciplinary assessment was made on 25 June 2018 by her clinical team under the leadership of Dr Rahim, who had been the responsible consultant since her admission. The outcome was that her detention under s. 3 was rescinded and she agreed to remain at CGR as a voluntary patient. The notes record the following:

“Tanya denies any mental health symptoms apart from sometimes feeling down due to her life situation, asked for an increase in Citalopram [an anti-depressant] to

30mg as prev did well on this dose. Agrees to remain at 2CGR to take meds, stay off drugs and alcohol, work with ARCH [a community support organisation for drink and drug abuse] psychology OT and to ensure there is a good support/activity package in place prior to discharge.”

15. Dr Rahim has provided a witness statement. She states that Tanya’s account of her drug taking prior to admission in December 2017 was of recreational use with friends for two days at a time, around once a week, for three weeks prior to admission. Of the s. 3 decision she says:

“Ms Morahan presented with no active symptoms of affective or psychotic disorder; she expressed good insight into her difficulties and talked about feeling low sometimes in response to her life situation, but this did not amount to clinical depression. She also talked about her plans to try and appeal her son’s adoption. She told us that she was willing to remain on the ward as an informal patient, to continue to attend therapy groups, to engage with psychology and drug services, and to take her medication as prescribed. The team considered the chronology of her illness, her good progress and compliance with her treatment plan. She did not fulfil criteria for detention under the Mental Health Act as she was asymptomatic, with good insight, and had the capacity to continue with her admission and treatment plan on a voluntary basis. Therefore, her Section 3 was rescinded following this meeting.”

16. There is no reason to doubt the correctness of the assessment that Tanya no longer met the criteria for detention under the MHA, and Mr Bowen accepts that there is currently no evidence to support any criticism of the Trust for rescinding her s. 3 detention or failing to extend it when it would have expired on 28 June 2018. The grounds for the decision are supported by the history shown in the medical notes, although Dr Rahim’s narrative in her witness statement is fuller than the record of the decision in the notes.
17. On 27 June 2018 Tanya visited her flat again with the occupational therapist, and some progress was made towards clearing it up. Plans were made for the next steps to prepare the flat for habitation.
18. On 30 June 2018 Tanya left the unit, with the agreement of staff, to meet friends. She returned at 1530 to collect something and went out again. She was expected to return that evening but failed to do so. Staff were unable to make contact with her by mobile phone. She rang the unit at 0700 the following morning and said she was in Munich, where she had met friends after getting drunk. She said it was a stupid thing to have done and she had booked a flight back at 1600 and would return that evening. She reported that she was safe and well. She kept her word and returned at 1750 that evening, 1 July. The notes record that “she was a little distressed on return”. She tested negative for alcohol on a breath test and a urine drugs test was carried out. The notes record the result as “negative for cannabis”. She was reviewed by Dr Head, a junior doctor on 2 July at 1300. She explained it had been a spur of the moment decision to go to Germany. Dr Head recorded that he had no new physical or mental health concerns. A Risk Assessment form completed later that day by the Registered Mental Nurse was in identical terms to that of 21 May 2018 in respect of the risks identified at questions 7 to 10 and the context in boxes 26 and 30.
19. Dr Rahim’s statement states:

“The team considered that this was the first time during her rehabilitation admission that she had failed to comply with her treatment plan, she had remained stable in mental state, she appeared remorseful regarding the absconson, and was willing to continue her treatment; therefore it was found that there were no grounds for use of the Mental Health Act. It was agreed to continue with her informal status on the ward and continue to work with her towards her recovery in open rehabilitation.”

20. Mr Bowen emphasised that this reasoning is not contained in the records. The evidential basis for it, however, is.
21. The RMN recorded in the notes that evening that her mood was euthymic (not abnormal) and her behaviour appropriate and she was not showing any psychotic symptoms. She had been out for a short time after supper but had returned to the unit.
22. On 3 July 2018 Tanya spoke in the morning to the occupational therapist, and later in the morning left the unit telling staff that she was going to tidy up her flat. This was permitted by staff and tidying up her flat to make it habitable was part of the process of her intended rehabilitation into the community. In the evening she phoned and reported to staff that she was in Essex and would return later. When she was reminded that she was due to take evening medication she responded “I have a life”.
23. That evening staff tried to contact her numerous times on her mobile phone but without any response. It subsequently emerged that she had left her mobile phone at the unit. During the night the police were contacted for them to make a welfare check. In the early hours of the morning of 4 July the police went to her flat and knocked on the door repeatedly, without response. The police record includes an entry that it was their view that the Trust should seek an order under s. 135 MHA to enable them to get a warrant, but it is not clear whether the police reported back to the Trust staff the fact of their visit or their view about a s. 135 warrant. Although Mr Bowen at one stage of the argument suggested that this was put forward as a failing by the police which constituted an arguable breach of an operational duty by them, he made clear in reply that he did not maintain such an argument. The application before us proceeded on the basis of allegations of failings by the Trust alone, not the police.
24. On 4 and 5 July 2018, staff again tried to contact Tanya but got no answer from her mobile phone.
25. Dr Rahim was due to go on annual leave on 6 July 2018. Accordingly on 5 July 2018 she emailed Dr Ashraf, the senior registrar, informing him that Dr Bhatkal would be the consultant providing cover. The email said:

“I hear Tanya Morahan has gone AWOL again (that’s twice since coming off section a week ago). I think that once she returns we should assess her under the MHA and try and work with her on Section again at CGR. Please could you put in the first recommendation if you are there when she returns? Otherwise we could even consider going down the 5:2 route and get the MHA completed after that ...”

26. On 6 July 2018 Dr Ashraf discussed Tanya’s management with staff and recorded that the plan was to follow the Trust’s policy on missing patients and that the lead staff member on the shift should get an update from the police on a regular basis. After her return there was to be consideration of a detention under s.5(4) or s. 5(2) MHA or an MHA assessment, as suggested by Dr Rahim. The police were contacted, and responded that they could not look for her as she was a voluntary patient; but if her whereabouts were known, they would offer assistance.
27. On 9 July 2018 police received two reports of a bad smell from Tanya’s flat. They attended and, following forced entry of the premises, found Tanya’s body.
28. The post-mortem was carried out by the Home Office pathologist Dr Chapman on 12 July 2018. The body was heavily decomposed. The post-mortem report recorded the quantities of drugs in her blood, which included a substantial amount of cocaine, a lesser amount of morphine and small quantities of prescription drugs. Dr Chapman gave as the probable cause of death cocaine and morphine toxicity. He was subsequently asked two questions by the Claimant’s solicitors for the purposes of the inquest and gave a written response. The first asked about the time of death. He said that the extent of decomposition of the body at the time of the post-mortem made it more likely that she had died closer to the last time she was known to be alive (3 July) than the time when her body was discovered (9 July). He was also asked whether, if she had been abstinent from drugs for some time whilst at the rehabilitation unit, that would affect her tolerance. His response was:

“Tolerance to opiate drugs can be lost rapidly during abstinence so a period in hospital could make taking the drug more dangerous once drug abuse is restarted. Tolerance to cocaine is less significant.”

### **The article 2 duties**

29. Article 2.1 of the ECHR provides:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.”
30. Article 2 has been interpreted as imposing three distinct duties on states and those exercising state functions:
  - (1) There is a **negative duty** to refrain from taking life without justification (see, for example, *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 at paras 12 and 93). This arises not only at a state level but more commonly, in practice, at an operational level, and includes cases where an individual dies at the hands of an agent of the state, such as a police shooting. This may be labelled the negative operational duty.
  - (2) There is a **positive duty** to protect life which has two aspects:



- (a) There is a duty to put in place a legislative and administrative framework to protect the right to life, involving effective deterrence against threats to life, including criminal law provisions to deter the commission of offences, backed up by a law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; and in the healthcare context having effective administrative and regulatory systems in place (*Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 at para 28, *Rabone* at paras 12 and 93). This is the **framework duty**, of which the latter aspect is sometimes referred to as a systems duty.
- (b) There is a duty, first articulated in *Osman v UK* [1998] 29 E.H.R.R 245, to take positive measures to protect an individual whose life is at risk in certain circumstances. This is the **positive operational duty**. In *R (L(A Patient)) v Secretary of State for Justice* [2009] 1 AC 588, Lord Walker of Gestingthorpe observed at paragraph 89 that there is often no clear dividing line between this operational duty, and the systems duty below the national level.
- (3) There is an investigative duty to inquire into and explain the circumstances of a death. As I explain below, there are two different investigative duties which have a different scope and different juridical basis. One is a substantive duty to investigate every death as an aspect of the framework duty; the other is a procedural obligation which arises only in some cases, and is parasitic on the possibility of a breach by a state agent of one of the substantive operational or systems duties. When the latter arises, it is a duty of enhanced investigation, to initiate an effective public investigation by an independent official body. This is the **enhanced investigative duty**.
31. This case is concerned with the positive operational duty and the enhanced investigative duty.

### Procedural history

32. The inquest was opened on 11 October 2018. The first pre-inquest review hearing (“PIR”) took place on 19 June 2019. There were written submissions, supplemented by oral submissions at the PIR, as to whether article 2 was engaged. The Coroner indicated that the evidence currently before her did not appear to engage article 2, but that she would listen to submissions to the contrary and keep the matter under review. Various procedural directions were given. She determined that the issues which would be covered by the inquest would be, as agreed:
- “Ms. Morahan’s care from the time the decision to rescind the section was made until 3<sup>rd</sup> July to include the Trust’s response to any previous failures to return from leave. The Trust’s response to Ms. Morahan’s failure to return from unescorted leave on 3<sup>rd</sup> July 2018. Police response and police checks undertaken on 3<sup>rd</sup>/4<sup>th</sup> July.”
33. At a second PIR on 18 September 2019 the Coroner heard further argument on whether a *Middleton* inquest was required. There had again been written submissions on the

point prior to the hearing, which were supplemented by oral argument. On 23 September 2019 the Coroner gave a written decision (“the First Ruling”) setting out reasons for her conclusion that there was no duty to hold a *Middleton* inquest. In the First Ruling, the Coroner considered whether there was evidence of an arguable breach of an operational duty, taking account of the guidance in *Rabone*. She addressed the four considerations identified at paragraphs 20 to 24 of *Rabone* namely:

- (a) the existence of a real and immediate risk to the individual’s life;
- (b) assumption of responsibility by the State for the individual’s welfare and safety (including the exercise of control);
- (c) vulnerability of the individual concerned; and
- (d) whether the risk is an ‘ordinary’ risk or an ‘exceptional’ risk.

34. On the basis of the evidence available, she concluded that there was no assumption of responsibility by the State as Tanya was a voluntary patient, and it was “speculative” whether she would have been further detained following reassessment upon her return. As to vulnerability, she said that Tanya’s history might suggest she was vulnerable to the extent which met the criteria to give rise to an operational duty. However, noting the test laid down in *Osman* she found “there is no evidence at the present time before the court of a real and immediate risk of which the Police or the Trust ought to have known and which they failed to take reasonable steps to avoid”. Finally, she indicated that she would keep the issue under review in the light of any further evidence which emerged.
35. Following a letter of claim sent on the Claimant’s behalf foreshadowing the present application for judicial review, there was a third PIR on 11 November 2019, which again addressed the engagement of the *Middleton* investigative duty. In a further written decision dated 25 November 2019 (“the Second Ruling”) the Coroner maintained her previous decision that it was not engaged. The bulk of the Second Ruling addressed and rejected the submissions that the article 2 systems duty was engaged. That argument has not been renewed on this judicial review application. So far as the operational duty was concerned, she referred to what she had said in her First Ruling and said that the only point to add was that the evidence which had subsequently been received was from Dr Bhaktal, the consultant providing cover in Dr Rahim’s absence, which reinforced the position that Tanya was considered by those looking after her to be low risk. The Coroner went on to say “The court considers that to consider the operational duty engaged on the evidence available would be an extension of *Osman* and *Rabone*, not simply an application of either case to the facts in this case”.

### The Claimant’s submissions

36. Mr Bowen’s submissions on behalf of the Claimant can be summarised as follows:
  - (1) There was, at least arguably, a substantive operational duty owed to Tanya, applying the three *Rabone* factors of voluntary assumption of responsibility, vulnerability and exceptionality of risk. *Rabone* and *Fernandes de Oliveira v Portugal* (2019) 69 EHRR 8 establish the assumption of responsibility of the state to a voluntary psychiatric patient as applicable to all in that category by

virtue of the compulsory powers of detention available. Tanya was exceptionally vulnerable by reason of her history of mental illness. The nature of the risk, namely death from an overdose in the context of a relapse into alcohol and drug use, was an exceptional one sufficient to engage the operational duty. Whether there was a real and immediate risk of such death of which the Trust was or ought to have been aware is a question which goes to whether there was a breach of such duty, not its existence. The question to be answered in the first instance ignores real and immediate risk, and focuses only on whether the circumstances are capable of giving rise to the operational duty in principle, which is, Mr Bowen submitted, a necessary but sufficient precondition to the existence of the automatic enhanced investigative duty. The existence of such duty in principle was established in this case by reference to the *Rabone* factors.

