

**LAW AND PRACTICE NOTE: RACE AND HUMAN RIGHTS**

**Sheku Bayoh Public Inquiry**

**June 2024**

**Contents**

<b>1. Introduction</b> .....	2
<b>2. HRA 1998</b> .....	3
2.1 <i>Legislative purpose of the HRA 1998</i> .....	3
2.2 <i>Relevant provisions of the HRA 1998</i> .....	3
<b>3. ECHR</b> .....	6
3.1 <i>Legislative purpose of the ECHR</i> .....	6
3.2 <i>Relevant provisions of the ECHR</i> .....	7
<b>4. Article 2 of the ECHR – the right to life</b> .....	7
4.1 <i>Negative obligation – not to intentionally deprive an individual of life</i> .....	8
4.2 <i>Positive obligation - duty to provide a regulatory framework</i> .....	11
4.3 <i>Positive obligation - operational duty</i> .....	11
4.4 <i>Procedural obligation - duty to investigate</i> .....	11
4.4.1 <i>Requirement 1: adequate investigation, including determinative analysis of the use of force</i> .....	13
4.4.2 <i>Requirement 2: “independent and impartial” investigation</i> .....	14
4.4.3 <i>Requirement 3: “promptness and reasonable expedition”</i> .....	14
4.4.4 <i>Requirement 4: involvement of the victim and victim’s family members</i>	15
4.4.5 <i>Requirement 5: public scrutiny</i> .....	15
<b>5. Article 14 of the ECHR – Prohibition of Discrimination</b> .....	15
5.1 <i>Prohibition of racial discrimination under Article 14 ECHR</i> .....	15
5.2 <i>Comparison to the Equality Act 2010</i> .....	16
5.3 <i>Race under Article 14 ECHR</i> .....	17
5.4 <i>Definition of discrimination</i> .....	18
5.5 <i>Test for unlawful discrimination under Article 14</i> .....	19
5.6 <i>Within the ambit of another ECHR right</i> .....	20
5.7 <i>Protected status</i> .....	21
5.8 <i>Difference in treatment to those in analogous situation</i> .....	21
5.9 <i>Objective and reasonable justification</i> .....	22
<b>6. Article 14 in conjunction with Article 2</b> .....	23
<b>7. The ICERD and ICCPR</b> .....	26

7.1	ICERD.....	27
7.1.1	Legislative purpose of the ICERD.....	27
7.1.2	Relevant provisions of the ICERD .....	27
7.1.3	Application of ICERD .....	28
7.2	ICCPR.....	29

## 1. **Introduction**

This note summarises the legal duties owed by public authorities, as state bodies, through the Human Rights Act 1998 (“HRA”), in particular section 6; and, the European Convention on Human Rights (“