- (2) The automatic enhanced duty therefore arose. Green J, as he then was, held in *R (Letts) v Lord Chancellor* [2015] 1 WLR 4497 that it could apply to voluntary psychiatric patients. Although it had not previously been applied to a risk of death from accidental causes, that was a principled extension and in accordance with what Green J said in *Letts*, where Tanya was in the care and control of the State.
- (3) Alternatively, if the enhanced investigative duty did not arise automatically, it arose because there was an arguable breach of an arguable operational duty.

37. In order to address these arguments, I must first seek to identify the correct legal principles.

## The law

### *The positive operational duty*

38. The positive operational duty arises where the state agency knows or ought reasonably to know of a real and immediate risk to an individual's life, and requires it to take such measures as could reasonably be expected of it to avoid such risk (*Osman* paras 115, 116). In this context:

- (1) *Risk* means a significant or substantial risk, rather than a remote or fanciful one. In *Rabone* the risk in question was one of suicide and was quantified as being 5%, 10% and 20% on successive days, which was held to be sufficient (see paras 35-38).
- (2) An *immediate* risk to life means one that is "present and continuing" as opposed to "imminent" (*Rabone* para 39).
- (3) The relevant risk must be to life rather than of harm, even serious harm (*G4S Care and Justices Services Ltd v Kent County Council* [2019] EWHC 1648 (QB), paras 74-75 and *R (Kent County Council) v HM Coroner for the county of Kent* [2012] EWHC 2768 (Admin) at paras 44-47).
- (4) *Real* focuses on what was known or ought to have been known at the time, because of the dangers of hindsight (*Van Colle* at para 32).

- (5) Overall, in the light of the foregoing considerations viewed cumulatively, the test is a stringent one (see *Van Colle*, per Lord Brown of Eaton-under Heywood at para 115; and *G4S*, paras 71-73). It will be harder to establish than mere negligence, but that is not because reasonableness here has a different quality to that involved in establishing negligence; rather it is because it is sufficient for negligence that the risk of damage be reasonably foreseeable, whereas the operational duty requires the risk to be real and immediate: see *Rabone* at paras 36-37.
39. It is also clear that the existence and scope of the duty must not impose an impossible or disproportionate burden on state agencies in carrying out their necessary state functions and must take into account the individual's rights to liberty (article 5) and private life (article 8): see *Osman* at para 116, *Rabone* at 104 and *Fernandes de Oliveira* at paras 111, 125, 131.
40. In *Osman* it was said at para 115 that the operational duty exists in "certain well-defined circumstances". However its boundaries have been the subject of developing jurisprudence both in the European Court of Human Rights ("ECtHR" or "Strasbourg") and domestically. For present purposes, the decision of the Supreme Court in *Rabone* can be taken as the point of departure, in which Lord Dyson JSC observed at para 25 that the Strasbourg jurisprudence was young and the boundaries were still being explored; and that they might expand to include new categories of circumstances as giving rise to the operational duty as new factual circumstances were considered.
41. There are four cases from which I derive authoritative assistance in identifying whether the Trust owed a positive operational duty to Tanya in this case.

#### *Rabone*

42. *Rabone* involved a claim for damages brought by the family of a voluntary psychiatric in-patient who committed suicide when staff authorised a two day home visit. The claim was brought both in negligence under the Law Reform (Miscellaneous Provisions) Act 1934, and for breach of article 2. The responsible NHS Trust had admitted negligence in authorising the home visit, but not a breach of article 2 in that respect. The High Court and Court of Appeal had held that no operational duty was owed to a voluntary psychiatric patient. The Supreme Court held unanimously that there was such a duty to take steps to protect the patient in that case, Melanie, from the suicide risk which had been assessed as high in the light of her presentation and history, which included a previous suicide attempt; and that there had been a breach of that duty. The leading judgments were given by Lord Dyson JSC and Baroness Hale of Richmond, each of whom drew on the previous ECtHR jurisprudence.
43. Lord Dyson identified categories of cases in which the operational duty had been held to exist at paragraphs 15 to 18. They included a duty to protect those detained by the state from harm inflicted by other detainees and from suicide, which applied to those in prison, immigrants in administrative detention, and involuntary psychiatric patients detained in public hospitals, the last being established in *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681. The category had been expanded to include what might generally be described as dangers for which the state was in some way responsible, citing as an example *Oneryildiz v Turkey* 41 EHRR 325, a case in which deaths occurred in a house bordering on a household refuse tip where a methane

explosion caused a landslide engulfing the house; and *Mammadov v Azerbaijan* (17.12.09 unreported) where the applicant's wife set fire to herself when police officers were attempting to evict them from residential accommodation. A duty had also been held to be capable of existing in relation to transfer of elderly patients between care homes in a way which gave rise to a risk of reduced life expectancy in *Watts v United Kingdom* (2010) 51 EHRR SE 66. Lord Dyson drew a contrast with the line of cases, of which *Powell v United Kingdom* (2000) 30 EHRR CD 362 was the leading Strasbourg authority, in which no duty was held to exist for deaths in hospital as a result of what Lord Rodger described in *Savage* as "casual acts of negligence".

44. In a well-known passage at paragraphs 21 to 24 Lord Dyson then identified four essential features of the cases in which Strasbourg had theretofore recognised the existence of the duty, concluding at para 25 that all might be relevant in determining the existence of a duty in any given circumstances, but recognising that they did not necessarily provide a sure guide in what was a developing jurisprudence. The four identified factors were:

- (1) the existence of a real and immediate risk to life as a necessary but not sufficient condition for the existence of the duty (para 21);
- (2) an assumption of responsibility by the state for the individual's welfare and safety, including by the exercise of control (para 22);
- (3) the especial vulnerability of the individual (paras 22 and 23); and
- (4) the nature of the risk being an exceptional risk, beyond an "ordinary" risk of the kind that individuals in the relevant category should reasonably be expected to take (para 24).

45. Lord Dyson went on to say:

"26. I must now come to the central question, which is whether the lower courts were right to hold that the *Powell* case 30 EHRR CD 362 compels the conclusion that the trust owed no operational duty in the present case...

27. I accept, of course, that there are differences between detained and voluntary psychiatric patients.....But the differences between the two categories of psychiatric patient should not be exaggerated...

28. As regards the differences between an informal psychiatric patient and one who is detained under the MHA, these are in many ways more apparent than real. It is true that the paradigm of a detained patient is one who is locked up in a secure hospital environment. But a detained patient may be in an open hospital with freedom to come and go. By contrast, an informal patient may be treated in a secure environment in circumstances where she is suicidal, receiving medication for her mental disorder which may compromise her ability to make an informed choice to remain in hospital and she would, in any event, be detained if she tried to leave. Informal in-patients can be detained temporarily under the holding powers given by section 5 of the MHA to allow an application to be made for detention under section 2 or section 3 of the MHA. The statutory powers of detention are the means by which the hospital is able to protect the psychiatric patient from the specific risk

of suicide. The patient's position is analogous to that of the child at risk of abuse in *Z v United Kingdom* 34 EHRR 97, paras 73–74, where the court placed emphasis on the availability of the statutory power to take the child into care and the statutory duty to protect children....

29. Although informal patients are not “detained” and are therefore, in principle free to leave hospital at any time, their “consent” to remaining in hospital may only be as a result of a fear that they will be detained. In *Principles of Mental Health Law and Policy*, (2010) ed Gostin and others, the authors have written in relation to admission, at para 11.03:

“Since the pioneering paper by Gilboy and Schmidt in 1979, it has been recognised that a significant proportion of [informal] admissions are not ‘voluntary’ in any meaningful sense: something in the range of half of the people admitted voluntarily feel coerced into the admission; it is just that the coercion is situational, rather than using legal mechanisms.”

30. As regards the voluntary psychiatric patient who is at risk of suicide and the patient suffering from a life-threatening physical illness who is in an “ordinary” hospital setting, the nature of the risk to which these two categories of patient are exposed is very different. In the case of the suicide of a psychiatric patient, the likelihood is that, given the patient's mental disorder, her capacity to make a rational decision to end her life will be to some degree impaired. She needs to be protected from the risk of death by those means. The present case is a tragic illustration of this. Melanie was admitted to hospital because she was suffering from a mental disorder and had attempted to commit suicide. The very reason why she was admitted was because there was a risk that she would commit suicide from which she needed to be protected. On the other hand, the patient who undergoes surgery will have accepted the risk of death on the basis of informed consent. She may choose to avoid the risk by deciding not to go ahead with the medical treatment.

.....

33. As I have said, the ECtHR has not considered whether an operational duty exists to protect against the risk of suicide by informal psychiatric patients. But the Strasbourg jurisprudence shows that there is such a duty to protect persons from a real and immediate risk of suicide at least where they are under the control of the state. By contrast, the ECtHR has stated that in the generality of cases involving medical negligence, there is no operational duty under article 2 .

34. So on which side of the line does an informal psychiatric patient such as Melanie fall? I am in no doubt that the trust owed the operational duty to her to take reasonable steps to protect her from the real and immediate risk of suicide. Whether there was a real and immediate risk of suicide on 19 April 2005 (and if so whether there was a breach of duty) is the second issue that arises on this appeal. But if there was a real and immediate risk of suicide at that time, of which the trust was aware or ought to have been aware, then in my view the trust was under a duty to take reasonable steps to protect Melanie from it. She had been admitted to hospital because she was a real suicide risk. By reason of her mental state, she was extremely vulnerable. The trust assumed responsibility for her. She was under its

control. Although she was not a detained patient, it is clear that, if she had insisted on leaving the hospital, the authorities could and should have exercised their powers under the MHA to prevent her from doing so. In fact, however, the judge found that, if the trust had refused to allow her to leave, she would not have insisted on leaving. This demonstrates the control that the trust was exercising over Melanie. In reality, the difference between her position and that of a hypothetical detained psychiatric patient, who (apart from the fact of being detained) was in circumstances similar to those of Melanie, would have been one of form, not substance. Her position was far closer to that of such a hypothetical patient than to that of a patient undergoing treatment in a public hospital for a physical illness. These factors, taken together, lead me to conclude that the ECtHR would hold that the operational duty existed in this case.”

46. Baroness Hale emphasised at para 100 that the risk being examined in that case was a risk of suicide. She observed at para 101 that there was a general obligation to take certain routine steps to try to prevent prisoners and other detainees from committing suicide, because the very fact of incarceration heightens the risk of self-harm. She expressed her conclusions in these terms:

“105. In the light of all this, there can be little doubt that the operational duty under article 2 is engaged in the case of a patient such as Miss Rabone. She was admitted to hospital precisely because of the risk that she would take her own life. The purpose of the admission was both to prevent that happening and to bring about an improvement in her mental health such that she no longer posed a risk to herself. The experts were agreed that for patients such as Miss Rabone, one of the most risky periods for further suicide attempts is within a week or so of beginning to recover. Her mental disorder meant that she might well lack the capacity to make an autonomous decision to take her own life. Although she was an informal patient, the hospital could at any time have prevented her leaving. Section 5(4) of the Mental Health Act 1983 empowers a suitably qualified nurse to authorise the detention of an informal patient who is receiving treatment for mental disorder for up to six hours if the nurse believes that the patient is suffering from mental disorder to such a degree that it is necessary for her health or safety for her to be immediately restrained from leaving the hospital and it is not practicable to secure the immediate attendance of a doctor or approved clinician who can act under section 5(2). Section 5(2) empowers a doctor or approved clinician to authorise detention for up to 72 hours if it appears appropriate that an application be made to detain her under the 1983 Act. The experts were agreed that it would have been appropriate to detain her under the 1983 Act if she had intended to leave the hospital without medical approval. The judge in fact found that she would not have done so.”

47. I would make three observations which are of relevance to the present case. The first addresses Mr Bowen’s submission that the existence of a real and immediate risk to life, of which the Trust was or ought to have been aware, is not an ingredient of the duty, but rather relevant only to its breach. Whether it is an element of duty or breach was not in issue in *Rabone*, but assumes potential relevance in the current case because of Mr Bowen’s submission that it was a necessary threshold for the existence of the automatic investigative duty that the circumstances were *capable* of giving rise to the

operational duty, but that that inquiry looked only at the nature of the risk, not whether it was one which the authority knew or ought to have known was immediate and real. His submission was that the reality and immediacy of the risk to life goes only to breach, not to duty. I find this impossible to reconcile with what Lord Dyson said in terms at para 21, namely that it was a necessary (but not sufficient) condition *of the existence of the duty*; and with his statement in para 34 that *if* there was a real and immediate risk of suicide of which the trust was aware, it was under a duty to take reasonable steps to protect Melanie from it. It also does not sit easily with his recital of the trust's argument at para 36 that "the risk was neither real nor immediate and in any event there was no breach of the operational duty". Lord Mance JSC included the reality and immediacy of risk amongst the other factors which went to the question of whether the duty arose, at para 118. The language used by Baroness Hale at para 107, on the other hand, might appear to treat it not as a question which went to whether the operational duty "was engaged" but whether it was broken. Lord Walker and Lord Brown agreed with all three judgments. Lord Rodger of Earlsferry clearly treated it as an ingredient of the duty in *Savage* at para 72 and *Mitchell v Glasgow City Council* [2009] 1 AC 874 at para 66.

48. This is consistent with principle because 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; until the specific risk to life has been identified, it is impossible to answer the duty question. Just as in the domestic tortious law of negligence it is not sufficient merely to ask, "Is there a duty" but rather, "Is there a duty not carelessly to inflict a particular type of damage?", so too the article 2 operational duty must be examined and defined as a duty to take reasonable steps to avoid the specific risk to life which is relevant in the circumstances of a given case. So a risk of death from natural causes is not one which necessarily or ordinarily attracts the operational duty even for detainees. It is not all risks to life, or even all risks to life within limited categories, which attract the duty, but only real and immediate risks to life in those categories of which the state agent is or ought to be aware. As will be seen, this approach derives further support from the Court of Appeal's decision in *R (Maguire) v Blackpool and Fylde Senior Coroner* [2020] 3 WLR 1268.
49. Secondly, I do not accept Mr Bowen's submission that *Rabone* is properly to be read as treating *all* voluntary psychiatric patients as falling into the same category for the purposes of the existence of the duty irrespective of their personal circumstances. Baroness Hale addressed the existence of the duty at para 105 by reference to Melanie's particular circumstances. Lord Dyson's observations at paragraph 28 identified ways in which there *might* be no distinction between the two categories, and he addressed his conclusion in para 34 by reference to a psychiatric patient "such as Melanie". In her case the power to impose involuntary detention, which the Court held should have been exercised, meant that the difference for her between a voluntary and involuntary patient was, as Lord Dyson put it, one of form, not substance. However that will not be so for every voluntary psychiatric patient. There is a spectrum, at the other end of which would be a patient for whom there are no medical grounds for statutory detention, in which it is made clear that there is no threat of detention if the patient chooses not to remain at the unit or to comply with the clinicians' plan as to times of absence. Such a patient, even if residing for much of the time in the hospital, may do so on a genuinely voluntary basis. Her choice may be just as unrestricted as if she were visiting as an outpatient; or as if she were an in-patient in a hospital suffering from a physical illness.



In principle, the approach to whether an operational duty is owed to an individual ought not to be a category exercise, unless it can be said that everyone in the category will share the characteristics which justify the imposition of the duty. That cannot, in my view, be said of all voluntary psychiatric patients.

50. Thirdly, the reasoning in *Rabone* is specific to the risk in issue in that case, namely suicide. Both Lord Dyson and Baroness Hale laid emphasis on the fact that Melanie was particularly vulnerable to the risk of suicide, which was the very reason she had been hospitalised; and both emphasised that her mental disorder impaired her capacity to make an autonomous decision about taking her own life.

*Lopes de Sousa Fernandes*

51. In *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 28 the Grand Chamber was concerned with a case of alleged medical negligence in relation to physical illness. It restated the principles that the operational duty did not apply to mere medical negligence in such cases save in two “very exceptional circumstances”, namely, first, “a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment”; and secondly “where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew or ought to have known about the risk and failed to undertake the necessary measures to prevent the risk from materialising, thus putting the patients’ lives, including the life of the particular patient concerned, in danger”. At paragraph 163 the Court said:

“163. The Court would emphasise at the outset that different considerations arise in certain other contexts, in particular with regard to the medical treatment of persons deprived of their liberty or of particularly vulnerable persons under the care of the State, where the State has direct responsibility for the welfare of these individuals (see, for example, *Slimani v. France*, no. 57671/00, ECHR 2004-IX (extracts), and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 143-44). Such circumstances are not in issue in the present case.”

*Fernandes de Oliveira*

52. *Fernandes de Oliveira* is the Strasbourg case decided by the Grand Chamber of most direct relevance to the current dispute, and merits close examination. It concerned the suicide of a man aged 36, AJ, who had been a voluntary in-patient in a psychiatric hospital on eight occasions. He was addicted to alcohol and prescription drugs and suffered from schizophrenia and depression. On 1 April 2000 he attempted to commit suicide and returned voluntarily to hospital under a restrictive regime. His condition improved sufficiently for him to be allowed to move within the grounds of the hospital. He spent Easter with his family but was taken by his mother on 25 April to the emergency department of the local hospital because he had consumed a very large amount of alcohol. He returned to the psychiatric hospital and to the same regime. He spent most of the day of 26 April in bed. At 16.00 on 26 April he was noted to be calm and strolling outside the pavilion where he resided. His mother was told that he was fine but he did not appear for dinner at 19.00. A search failed to find him by 20.00 when he was reported missing. It was not known when he left the hospital grounds, but he had in fact jumped in front of a train at a nearby station at 17.37.

53. A Chamber of the Strasbourg court found a violation of both the substantive and procedural limbs of article 2. It concluded that the risk of suicide should have been clear to the hospital staff and that they should have foreseen an attempt to leave the hospital. The state should have protected the deceased from the risk he posed to himself. It considered that there was no difference between a voluntary patient and one detained under mental health laws. The procedures on checking his whereabouts were inadequate and there was too ready access to a railway platform near the hospital.
54. In its assessment, the Grand Chamber noted, at para 103, that the case concerned “an alleged act of medical negligence within the context of a suicide during a period of voluntary hospitalisation in a state psychiatric institution”. It followed that two distinct positive obligations developed by the court might be engaged. First, the positive obligation “on the state to put in place a regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients’ lives”. Secondly, the positive obligation “to take preventive operational measures to protect an individual from another individual or ... from himself”. So far as the second obligation was concerned, the court referred to the well-known test derived from *Osman* that it must be established that the authorities knew, or ought to have known, of the existence of a real and immediate risk to the life of an identified person from the criminal acts of another; and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (para 109). It continued at para 110:
- “In a series of cases where the risk derived not from the criminal acts of a third party, but from self-harm by a detained person, the court found that a positive obligation arose where the authorities knew or ought to have known that the person posed a real and immediate risk of suicide. Where the court found that the authorities knew or ought to have known of the risk it proceeded to analyse whether the authorities did all that could reasonably have been expected of them to prevent that risk from materialising ... Thus, the court assesses whether, looking at all the circumstances of a given case, the risk in question had been both real and immediate.”
55. The Grand Chamber referred to para 116 of *Osman* in support of the proposition that this positive obligation should not be interpreted to impose a disproportionate burden on the authorities; and that accordingly, “not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising” (para 111). The Grand Chamber continued by reiterating the need for the authorities to discharge their duties in a manner which diminishes the risk of self-harm compatibly with the rights and freedoms of the individual concerned, without infringing personal autonomy, referring in this regard to articles 3, 5 and 8 ECHR.
56. At para 113 the Court said:
- “113. As regards mentally ill persons, the Court has considered them to be particularly vulnerable [footnote 30: see *Renolde v France* (2009) 48 EHRR 42 at [84]]. Where the authorities decide to place and keep in detention a person suffering from a mental illness, they should demonstrate special care in guaranteeing such conditions as corresponds to the person's special needs resulting from his or her disability. The same applies to persons who are placed

involuntarily in psychiatric institutions. [footnote 31 see *Hillier v Austria* (1967/14) 22 November 2016 at [48]”.

57. After addressing the framework obligation, The Court concluded that there was an operational duty to protect AJ as an involuntary psychiatric patient from the risk of suicide. Its essential reasoning is contained in para 124:

“124. There is no doubt that as a person with severe mental health problems A.J. was in a vulnerable position. The Court considers that a psychiatric patient is particularly vulnerable even when treated on a voluntary basis. Due to the patient’s mental disorder, his or her capacity to take a rational decision to end his or her life may to some degree be impaired. Further, any hospitalisation of a psychiatric patient, whether involuntary or voluntary, inevitably involves a certain level of restraint as a result of the patient’s medical condition and the ensuing treatment by medical professionals. In the process of treatment, recourse to further kinds of restraint is often an option. Such restraint may take different forms, including limitation of personal liberty and privacy rights. Taking all of these factors into account, and given the nature and development of the case-law referred to in paragraphs 108-115 above, the Court considers that the authorities do have a general operational duty with respect to a voluntary psychiatric patient to take reasonable measures to protect him or her from a real and immediate risk of suicide. The specific measures required will depend on the particular circumstances of the case, and those specific circumstances will often differ depending on whether the patient is voluntarily or involuntarily hospitalised. Therefore, this duty, namely to take reasonable measures to prevent a person from self-harm, exists with respect to both categories of patient. However, the Court considers that in the case of patients who are hospitalised following a judicial order, and therefore involuntarily, the Court, in its own assessment, may apply a stricter standard of scrutiny.”

58. The judgment went on to say at para 125 that it was therefore necessary for the Court to examine whether the authorities knew or ought to have known that AJ posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk. The conclusion on the facts was that the first of these two questions was answered in the negative so that the second did not arise.
59. Two aspects of the decision deserve emphasis. First, as in *Rabone*, the case was concerned with the risk of suicide, and must be interpreted in that light. The references to the special vulnerability of mental patients in paragraph 113 was in the context of their special vulnerability to the risk of suicide: the two footnoted cases, *Renolde* and *Hiller* were both suicide cases. Importantly, the duty was linked to the nature of the special needs to which the mental disability gave rise which the hospital was treating (“Where the authorities decide to place and keep in detention a person suffering from a mental illness, they should demonstrate special care in guaranteeing such conditions *as corresponds to the person's special needs resulting from his or her disability*”). The special needs of AJ, for which he was being cared for as a voluntary patient, were specifically protection from suicide, which was a major reason for his residence as an in-patient. The duty to protect against the suicide risk was linked to that being an aspect, indeed a major aspect, of the mental disability which gave rise to the hospital’s care for him as a resident.

60. Secondly, the factors identified in para 124 echo those identified in *Rabone* by Lord Dyson at para 34 and Baroness Hale at 105. However the factors are mostly expressed as those applicable to voluntary psychiatric patients generally as a category, rather than by specific reference to AJ's circumstances. This might support the view that the existence of an operational duty towards voluntary psychiatric patients was being treated as a category exercise, applicable to all voluntary psychiatric patients regardless of their individual circumstances. I would be reluctant to read it in this way. In fact the factors identified are not all expressed in terms divorced from a consideration of AJ's particular circumstances: there is reference to the specific severe mental health problems of AJ. More significantly, there is no reason to think that the general factors identified were not applicable in AJ's case, or that it would have made any difference whether this was a category approach or one identifying factors applying specifically to AJ. If the case were to be read as extending the duty to *any* voluntary psychiatric patient, the consequence would be to impose a duty outside the circumstances of that case, and where the circumstances underpinning the previous jurisprudence, namely detention or assumption of responsibility for welfare, as summarised in *Lopes de Sousa*, would be absent. It would, for example, apply to impose a duty to protect a psychiatric patient attending as an outpatient from fatal accidents of a kind which routinely occur in numerous working environments. The reference to the development of the case law at paragraphs [108] to [115] shows that this was clearly not the Court's approach.

### *Maguire*

61. In *Maguire*, the Court of Appeal upheld the dismissal of a claim for judicial review of a coroner's decision not to hold a *Middleton* inquest. The case concerned an adult with severe learning disabilities, Jackie, living in a residential care home, having been subject to the Deprivation of Liberty Safeguards ("DoLS") set out in Schedule A1 to the Mental Capacity Act 2005 pursuant to an authorisation by the local authority. She became seriously ill over the course of two days, and when transferred to hospital died of a perforated gastric ulcer and peritonitis, and pneumonia.
62. Lord Burnett CJ, giving the judgment of the court, referred to the medical cases relating to physical and mental illness, including a close examination of *Rabone*, *Lopes de Sousa* and *Fernandes de Oliveira*. At its conclusion he referred to Lord Dyson's concluding observation in *Rabone* that "the Strasbourg jurisprudence shows that there is such a duty to protect persons from a real and immediate risk of suicide at least where they are under the control of the state" and said of it at para 48:
- " This last observation is important. The operational duty under article 2 rests on the state. One of the features of the medical cases is that the Strasbourg court has taken care to ensure that any breach of this duty must be linked to state responsibility...."
63. Lord Burnett CJ referred to *Tyrrell v HM Senior Coroner for County Durham and Darlington* (2016) 153 BMLR 208, in which he had given the judgment of the Divisional Court, which was a case concerning the investigative duty, and to which I will return in that context. At paragraphs 70 to 76 he said:
- "70. The underlying argument of the claimant is that the undeniable vulnerability of an individual in Jackie's position, coupled with the fact of a DoLS authorisation dictates that she was owed the operational duty under article 2 of the ECHR .....

71. It is important, however, to focus on the scope of any such duty and why it might be owed.

72. The Divisional Court was right to identify the unifying feature of the application of the operational obligation or duty to protect life as one of state responsibility. That, for example, is the theme which emerges from the Strasbourg authorities discussed in *Tyrrell* 153 BMLR 208 and supports the conclusion that the article 2 procedural obligation does not apply to cases of deaths in custody arising from natural causes. In both *Nencheva v Bulgaria* CE:ECHR: 2013: 0618JUD004860906 and *Centre for Legal Resources on behalf of Câmpeanu v Romania* 37 BHRC 423 (noted in para 38 above) the substantive article 2 duty owed to the people concerned was to protect from a type of harm entirely within the control of those who cared for them. They were in the institutions to be cared for. In *Nencheva* the Bulgarian state was in breach of its positive obligation for failing to take prompt action to protect the lives of young people in a residential care home where 15 disabled children died. The authorities were aware of the appalling conditions in the care home and of an increased mortality rate (paras 121–123). In *Câmpeanu*, the Grand Chamber concluded that the domestic authorities knew that the facility in which the deceased was kept lacked proper heating and food, had a shortage of medical staff and resources and inadequate supplies of medication. That led to an increased mortality rate. It found:

“143. ... in these circumstances, it is all the more evident that by deciding to place Mr Câmpeanu in the PMH, notwithstanding his already heightened state of vulnerability, the domestic authorities unreasonably put his life in danger. The continuous failure of the medical staff to provide Mr Câmpeanu with appropriate care and treatment was yet another factor leading to his untimely death.

144. The foregoing considerations are sufficient to enable the court to conclude that the domestic authorities have failed to comply with the substantive requirements of article of the Convention, by not providing the requisite standard of protection for Mr Câmpeanu's life.”

73. Both the prison cases and those concerning conditions within an institution where vulnerable people are cared for demonstrate that the article 2 substantive obligation is tailored to harms from which the authorities have a responsibility to protect those under its care. It cannot be supposed that if a child in a care home or an adult in a position such as Mr Câmpeanu had suffered an isolated medical emergency that the substantive obligation would have applied to the manner in which that was dealt with. The reasoning of the Strasbourg court which supported the imposition of the operational duty would not apply.

74. The argument advanced before the coroner, the Divisional Court and us was largely structured around a binary question: is this a *Rabone* case or a *Parkinson* case? That, however, is not the approach of the Strasbourg court. The fact that an operational duty to protect life exists does not lead to the conclusion that for all purposes the death of a person owed that duty is to be judged by article 2 standards.

75. The need to determine the nature or scope of any operational duty owed under article 2 becomes clear in the reasoning of the Strasbourg court in *Dumpe v Latvia CE:ECHR:2018:1016DEC007150613*. The applicant's contention was that her son had been the subject of protracted sub-standard medical attention for some time both in the home in which he resided and also at the hands of a general practitioner. He was, of course, vulnerable as a result of his impaired intellectual functioning and his mental illness. Indeed, his circumstances are not dissimilar from those of Jackie. He was also restricted in his liberty, as is clear from the use of the language of "escape", although there is no discussion in the judgment of whether Latvia has an equivalent of DoLS as part of its legal system. The court decided that the facts in *Dumpe* supported the conclusion that it was a medical case in the sense discussed in *Lopes de Sousa 66 EHRR 28*. That was despite the underlying suggestion that the failures in treatment and care were not isolated. There was no breach of the operational duty owed under article 2. The operational duty did not apply to the provision of medical treatment to someone in a care home. Had the death resulted from neglect or abuse of the sort in play in *Nencheva CE:ECHR:2013:0618JUD004860906* and *Câmpeanu 37 BHRC 423* the position would have been different. It followed that the procedural obligation imposed by article 2 was not of the sort discussed in *Middleton* and with which we are concerned, namely the parasitic procedural obligation to investigate when a credible suggestion is made that the state has breached its substantive article 2 obligations. The procedural obligation in a medical case is to set up an effective judicial system to determine liability.

76. A similar approach is apparent in the military cases discussed by Lord Dyson JSC in *Rabone* and from the discussion in the Supreme Court in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1. That concerned the death from hyperthermia of a soldier on active service in Iraq. The substantive obligation is owed to protect soldiers from some hazards but not all: see, for example, Lord Rodger of Earlsferry JSC at paras 126 and 127."

64. At paragraphs 96 and 97, in applying the principles he had identified, he said that the question whether an operational duty under article 2 was owed to Jackie was not an abstract one which delivers a "yes" or "no" answer in all circumstances. It was necessary to consider the scope of any operational duty.
65. I derive three important and related points from this analysis. First, the existence or otherwise of the operational duty is not to be analysed solely by reference to the relationship between the state and the individual, but also, and importantly, by reference to the type of harm of which the individual is foreseeably at real and immediate risk. This follows from the operational duty to protect life having the unifying feature of being one of state responsibility, and the need to focus on the scope of the duty which may be owed. There may be an operational duty to protect against some hazards but not others.
66. Secondly, the foreseeable real and immediate risk of the type of harm in question is a necessary condition of the existence of the duty, not merely relevant to breach. Without identifying such foreseeable risk of the type of harm involved, it is impossible to answer the question whether there is an operational duty to take steps to prevent it.

67. Thirdly, in cases where vulnerable people are cared for by an institution which exercises some control over them, the question whether an operational duty is owed to protect them from a foreseeable risk of a particular type of harm is informed by whether the nature of the control is linked to the nature of the harm. A prison's control over its inmates gives rise to an obligation to protect its detainees against suicide risks because, as Baroness Hale observed in *Rabone*, the very fact of incarceration increases such a risk. The control is linked to the risk. So too in the case of detained mental patients, where the detention gives rise to the increased risk of suicide whatever the nature of the mental condition being treated. The same is true of voluntary mental patients in relation to the risk of suicide where their residence at the institution is not truly voluntary if and because the mental condition for which they are being treated itself enhances the suicide risk. It does so not only as the potential result of incarceration, if not truly voluntary, but often also because, as was identified in both *Rabone* and *Fernandes de Oliveira*, the mental condition which the institution assumes control for treating impairs the patient's capacity to make a rational decision whether to take their own life. The nature of the control is again linked to the risk of harm. Where, however, there is no link between the control and the type of harm, to impose an operational duty to protect against the risk would be to divorce the duty from its underlying justification as one linked to state responsibility. It would also undermine the requirement identified in *Osman* that the positive obligations inherent in article 2 should not be interpreted so as to impose a disproportionate burden on a state's authorities. The control by the state could not justify the imposition of the duty by reference to state responsibility if the risk were of a type of harm which is unconnected to the control which the state has assumed over the individual. A psychiatric hospital owes no duty to protect a patient, whether voluntary or detained, from the risk of accidental death from a road traffic accident whilst on unescorted leave.

### ***The investigative duty***

#### *Amin and Middleton*

68. The existence and scope of the investigative duty was identified and expounded by Lord Bingham of Cornhill in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 and *Middleton*. In *Middleton*, having referred in paragraph 1 to the negative duty not to take life without justification, and the framework duty, Lord Bingham expressed the investigative duty in these terms:

“The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been or may have been violated and it appears that agents of the state are, or may be, in some way implicated.”

69. This is the enhanced investigative duty. Its content is flexible and depends upon the circumstances in which it is to be applied, but it is sufficient for the present case to take the summary given by Lord Phillips of Worth Matravers in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1 at paragraph 64:

“64. The procedural obligation requires a state, of its own motion, to carry out an investigation into a death that has the following features: (i) It must have a sufficient element of public scrutiny of the investigation or its results. (ii) It must be conducted by a tribunal that is independent of the state agents who may bear some responsibility for the death. (iii) The relatives of the deceased must be able to play an appropriate part in it. (iv) It must be prompt and effective. This means that it must perform its essential purposes. These are to secure the effective implementation of the domestic laws which protect the right to life and to ensure the accountability of state agents or bodies for deaths occurring under their responsibility. These features are derived from the Strasbourg jurisprudence, as analysed in the *Middleton* case and *R (L (A Patient)) v Secretary of State for Justice* [2009] AC 588. I shall describe an investigation that has these features as an “article 2 investigation”.

70. The way in which the State in England and Wales fulfils its enhanced investigative duty, when it arises, is usually by holding an inquest. It does so by the inquest asking and answering the question “in what circumstances” the deceased died, thereby broadening the scope of the traditional coronial inquiry (see *Middleton*, para 20 and 35) as now reflected in the language of s. 5(2) of the CJA 1999. This is what is commonly called a *Middleton* inquest, in contrast to that where the enhanced investigative duty does not arise, in which the questions answered are limited to those identified in section 5(1) of the 2009 Act. The latter is commonly referred to as a *Jamieson* inquest. In many instances, of which the current case is an example, there will be no practical difference in the scope of the inquiry conducted at a *Jamieson* inquest from that at a *Middleton* inquest. There are however two practical consequences of the inquest being a *Middleton* one pursuant to the enhanced investigative duty. One is that the questions answered in the conclusion will include an identification of “in what circumstances” the death occurred, which will permit an opinion on fault by way of narrative. The second is that generally legal aid is available to the family of a deceased in a *Middleton* inquest, but not a *Jamieson* inquest.
71. A coronial investigation is not the only means, however, by which the investigative duty may be discharged in this country. There may be a sufficient public examination by a public inquiry or in criminal proceedings, and there are some types of case in which a coroner’s inquest is not the correct medium for the inquiry: see *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189 per Lord Brown at para 48 and *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC per Lord Phillips at para 81. Moreover, as Lord Phillips observed in *Smith* at para 85, where a death occurs in circumstances involving a public authority, an in-house investigation will often precede the inquest and provide valuable information to assist the inquest.
72. Both *Middleton* and *Amin* were cases involving the death of a prisoner in custody, in one case by suicide and the other murder by a cellmate. In that context Lord Bingham emphasised at paragraph 30 of *Amin* that “the state owes a particular duty to those involuntarily in its custody” and described the purposes of the investigative duty at paragraph 31:
- “31. The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom* (Application No 47916/99) (unreported) 6 May 2003, p 13. It can fairly be



described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”

73. Lord Bingham said at paragraph 5 of *Middleton*, after recording the very high rates of suicide in custody:

“These statistics, grim though they are, do not of themselves point towards any dereliction of duty on the part of the authorities (which have given much attention to the problem) or any individual official. But they do highlight the need for an investigative regime which will not only expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations. The death of any person involuntarily in the custody of the state, otherwise than from natural causes, can never be other than a ground for concern. This appeal is concerned with the death of a long-term convicted prisoner but the same principles must apply to the death of any person in the custody of the prison service or the police.”

74. These formulations of the purpose of the investigative duty have two distinct aspects. One is the holding to account of state agents and exposing any culpable conduct, or dispelling unjustified suspicions of it. This is aligned with possible breaches by the state of its substantive obligations, in a way to which I will return. The other, as Lord Walker emphasised in *L's case* at para 87, is a wider purpose in identifying from experience lessons which may be learned, so as to rectify deficient practices and procedures and, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations. The two purposes engage different aspects of the article 2 duties: the first is concerned with exposing breaches of the substantive duties in relation to the death which has occurred; the second is concerned with the framework or systems duty to protect against subsequent deaths which have not occurred. This is explicit in the ECtHR judgment in *Jordan v United Kingdom* (2001) 37 EHRR 52 at para 105, which Lord Bingham cited at paragraph 20(5) of *Amin*, explaining the essential purpose of the investigative duty as being:

"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..."

75. Lord Bingham's formulation in *Middleton* identifies the duty as arising when there is a sufficiently arguable breach by the state of one of its substantive obligations (“it appears that [a substantive obligation] has been or may have been violated”). Different expressions have been used to describe this arguability threshold. In *R (AP) v HM Coroner for the County of Worcestershire* [2011] EWHC 1453 (Admin) Hickinbottom

J said at para 60 that arguable in this context means anything more than fanciful. The threshold was expressed in different language by Lord Burnett CJ in *Maguire* at para 75 where he said: "...the procedural obligation imposed by article 2....with which we are concerned [is]..the parasitic procedural obligation to investigate when a credible suggestion is made that the state has breached its substantive article 2 obligations." This threshold is a low one because to impose a more onerous burden would run the risk of the coroner determining, in advance of the full evidential picture, what the outcome of any inquest might be. Nevertheless it must amount to more than mere speculation. There must be a real evidential basis which makes the suggestion of a breach of a substantive obligation by the state a credible one. As I explain below, in certain categories of circumstances where the duty arises automatically, of which suicide of a prisoner in custody is a paradigm example, that threshold is reached by the legitimate suspicion of such a breach which necessarily arises in all such cases.

76. In *Amin*, Lord Bingham had identified the investigative duty as having been developed by the Strasbourg jurisprudence mainly by reference to cases in which there had been a killing by state agents. At paragraph 20 he identified a number of important propositions established by that jurisprudence, which included:

"(2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight: para 192 of the opinion of the Commission in *McCann*, set out at pp 139-140.

(3) As it was put in *Salman*, para 99:

"Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies."

Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred: *Salman* , para 100; *Jordan* , para 103.

77. The references in paragraphs 20(2) and (3) to the imbalance of knowledge of the circumstances of the death are, to my mind, significant: one of the important factors underlying the imposition of the investigative duty on the state is that the facts surrounding a death, and whether or not the state is implicated in the sense of whether there is or may be a breach of the state's substantive obligations, is often a matter

peculiarly within the knowledge of the state authorities. It is therefore natural to impose upon them a duty of investigation and explanation.

78. Lord Bingham explained in *R (Gentle) v Prime Minister* [2008] AC 1356 at paras 5-6 that the procedural duty is implied in order to make sure that the substantive duty is effective in practice. It is parasitic upon the existence of the substantive right, and cannot exist independently:

“5. This substantive obligation derived from article 2 has been supplemented by a procedural obligation, the effect of which the House also summarised in the *Middleton* case, para 3: [which was then quoted]. This procedural duty does not derive from the express terms of article 2, but was no doubt implied in order to make sure that the substantive right was effective in practice. There have again been further decisions on the procedural obligation, but it is not suggested that any modification of the summary is called for. In the *Middleton* case the House was required to consider whether the rules and authorities formerly governing inquests permitted the coroner to conduct an inquiry which fulfilled the UK's procedural obligation under article 2. It held that in some cases they did not. In such cases, the House ruled, the question “how, when and where the deceased came by his death” should be understood to mean “when, where and by what means and in what circumstances the deceased came by his death”: see para 35. In later Strasbourg authorities this approach has not been criticised as failing to meet the UK's obligation under article 2.

6. It is the procedural obligation under article 2 that the claimants seek to invoke in this case. But it is clear (see the *Middleton* case [2004] 2 AC 182, para 3, *Jordan v United Kingdom* (2001) 37 EHRR 52, para 105; *Edwards v United Kingdom* (2002) 35 EHRR 487, para 69; *In re McKerr* [2004] 1 WLR 807, paras 18–22) that the procedural obligation under article 2 is parasitic upon the existence of the substantive right, and cannot exist independently. Thus to make good their procedural right to the inquiry they seek the claimants must show, as they accept, at least an arguable case that the substantive right arises on the facts of these cases. Unless they can do that, their claim must fail.”

79. We will see that in the context of an automatic enhanced investigative duty under consideration in *Smith*, both Lord Hope of Craighead (at para 97) and Lord Mance JSC (at para 200), reaffirmed this parasitic nature of the enhanced investigative duty, and that it cannot exist independently of a substantive duty.

#### *L's case*

80. *L's case* was one in which a prisoner attempted to hang himself while on remand, as a result of which he suffered permanent brain damage. The prison service conducted an internal investigation. The investigators submitted a written report to the prison service area manager which was not published. The claimant challenged the decision of the Secretary of State not to conduct a further enhanced investigation. The Secretary of State resisted the claim on the basis that the enhanced investigative duty did not arise unless there was an arguable case that the prison authorities were in breach of their substantive duty to protect life and that, since that threshold had not been reached, the internal investigation was appropriate. The Judge had not been asked to address what form an enhanced investigation would take, if required, but merely to decide whether

there was a duty to conduct one. Since the suicide attempt was unsuccessful it would not be an inquest.

81. Lord Phillips reviewed the Strasbourg authority as it had developed in relation to the procedural investigative duty, noting that it had only been considered by the Strasbourg court in conjunction with a primary complaint of a breach of a substantive obligation. At para 26 he observed that the procedural investigative duty can arise where there is no question of the involvement of a state agent, citing as an example *Menson v United Kingdom* (2003) 37 EHRR CD 220 in which the ECtHR had held there to be a duty of some form of official investigation into the death of a black man who had been set on fire during a racist attack on him. Lord Phillips treated this as an investigative duty which itself arose as a positive article 2 duty on the state: it was part of its framework duty to have effective criminal law provisions to deter the commission of offences backed up by the law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. Having referred to what Lord Bingham had said in *Amin* about the purposes of an article 2 investigation, and what he had said in *Gentle*, Lord Phillips rejected the suggestion that they should be taken as supporting the submission for the Secretary of State that a state never has an obligation to carry out an investigation into a life-threatening incident unless there is reason to believe that state agents have failed to perform the substantive article 2 obligations. One of the purposes of an article 2 investigation was to learn lessons from near misses in order to fulfil the framework duty. At paragraph 39 Lord Phillips identified the substantive systemic obligation on prison authorities to protect against the suicide risk to prisoners, and endorsed the reasoning of Lord Hope in *R (Sackler) v West Yorkshire Coroner* [2004] 1 WLR 796 that where a suicide takes place, the facts must be carefully, thoroughly and impartially investigated in order to open up the death to public scrutiny, not only to ensure that those who were at fault are made accountable but also for the part it has to play in the correction of mistakes and search for improvements.
82. Lord Phillips' reasoning identifies that the investigative duty may arise as a procedural or a substantive one. It may, as in *Menson*, be part of the framework duty, itself a substantive obligation, for the purposes of learning lessons to protect life in the future. Alternatively, it may be procedural in the parasitic sense used in *Gentle*, which is that it is to be implied into the substantive obligations of state agents, in order to make sure that such substantive obligations are effective in practice. This duality is not always apparent in the language of subsequent authorities, which often refer to the investigative duty simply as a procedural obligation. Indeed that was how it was referred to by Lord Bingham in *Middleton*, notwithstanding that his exposition of the rationale for the duty in *Amin* and *Middleton*, which I have quoted above, recognised that it was in part required in order to fulfil the substantive framework duty of learning lessons.
83. Lord Rodger of Earlsferry addressed the issue without making the distinction between a substantive duty and a procedural one. At paragraph 58 he recited the argument on behalf of the Secretary of State that, since the obligation on the prison authorities to protect a prisoner from himself is not absolute and so only arises in particular circumstances, a suicide can occur without there having been any breach of the authorities' article 2 obligation to protect him; and therefore there did not need to be an independent investigation unless there was some positive reason to believe that the authorities had indeed been in breach of their obligation to protect the prisoner. He rejected the argument in these terms:

”59. That argument is mistaken. Whenever a prisoner kills himself, it is at least *possible* that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world, without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong. In this respect a suicide is like any other violent death in custody. In affirming the need for an effective form of investigation in a case involving the suicide of a man in police custody, the European court held that such an investigation should be held when a resort to force has resulted in a person’s death: *Akdogødu v Turkey*, para 52. (emphasis in original).

60. In *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, another case of a suicide in custody, at p 191, para 3, Lord Bingham of Cornhill summarised the jurisprudence of the European court as imposing an obligation to hold an independent investigation if “it appears that one or other of the . . . substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way, implicated”. Mr Giffin suggested that Lord Bingham’s formulation was inconsistent with there being a requirement for an independent investigation in all cases of suicide in custody. I do not agree. In summarising the case law, Lord Bingham was recognising that, where the circumstances of a prisoners death in custody indicate that the substantive obligations of the state may have been violated, any violation, whether due to a systemic or operational failure, will necessarily have involved members of the prison service in one capacity or another. An independent investigation is therefore required to see whether there was, in fact, a violation.”

84. This reasoning treats the investigative duty in the case of suicides in prison as a procedural duty parasitic on the substantive systemic and operational duties to protect prisoners from suicide, but as engaged by the mere possibility of a substantive breach of the latter. What is said to trigger the procedural investigative obligation is the possibility of state agent substantive responsibility, whether systemic or operational, which is present in every case of a suicide in custody.
85. Lord Mance stated that he was in general agreement with all the other judgments and expressed his conclusion at paragraph 113 in these terms:

“113. In common, I understand, with all of your Lordships, I would reject the Secretary of State’s submission that an article 2 investigation is only required where the state is in arguable breach of its substantive article 2 duty to protect life, in the sense that it ought arguably to have known of a real and immediate risk of a prisoner committing suicide and failed to take out reasonable preventive measures. While it is dangerous to generalise and I confine myself for the present to circumstances such as those of the present case, I agree that the relationship between the state and prisoners is such that the state is bound to conduct an article 2 compliant inquiry whenever its system for preventing suicide fails and as a result the prisoner suffers injuries in circumstances of near-suicide significantly affecting his or her ability to know, investigate, assess and/or take action by him- or herself in relation to what has happened.”

86. The reference to a failure in a system of preventing suicide echoes Lord Rodger's rationale that it is the possibility of a breach of this systemic duty which is of importance to the existence of the automatic duty of investigation, and suggests that he too was treating it as the parasitic procedural obligation.
87. Lord Walker and Lord Brown gave concurring judgments which do not identify whether the rationale for imposing the enhanced investigative duty was limited to it being a procedural obligation parasitic on a breach of a substantive operational duty.
88. Both Lord Rodger and Lord Mance also emphasised the imbalance of knowledge to which Lord Bingham had referred at paragraphs 20(2) and (3) of *Middleton*.

*Smith*

89. In *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1, a nine Justice constitution of the Supreme Court was concerned with whether there was a duty to hold a *Middleton* inquest into the death of a soldier from hyperthermia when serving at a military base in Iraq. There were two issues. The first was whether the Convention applied to the extraterritorial service in that particular case; the second was whether, if so, the enhanced investigative duty arose in the circumstances of the case. On the first issue the Court decided by a majority that the Convention did not apply. On the second issue it unanimously decided that the enhanced investigative duty would have arisen if the Convention had applied, not automatically by reason of it being a death during military service, as the claimant argued, but because the evidence before the coroner raised a sufficient possibility of systemic failure by the military authorities to protect soldiers from the risk posed by the extreme temperatures in which they had to serve.
90. Lord Phillips gave the leading judgment on the second issue, with which a majority expressly agreed (Lord Walker, Lord Brown, Lord Collins of Mapesbury, Lord Kerr of Tonaghmore and Baroness Hale of Richmond); there were concurring judgments from Lord Hope, Lord Rodgers and Lord Mance.
91. At paragraph 70 to 72 Lord Phillips said:

“70. The duty to hold an article 2 investigation arises where there are grounds for suspecting that a death may involve breach by the state of one of the substantive obligations imposed by article 2. This raises the question of how the state is to identify that there are grounds for such suspicion. Any effective scheme for protecting the right to life must surely require a staged system of investigation of deaths, under which the first stage takes place automatically in relation to every death, whether or not there are grounds for suspecting that there is anything untoward about the death. Where the first stage shows that the death has not, or may not have, resulted from natural causes, there will be a requirement for a further stage or stages of the investigation. The requirement for an article 2 investigation will only arise if the preceding stage of the investigation discloses that there is a possibility that the state has not complied with a substantive article 2 obligation.

71. In the United Kingdom such a staged system of investigating deaths exists. All deaths are required to be registered under the Births and Deaths Registration Act 1953. Registration requires a death certificate certifying the cause of death from a doctor or coroner. Where there is doubt as to whether the death is due to natural

causes, it will be reported to a coroner. He then decides whether further inquiries need to be carried out. These may take the form of a post-mortem examination or an inquest. Section 8 of the Coroners Act 1988 requires a coroner to hold an inquest where the body of a person is lying within his district and there is reasonable cause to suspect that the deceased has died a violent or an unnatural death, has died a sudden death of which the cause is unknown or has died in prison or in such place or in such circumstances as to require an inquest under any other Act.

72. The inquest was designed to perform a fact finding role. It was not intended necessarily to be the final stage of the investigation. Its mandate expressly excludes determining civil or criminal liability. It is, however, being used as the appropriate process for determining whether there has been a violation of the state's article 2 obligations.

92. This is an important passage which reaffirms the dual nature of the investigative duty cast on the state by article 2. What Lord Phillips was calling the article 2 duty as he had defined it in paragraph 64, which is what I have called the enhanced investigative duty, is not the only investigative duty imposed on the state by article 2. There is a substantive obligation on the state to investigate every death, irrespective of its circumstances, as part of the framework duty (“Any effective scheme for protecting the right to life must surely require a staged system of investigation of deaths, under which the first stage takes place automatically in relation to every death, whether or not there are grounds for suspecting that there is anything untoward about the death.”) This is fulfilled by the procedures identified in paragraph 71 (to which the Coroners Act 2009 has not made changes of any materiality for present purposes), which may not require an inquest at all, as for example with certified registrations of deaths from natural causes. This substantive investigative duty is distinct from any enhanced procedural duty, both in its content and its juridical basis. It is also distinct temporally. It arises immediately upon death, and may be the precursor which informs whether subsequently the enhanced procedural obligation arises.
93. At paragraph 84 Lord Phillips said:
- “84. The obligation to hold an article 2 investigation is triggered by circumstances that give ground for suspicion that the state may have breached a substantive response.”
94. Lord Hope referred to the trigger being the possibility of breach of a substantive obligation, echoing the words of Lord Rodger in *L’s case*, when he said at paragraph 98:
- “98. Some situations in which the procedural obligation is triggered are now well recognised. The suicide of an individual while in the custody of the state is the prime example. It has been extended to the case where a prisoner attempted to commit suicide while in custody and suffered brain damage: *R (L (A Patient)) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2009] AC 588. This is because it has been recognised that prisoners as a class present a particular risk of suicide and because those who have custody of them, as agents of the state, are or may be in some way implicated. *A Middleton*

inquest is required in all these cases, because it is at least possible that the prison authorities failed to take the steps to protect the prisoners life that the substantive right requires. As Lord Rodger of Earlsferry said in *Ls* case, para 59, suicide is in this respect like any other violent death in custody. The procedural obligation extends to prisoners as a class irrespective of the particular circumstances in which the death occurred. The fact that they are under the care and control of the authorities by whom they are held gives rise to an automatic obligation to investigate the circumstances. The same is true of suicides committed by others subject to compulsory detention by a public authority, such as patients suffering from mental illness who have been detained under the Mental Health Acts: *Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2009] AC 681. This approach has the merit of clarity. Everyone knows from the outset that the inquest in these cases must follow the guidance that was given in *Middleton's case* [2004] 2 AC 182, paras 36—38.”

95. Lord Mance at para 210 identified the categories of case in which the Strasbourg and domestic jurisdiction had clearly established that “the substantive right contained in article 2 has been held to be *potentially* engaged, with the result that the procedural obligation has been held to exist” (my emphasis); these were killings by state agents, suicides or near suicides in custody, suicides by conscripts and mental health detainees, and other situations where the state has a positive obligation to protect life, such as *Osman*. At paragraph 211 he referred to the procedural obligation arising in these cases because the deaths “either of their inherent nature or in their particular circumstances involved the state’s responsibility under article 2.” In para 212 he again framed the issue as being whether the circumstances involved a *potential* breach of a substantive article 2 obligation. He explained what this meant at paragraph 215:

“215 The European Court of Human Rights jurisprudence summarised in para 210 above, is focused on deaths where, because of the nature or context (whether general or specific) of the death, the state can, without more, be said realistically to have some form of responsibility and in particular where it may alone have sufficient relevant knowledge to identify and establish the cause of the death or near death. Whether it can be said that such responsibility potentially exists in other cases depends upon their particular circumstances. The significance of a state having exclusive knowledge of the relevant events appears to be that this tends to open up a possibility of state involvement and a corresponding need for public investigation to exclude or establish that possibility. Nothing in the case law, and nothing in principle, establishes or indicates that the duty extends to every death of every active soldier on active service.”

96. Four points may be noted about the decision in *Smith*. First, the Court was unanimous in rejecting the argument that the investigative duty arose whenever there was a death of a soldier on active service, because such deaths might occur without any breach of a substantive article 2 duty. The judgments make clear that it is only where the death falls into a category in which the death *necessarily* raises the possibility of a substantive breach that an automatic enhanced investigative duty may be triggered. For these purposes it is necessary to focus not only on the relationship between the individual and the state authorities, but upon the circumstances of the death itself.



97. Secondly, this is a category exercise. Where a category of circumstances gives rise to a sufficient possibility of state responsibility *in all cases*, the automatic duty is triggered.
98. Thirdly, the automatic duty in question was treated as being the parasitic procedural duty and was justified by reference to the potentiality of state responsibility for the death in question. *Smith* and *L's* case, and the authorities establishing categories where an automatic enhanced investigative duty arises, might conceptually be justified by reference either to the substantive framework duty or the parasitical procedural obligation. The need to investigate and explain deaths or near deaths in custody from suicide or attempted suicide engages the substantive framework duty because of the need to learn lessons and protect the life of others; it also engages the parasitic procedural duty if they are suspicious, because they necessarily give rise to a sufficient possibility of substantive breach of the systemic and/or operational duty. Although conceptually the justification for imposing an automatic enhanced investigative duty might be found in the substantive framework duty to protect against future deaths, that was not the basis adopted in *Smith*. Lord Phillips identified the test as being grounds for suspicion of a substantive breach. Lord Hope treated the death in custody cases as an example of where an investigative duty arose because of the possibility of a breach of substantive duty in every case. Lord Mance treated them as an example of circumstances in which the death raised the potential liability of the state for a substantive breach without more. The concept of legitimate suspicion was identified in *Finogenov v Russia* (2015) 61 EHRR in which state agents had stormed a theatre to rescue hostages, with the use of narcotic gas, and a number of the hostages died or were injured as a result of what were alleged to be state failings. At para 273 the Court said that the duty to have an effective investigation arose where it was “legitimate to suspect” that some of the victims died as a consequence of an ineffective rescue operation, going on to emphasise the imbalance of knowledge which required the authorities to carry out an effective official investigation in order to provide a satisfactory and convincing explanation for the victim’s deaths.
99. All these formulations treat the enhanced investigative duty as a procedural one, parasitic upon a sufficiently arguable breach of a substantive systemic/operational duty in all cases of suspicious deaths. Lord Phillips did so in maintaining the distinction in paragraphs 70 – 72 from the substantive investigative duty which arises in all cases to fulfil the framework duty, and treating the trigger at para 84 as grounds for suspicion of substantive breach. Lords Hope and Mance did so in tying the duty to a possibility or potentiality of state responsibility by way of breach of its substantive operational/systems duties at paragraphs 98 and 211, 212 and 215, and by both emphasising (Lord Hope at para 97 and Lord Mance at para 200) that *Gentle* established that the procedural obligation depends upon the substantive right and cannot exist independently of it.
100. It follows that the juridical basis for the existence of the automatic cases under consideration was not treated as being the wider learning lessons rationale expressed in *Middleton* and *Amin*, which is concerned with a framework duty to protect others from death. It was treated in *Smith*, as it had been by Lord Rodger and Lord Mance in *L's case*, as being the potentiality of state responsibility for the deaths or near deaths which had already occurred. The procedural duty arises in the case of suspicious deaths in custody, not deaths from natural causes; and it does so automatically because all such

deaths raise a sufficient possibility of state responsibility to require the enhanced investigation: suspicious deaths in custody are simply a category of case in which it is sufficiently arguable, in every case and without more, that there has been a breach by the state of one of its substantive article 2 obligations. That is what is meant by a suspicious death.

101. Fourthly, I do not see any practical difference between the various formulations of the trigger for the enhanced investigative duty where it arises automatically. Lord Hope treated such cases as an example of where an investigative duty arose because of the *possibility* of a breach of substantive duty *in every case*. Lord Mance treated them as an example of circumstances in which the death raised the *potential* liability of the state for a substantive breach *without more*. Lord Phillips identified the trigger as being *grounds for suspicion* of a substantive breach. *Finogenov v Russia* adopted the concept of *legitimate suspicion* of state responsibility. Each recognises that a suicide in custody case always meets a threshold of arguability of a breach of substantive obligations by the state. In such cases there are always reasonable grounds for suspicion of a breach by state agents of the systems or operational duty which require an investigation by persons independent of those agents if the suspicion is to be dispelled. It is this possibility or potentiality which triggers the enhanced investigative duty when it arises automatically. That is so because of the circumstances of death “without more” as Lord Mance put it, and because the imbalance of knowledge makes it impractical to place the burden on anyone other than the state authorities in assessing whether the arguability threshold is met. Possibility, potentiality and grounds for suspicion are different ways of expressing this single concept.
102. Nor do I regard that threshold of arguability as any different from the relatively low threshold which arises outside the category of cases giving rise to an automatic duty, where there is, for example, an arguable breach of the positive operational *Osman* duty in the particular circumstances of an individual death. The latter arises where, in the words of Burnett CJ in *Maguire*, a breach can credibly be suggested. The suggestion of a breach will always be a credible one in the suicide in custody cases: the circumstances give rise to a reasonable suspicion of breach, which possibly or potentially arises in every such case. These different expressions (grounds to suspect, legitimate suspicion, possibility, potential, more than fanciful, credible suggestion) are, in my view, simply alternative ways of expressing a single concept of a single threshold of arguability. It is a concept which is similar to the domestic test for summary judgment, keeping in mind that in the article 2 investigative duty context the test often falls to be applied at an early stage when the evidence is all in the hands of the state authorities (a factor also taken into account in the summary judgment jurisprudence: the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550).
103. I therefore regard *Smith* and *L's case* as suggesting that the category of cases in which the enhanced investigative duty arises automatically can be fully assimilated with those in which it does not arise automatically. Each depends upon a sufficiently arguable breach of a substantive obligation by state agents. The difference is that in the automatic cases, such arguable breach is automatically established by the circumstances being such that the threshold will necessarily be met in every case falling within the

category at the moment the death occurs. In other cases the enhanced investigative duty will only arise if a sufficiently arguable case of breach can be made out on the particular facts of the case.

104. I would therefore treat the touchstone for whether the circumstances of a death are such as to give rise to an automatic enhanced investigative duty as being whether they fall into a category which necessarily gives rise in every case to a legitimate ground to suspect state responsibility by way of breach of a substantive obligation, to adopt the language of *Finogenov* echoing that of Lord Phillips at para 84 of *Smith*.

*Letts*

105. In *Letts Green J* explored the circumstances in which the investigative duty arose automatically, in a case involving the death by suicide of a voluntary psychiatric patient. The patient had previously been detained under s.2 MHA but was later readmitted as a voluntary patient. He was then detained under s 5(2) MHA but on assessment found not to justify s. 2 or s. 3 detention, and remained as a voluntary patient. The following day he left and a few days later committed suicide. The case concerned the lawfulness of the guidance given by the Lord Chancellor to caseworkers determining whether to grant legal aid to the next of kin in relation to inquests, which required them to consider in every case whether there was an arguable breach of a substantive article 2 obligation by the state before granting legal aid. The argument for the claimant was that there was an automatic investigative duty in that case, irrespective of whether an arguable breach of a substantive obligation could be established. However as *Green J* was at pains to point out (see for example paras 99-100), it was not part of the inquiry he undertook to decide whether the automatic duty was triggered in that case, nor to determine the boundaries of when an automatic duty might arise. His decision was that the guidelines were deficient because an automatic duty arose in some cases and therefore the guidelines were flawed in requiring there to be shown to be an arguable breach in every case before legal aid were granted.
106. In that context *Green J* addressed the circumstances in which the investigative duty arises automatically, without evidence of an arguable breach of a substantive obligation by the state, at paragraphs 71 and following. Having referred at paragraph 73 to *Smith* and what was said by Lord Phillips at paragraph 84, Lord Hope at paragraph 98 and Lord Mance at paragraph 210, including the latter's reference to *Savage*, he said:

“74. In these cases the courts have held that the mere fact of death gives rise to a “possibility” of state complicity and that this suffices to trigger the investigative duty. It is quite clear that when referring to the “possibility” of a violation the courts are by no means saying that there is (or needs to be) any evidence of a violation. The courts in these cases are not linking the duty to investigate (and provide the derivative right of representation) with the existence of arguable evidence of breach. On the contrary it is the mere fact of death in circumstances where there is a hint of state control which creates the hypothetical “possibility” of violation and it is this “possibility” triggered by the fact of death which then activates the investigative duty. In such cases (as the examination of objects and purposes in section F above shows) there still can exist very good and powerful policy reasons for the inquiry to be held, including so that the finger of doubt can be dispelled and the state can emerge unblemished, which of course is the very opposite of a case where the purpose of the inquest is to find the state culpable.

75. For this reason the courts have now been quite explicit that in a number of circumstances the duty arises automatically, quite irrespective of any hint of arguable breach by the state.”

107. Green J went on to cite paragraph 59 of Lord Rodger’s judgment *L’s case* and said at paragraph 77:

77. The trigger for the investigation was encapsulated in the phrase “Whenever a prisoner kills himself”—it is the mere fact of death in a context in which there is a state involvement (custody) that triggers the duty to investigate. There is a “possibility” of a violation of article 2 by the state by reason of these minimal facts. But the duty to investigate arises quite regardless of whether there is even a hint or whiff of actual evidence that the prison authorities were culpable to *any* degree.

108. Having quoted paragraph 113 of Lord Mance’s judgment in *L’s case* he said at paragraph 80.

“80. The reference in this quote to “the state is bound to conduct an article 2 compliant inquiry whenever its system for preventing suicide fails” is plainly not a reference to an arguable breach test; it is a clear reference to the failure being no more than that the *system* did not prevent the suicide. The system failed to achieve what it was intended to achieve—the prevention of suicide and accordingly there has to be an investigation.”

109. He then turned to the specific position of mental health patients and derived support from *Rabone* and *Antoniou* for the conclusion he expressed at paragraph 92:

“92. In the light of these authorities it can be said that the suicide of an involuntary psychiatric patient is capable (depending on the facts) of triggering the procedural, investigative, duty under article 2 ECHR. The duty arises irrespective of whether the state, whether arguably or otherwise, is in breach of the substantive duties in article 2 ECHR. None the less, as para 34 of the *Rabone case* [2012] 2 AC 72 demonstrates, the precise outer limits of this principle are hard to define. The factors considered relevant by the courts concentrate on the circumstances when a mental health patient can be said to be, or remain, under the control or care of the state. It might well take further cases to draw the boundaries with greater clarity than presently exists.”

110. I take the reference to “an involuntary” psychiatric patient in para 92 to be a typographical error for a voluntary psychiatric patient, in the light of that being the position of the deceased in that case, and of the reference in para 92, and in the preceding paragraphs, to *Rabone*. See also paras 99-100.

111. I would agree with paragraph 74 insofar as it states that there need not be any positive *evidence* of an arguable breach of a substantive duty in cases where the automatic duty arises. I would disagree, however, with the suggestion that the existence of the duty in the automatic cases is not linked to an arguable violation of a substantive obligation of state agents. As I have endeavoured to explain, it is the possibility of such breach

arising in every case within a category which engages the automatic duty, and which provides the link which justifies such duty arising automatically. Nor can I accept that it is “the mere fact of death where there is a hint of state control” which activates the automatic duty. It is not merely a “hint” of state control which justifies the automatic duty in the cases of suicide in prison, but the fact that custody increases the risk of suicide amongst all inmates and requires an effective system to seek to minimise or prevent it, as a result of which any suicide in custody raises a sufficiently arguable possibility of a breach of the systems or operational duty; it is this which gives rise to the automatic duty. Nor would I think it right to say, as Green J does at paragraph 75, that the courts have explicitly said that in a number of circumstances the duty arises automatically quite irrespective of any hint of arguable breach by the state. On the contrary, in my view the duty has been held to arise automatically *where and because* the circumstances fall within a category which always (more than) hints at an arguable breach by the state.

112. Nor do I feel able to agree with the statement in paragraph 80 that Lord Mance’s reference to the duty arising whenever the state’s system for preventing suicide fails is “plainly not a reference to an arguable breach test.” It is because a death by suicide in custody will always give rise to a sufficiently arguable case of a breach of the substantive systems duty that an automatic investigative duty is imposed in such cases.
113. Nor can I agree, I am afraid, with Green J’s conclusion at paragraph 92. He said at paragraph 88 that *Rabone* was authority for the proposition that the article 2 substantive obligations can apply to psychiatric patients, both voluntary and involuntary. That much is not controversial. He went on to say that although *Rabone* does not address the investigative duty, the logic of the judgment would indicate that the triggers for the article 2 duties, including the investigative duty, centre on the sorts of factors referred to by Lord Dyson in para 34. I do not myself find anything in *Rabone* which provides any guidance as to the existence or otherwise of an automatic investigative duty in the case of voluntary psychiatric patients. *Rabone* was concerned with a damages claim. The parasitic procedural duty is dependent upon whether there is an operational duty, as *Gentle* confirms, and the factors considered by Lord Dyson at paragraph 34 of *Rabone* were directed to the existence or otherwise of the substantive duty. If there is an arguable case of breach of such duty the enhanced investigative duty will arise, but the factors informing the existence of the substantive duty do not dictate the existence or otherwise of an automatic procedural duty.
114. An automatic procedural duty can only arise in a category of case, and when it arises it applies to all cases in that category if and because they all necessarily raise a sufficient possibility of state responsibility for the death. The way in which Green J expressed his conclusion at paragraph 92 is antithetical to this approach: it proceeds on the basis that whether there is an automatic procedural duty will depend on the individual circumstances from case to case.
115. Green J also derived support for his conclusion from *R (Antoniou) v Central and North West London NHS Foundation Trust* [2015] 1 WLR 4459 which involved the suicide of a detained psychiatric patient. The issue in that case was whether there was a duty to have an independent enhanced investigation by an independent body prior to an inquest. The Divisional Court was concerned to identify (i) the scope of the investigative duty and (ii) when it arises. As to the second, at paragraphs 52 to 53 Aikens LJ referred to Lord Bingham’s formulation of when the duty arises at paragraph

3 of *Middleton* and its repetition by Lord Phillips in *Smith*, together with Lord Hope's emphasis at para 97 that the procedural obligation cannot exist independently of the substantive duty. Aikens LJ said at the end of paragraph 53 that the Court must follow this interpretation. This was a recognition that *Smith* is to be interpreted as being concerned with the parasitic procedural obligation. Reference was then made to the ECtHR decisions in *Ramashai v The Netherlands* (2007) 46 EHRR 983 *Silih v Slovenia* (2009) 49 EHRR 996. Aikens LJ addressed what the latter had to say about the scope of the duty and treated the former as irrelevant. He did not identify anything in those cases of importance on the question of when an investigative duty is triggered, and I cannot divine anything in what he said which would support the existence of an automatic duty divorced from breach of a substantive obligation. There is a reference at paragraph 76, not relied on by Green J, to the "automatic" duty (inverted commas in the original) when considering its scope, but the context makes clear that it is simply a reference to the parasitic procedural duty identified in *Middleton* and *Smith* as referred to in paragraphs 52 and 53.

### *Tyrrell*

116. Before drawing the strands together, I must refer to the illuminating judgment of Burnett LJ, as he then was, in the Divisional Court decision of *Tyrrell*, a case in which a serving prisoner died from the consequences of cancer of the tongue. The Prison and Probation Ombudsman ("PPO") conducted an investigation into the circumstances of his death, including whether the prison authorities or NHS staff were guilty of any failings in relation to diagnosing his cancer or its post-diagnosis treatment. The PPO was satisfied that the care he received was equivalent to that which he would have obtained in the community. The coroner commissioned expert medical evidence. The deceased's family commissioned a medical report which did not provide a foundation for alleging negligence in his medical care. They wished to explore further whether there was negligence in the late diagnosis of the tumour. The coroner declined to conduct a further investigation into the cause of death. The family brought a claim by way of judicial review contending that the coroner was obliged to conduct a *Middleton* inquest.
117. At paragraphs 22 to 27 Burnett LJ said:

"22. A clear statement of the nature of the investigation required by the ECHR of a death in custody from medical causes is found in *Kats v Ukraine* (2010) 51 EHRR 44. The applicants were the parents and son of a prisoner who died in custody of an HIV related illness. The Strasbourg Court concluded that there had been a violation of the positive obligation under article 2 as a result of a failure to safeguard the life of the deceased. The prison authorities were aware of the deceased's HIV status and there was a striking failure to give her medical attention. Her death was the result of inadequate medical assistance. In addition the court found a violation of article 2 in respect of the lack of an adequate investigation into the circumstances of the death. It is instructive to see how the court described the investigative duties which arise as part of the positive obligations under article 2 and contrasted them with the procedural obligation which arises when the responsibility of the state for the death is "potentially engaged", as it was in this case as a result of the wholly inadequate nature of the medical facilities and treatment available.

23. In discussing the failure to protect the deceased's life the court noted, para 101 and 102, the different factual contentions of the parties: on the one hand the applicants said that the authorities were well aware of her condition which they failed to treat, and on the other the state suggested that the death resulted from an unpredictable development of the illness which had occurred before the deceased went into custody but of which she failed to inform the authorities. That issue was resolved in favour of the applicants, para 112. The Strasbourg court reiterated, para 103, that the state was under an obligation to take appropriate steps to safeguard the lives of those within its jurisdiction before continuing:

“104 Persons in custody are in a particularly vulnerable position and the authorities are under an obligation to account for their treatment. Having held that the Convention requires the state to protect the health and physical well-being of persons deprived of their liberty, for example, by providing them with the requisite medical assistance, the Court considers that, where a detainee dies as a result of a health problem, the state must offer an explanation as to the cause of death and the treatment administered to the person concerned prior to his or her death.

As a general rule, the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the state has complied with its obligation to protect that person's right to life.”

24. The Strasbourg Court was making two different points in these sub-paragraphs. First, that whenever someone dies in custody an explanation of the cause of death must be provided, including (if it be the case) a narrative of medical treatment provided. The second point, which was echoed by Lord Rodger in the *L case* quoted in [16] above, was that a suspicious death in custody inevitably raises the question of a breach of article 2 on the part of the authorities. The consistent jurisprudence of the Strasbourg Court is that in this second circumstance the procedural obligation arises of the sort considered in the *Jordan case*, and which was in issue in the *Middleton case*.

25. Because of the egregious nature of the failure of medical care in this case, the Strasbourg Court went on to consider whether there was a violation of the procedural obligation under article 2. The responsibility of the state for the death was potentially engaged and so the procedural obligation arose, para 117. The court had encapsulated the triggering principle as being “when a detainee dies in suspicious circumstances, an “official and effective investigation” capable of establishing the causes of death and identifying and punishing those responsible must be carried out of the authorities' own motion.” The court went on to examine the nature of the investigation by reference to the *Jordan* criteria (although it referred to them through *Slimani v France (2006) 43 EHRR 49*).

26. In my judgment the reasoning of the Strasbourg Court demonstrates that the *positive* obligations under article 2 encompass a duty to account for the cause of any death which occurs in custody. The procedural obligation arises only in circumstances where the responsibility of the state is engaged in the sense that there is reason to believe that the substantive positive obligations (identified by Lord Bingham in the *Middleton case*) have been breached by the state. In the case of deaths in custody the procedural obligation will be triggered in the case of all

suspicious deaths, including apparent suicides, for the reason given by the Strasbourg Court in the *Kats* case. The distinction between these two types of case is principled. The essence was captured by Lord Bingham in para [5] of the *Middleton* case:

“The death of any person involuntarily in the custody of the state, otherwise than from natural causes, can never be other than a ground for concern.”

27. Unless there is binding domestic authority which dictates a different outcome it follows that the Coroner was correct to decline to conclude that the procedural obligation under article 2 was engaged. The evidence showed unequivocally that the death of Mr Tyrrell was from natural causes. There was no reason to suppose that the state in the guise of the prison authorities had failed to protect his health and well-being. On the contrary, the indications were that he had received appropriate treatment both within the prison and from the NHS.”

118. At paragraph 29 Burnett LJ referred to the passage in Lord Hope’s judgment in *Smith* at para 98 which I have quoted above, with the sentence “The procedural obligation extends to prisoners as a class irrespective of the particular circumstances in which the death occurred” in bold as that on which the claimant particularly relied, and went on:

“30. The *Smith* case raised two issues. .... This passage from Lord Hope's judgment forms part of his discussion of the second issue. He, along with all members of the court concluded that the circumstances of the death triggered the procedural obligation because of the potential responsibility of the state. The sentence in bold, if read out of context, provides support for the claimant's contention. But it is no more than a reflection of the position adopted by Lord Rodger in the L case (which Lord Rodger quoted from and repeated in his judgment in *Smith* ) to the effect that any suspicious death in custody (including one apparently the result of suicide) gives rise to the procedural obligation. On this aspect of the case Lord Phillips gave a judgment with which Lord Walker, Lady Hale, Lord Brown, Lord Collins and Lord Kerr agreed. Lord Hope, Lord Rodger and Lord Mance all reached the same conclusion, namely that the procedural obligation arose on the facts of the case, but gave their own reasons.

31. Lord Phillips of Worth Matravers encapsulated the difference between a preliminary inquiry to establish whether an article 2 investigation was called for on the facts surrounding any death, and an article 2 investigation itself, in para 70 of his judgment: [which was then quoted, and I have set out above]

32. He continued by explaining that in England and Wales such a staged approach is embedded in the coronial jurisdiction. In my view Lord Phillips' explanation mirrors the approach of the Strasbourg Court in requiring the state to account for a death of someone in its custody as part of the substantive obligation arising out of the duty to set up laws and systems to protect the right to life with the procedural [duty] only arising if there are grounds to believe that the state may have breached its substantive obligations to safeguard life.”

119. In *Maguire*, the Court of Appeal confirmed the nature of the decision in *Tyrrell* with approval at paragraph 49:



49.....Having reviewed the Strasbourg jurisprudence, the Divisional Court, at para 24, extracted two principles. First, that whenever someone dies in custody there is a positive obligation on the state to provide an explanation of the cause of death. Secondly, that a suspicious death in custody inevitably raises the question of a breach of the operational duty under article 2 of the ECHR to protect life which means that the procedural obligation also arises.”

120. This analysis reinforces the distinction between the two aspects of an article 2 investigative duty which Lord Phillips had identified in *L’s case* and *Smith*. One is a substantive investigative duty, which arises as a positive article 2 obligation to comply with the framework duty, and arises irrespective of any breach of the systemic or operational duty. The other is a procedural investigative duty, which is parasitic upon a breach of the systemic or operational duty. There is not a separate third category of cases in which the procedural duty arises automatically where there is no question of a breach of the systemic/operational duty.
121. *Tyrell* is also important in emphasising that the type of death is critical to whether an automatic enhanced investigative duty arises. It does so in cases of suicide, near suicide or unlawful killing in custody. It does not do so in the case of deaths by natural causes of those in custody. This principled distinction follows from the rationale for the automatic cases as applied to suicides or murders in custody, namely that such cases of themselves and without more always raise a legitimate suspicion of state responsibility by breach of its systems or operational duties. By contrast deaths from natural causes in custody do not do so in every case. The latter always engage the substantive investigative duty to investigate and explain; but they do not engage the parasitic procedural enhanced investigative duty in the absence of an arguable case of state responsibility on the facts of the particular case.

*Conclusions on the enhanced investigative duty*

122. Drawing the strands together, I derive the following principles as applying to the enhanced investigative duty and when it arises automatically:
- (1) There is a duty on the state to investigate every death. This is part of its framework duty under article 2 by way of positive substantive obligation. This duty may be fulfilled simply by identifying the cause of death. It may require further investigation and some explanation from state entities, such as information and/or records from a GP or a hospital.
  - (2) In certain circumstances there is also a distinct and additional enhanced duty of investigation which requires the scope of the investigation to have the minimum features summarised by Lord Phillips in *Smith* at paragraph 64. In this country the enhanced investigative duty is usually, but not always, to be fulfilled by a *Middleton* inquest.
  - (3) The enhanced investigative duty is procedural and parasitic on a substantive duty. It cannot exist where there is no substantive duty.
  - (4) The circumstances in which an enhanced investigative duty, as a procedural parasitic duty, arises are twofold:

- (a) whenever there is an arguable breach of the state's substantive article 2 duties, whether the negative, systemic or positive operational duties; and
  - (b) in certain categories of circumstances, automatically.
- (5) The categories in which it has been identified as arising automatically include killings by state agents, suicides or attempted suicides and unlawful killings in custody, suicides of conscripts, and suicides of involuntary mental health detainees. These have been identified by a developing jurisprudence and these categories cannot be considered as closed.
- (6) The underlying rationale for the categories of cases which automatically give rise to the enhanced investigative duty is that all cases falling within the category will always, and without more, give rise to a legitimate suspicion of state responsibility in the form of a breach of the state's substantive article 2 duties. The justification for the automatic imposition of the duty is not the wider rationale identified in *Amin* and *Middleton*, associated with the framework duty, of learning lessons with a view to protecting against future deaths.
- (7) The touchstone for whether the circumstances of a death are such as to give rise to an automatic enhanced investigative duty is whether they fall into a category which necessarily gives rise, in every case falling within the category, to a legitimate ground to suspect state responsibility by way of breach of a substantive article 2 obligation.
- (8) In this context legitimate grounds for suspicion connotes the same threshold of arguability as has to be satisfied in cases where the enhanced investigative duty does not arise automatically.
- (9) In addressing whether a category of death automatically attracts the enhanced investigative duty, the type of death is important. Deaths from natural causes are not to be treated in the same way as suicides or unlawful killings. This follows from (6) and (7).
123. The issue in this case was framed as raising the question identified in *Letts* as to when the enhanced investigative duty arises automatically in the absence of an arguable breach of a substantive obligation. My answer would be never. The automatic duty arises, in the categories of case to which it applies, only *when and because* every case in the category raises a sufficiently arguable case of breach of the state's substantive article 2 duties. In this respect the arguability threshold is no different from that which applies to non-automatic cases.

### **The law applied to the facts of this case**

#### *Operational duty and arguable breach*

124. Applying the law as I perceive it to be, I would conclude that no operational duty was owed to Tanya to protect her against the risk of accidental death by the recreational taking of illicit drugs. None of the factors identified in *Rabone* are fulfilled. First there was no real and immediate risk of death from such cause of which the Trust was or ought to have been aware. There was no history to suggest suicide risk. There was no

history of accidental overdose. There had been drug abstinence, evidenced by urine drug tests, throughout her s. 3 detention whenever she had had periods of unescorted leave. She had described her illicit drug taking prior to her admission as of limited intensity. Mr Bowen placed a great deal of reliance in his submissions on the opioid test result in December 2017 and Dr Chapman's response letter stating that a period of abstinence could result in a reduced tolerance to opioids in particular. Those aspects of the evidence cannot, in my view, bear the weight he sought to put upon them. They rest upon a single opioid test result and a statement that abstinence is capable of reducing tolerance, without providing any foundation for there having been a foreseeable real and immediate risk of overdose by opiate abuse. It must be kept in mind that the risk must be real, avoiding the benefit of hindsight, and be a risk of death, not merely of harm even serious harm. There was nothing to suggest that permitting Tanya to continue her rehabilitation into the community after her absence on 30 June/1 July gave rise to a real and immediate risk of death by overdose.

125. I have given my reasons for treating this as a question which goes to the existence of the duty. If I am right, it is fatal to the entirety of the Claimant's case. There is no arguable operational duty and no arguable breach. Nor can there be an automatic enhanced investigative duty because, as *Gentle* makes clear, any enhanced investigative duty is dependent on the existence of an arguable operational duty on which it is parasitic.
126. I will nevertheless consider the position if I am wrong and the existence of a real and immediate risk to life is an ingredient of breach, not duty.
127. On that hypothesis, I would also conclude that there was no operational duty in this case. The other three factors identified in *Rabone* also point, in my view, to the absence of any such operational duty existing towards Tanya in respect of death by accidental overdose.
128. There was no relevant assumption of responsibility. The Trust had not assumed responsibility for treatment of Tanya for drug addiction of a life threatening nature. It was aware of a history of substance misuse at a level giving rise to a potential risk of inducing or exacerbating psychosis, but not to a risk of death by accidental overdose. The responsibility towards Tanya which it had assumed was for treatment of her paranoid schizophrenia, and any potentially exacerbating effects of substance misuse. The paranoid schizophrenia had been successfully treated to a degree that meant she no longer satisfied the conditions which would have justified her detention. Her mental health condition was not linked to the harm which it is said in this case there was a duty to protect against as foreseeable, namely accidental death from a recreational drug overdose.
129. Nor was Tanya especially vulnerable, in the sense relevant to the existence of the duty. It is true that she is properly to be described as vulnerable as a result of her diagnosis and history of paranoid schizophrenia and potentially exacerbating effect of substance misuse. In relation to risks to which that condition gives rise, she would properly be described as especially vulnerable. But that is not a vulnerability which is relevant to the existence of the duty for which the Claimant contends. Lord Dyson in *Rabone* cited *Z v United Kingdom* as an example of the vulnerability here being considered, which was a vulnerability of a child to abuse. The Strasbourg jurisprudence refers to the vulnerability of mental patients in the context of suicide risk, which is to be understood

as a vulnerability to suicide. The link between the psychiatric condition and suicide risk is made specifically in the reasoning of both Lord Dyson and Baroness Hale in *Rabone* and by the ECtHR in *Fernandes de Oliveira*. By contrast, in Tanya's case the vulnerability is unconnected to the harm against which it is said the Trust owed a duty to protect her, namely a foreseeable risk of accidental overdose.

130. Nor was the risk in question an exceptional risk rather than an "ordinary" one. It was a risk to which Tanya was exposed in the same way as any other recreational drug user irrespective of her status as a patient at CGR.
131. Nor do I think it is legitimate to equate her position to that of a detained patient, at least on 3 July 2018. I have already expressed my reasons for preferring the view that the question whether a voluntary mental patient is to be equated with an involuntary one for the purposes of determining the existence of an operational duty is not a category exercise, but rather depends upon a fact specific inquiry of the extent to which the residence as an in-patient is truly voluntary. Melanie Rabone's status was that of an involuntary patient in all but form. Tanya's position on 3 July 2018, when it is said she should not have been allowed to leave, was quite different. She was in the phase of her treatment which involved rehabilitation into the community. As a voluntary patient it was necessary to respect her article 5 and article 8 rights to autonomy and private life. It was desirable that she should continue to take steps to clean up her flat and to take responsibility for doing so herself. There is no reason to doubt the assessment that there were no medical grounds on which she could properly have been detained when the decision was made to rescind her s. 3 MHA detention on 25 June 2018. What had changed when she left the unit for the last time on 3 July 2018? There had only been the period of overstayed absence on 30 June and 1 July. That had not involved any use of drugs, self-harm or adverse impact on her mental condition or recovery. She had returned voluntarily and was keen to continue her rehabilitation into the community with the assistance of the CGR team. The fact that she got drunk was of no relevance to whether she now qualified for involuntary detention. The only relevant change of circumstance was that she had once missed her evening medication. The statement of Dr Rahim that there were no grounds for detention under MHA at that stage seems to me to be unassailable.
132. This is relevant both as to the existence of a duty and to the question of breach if one existed. It militates against the existence of a duty because it undermines the equiparation of Tanya's position to that of an involuntary psychiatric patient. But even if one were to assume the existence of such duty, it undermines the case that the Trust was in breach by reason of its failure compulsorily to detain her under its MHA powers. There can be no arguable breach of duty because it is not arguable that it had any medical grounds for exercising a power to detain her.
133. I recognise that the position was different at some point in the days after she left the unit on 3 July 2018, both in relation to duty and breach. She had by then failed to return a second time and had missed her medication again and for an increasing period as the days passed. The consideration being given to the use of MHA powers on her return, which is evident on 5 and 6 July 2018, illustrates that at that stage the availability of detention options, which would have included the use of s. 135 MHA to search her flat and remove her, make her position more closely aligned with that of an involuntary detained mental patient.

134. In summary therefore, I would hold that there was no arguable breach of an operational duty because:
- (1) There was no arguable duty to protect Tanya from the risk of accidental death by overdose of recreational drugs irrespective of whether that was a real and immediate risk of which the Trust was or ought to have been aware.
  - (2) Further it is not arguable that there was a real and immediate risk of such death of which the Trust was or ought to have been aware. My preferred view is that this is an ingredient of the duty and provides a further reason why there was no arguable duty. In any event it means that there was no arguable breach of an operational duty had one existed.
  - (3) Moreover the Trust were not arguably in breach of a duty, if it existed, by reason of a failure to detain Tanya prior to her leaving the unit on 3 July 2018 because they did not even arguably have medical grounds for exercising any powers of detention.
  - (4) Nor would the Trust have been arguably in breach of a duty, if it existed, by reason of a failure to put in place a care plan pursuant to s. 117 MHA. This is because, as the wording of s. 117(1) makes clear, that section imposes a duty to provide after care services only following the patient leaving the hospital as a residential patient. It does not apply to services during periods of permitted temporary absence for a voluntary in-patient.

*Automatic enhanced investigative duty*

135. I have already observed that Mr Bowen's acceptance of the need for an arguable operational duty as a necessary condition for an automatic enhanced investigative duty is fatal on the facts of this case. I have concluded that there is no arguable case for the existence of such an operational duty to protect against the risk of accidental overdose.
136. However if I be wrong about that, I would hold that in any event there is no automatic enhanced investigative duty in the case of the accidental death of a voluntary psychiatric patient for each of two reasons.
137. First, I would not accept that a voluntary psychiatric patient is to be treated in the same way as an involuntary detainee for these purposes. As I have observed the extent to which they are in the same position is fact specific. The threat of detention may render them involuntary patients in all but name, as Melanie Rabone was. At the other end of the spectrum they may be genuinely voluntary patients. The determination of whether the enhanced investigative duty arises automatically is a category exercise, and the automatic imposition of the duty can only be justified if the circumstances *necessarily* engage the justification for *all* persons falling within that category. The justification, as I have endeavoured to show, is a sufficient ground for suspicion of a breach of a substantive obligation by the state. That does not arise for those whose residence in a psychiatric unit is genuinely voluntary. If it did, there would be no principled distinction from a psychiatric outpatient.
138. Secondly, there is no justification for extending the automatic duty to cases of accidental death. Nothing in the Strasbourg or domestic jurisprudence justifies such

extension and it would in my judgment be contrary to principle. The imposition of an automatic duty as a category exercise is only justifiable where all deaths in the category necessarily raise a legitimate suspicion of state responsibility. Accidental deaths by overdose from the use of recreational drugs may occur without any suspicion of state responsibility by way of breach of a substantive obligation, just as may deaths from natural causes. Such deaths do not necessarily or in all cases involve the imbalance of knowledge which makes it appropriate to impose the enhanced duty on the state.

**Conclusion**

139. I would dismiss the application.

**His Honour Judge Teague QC, Chief Coroner of England and Wales:**

140. I agree.

**Mr Justice Garnham:**

141. I also agree.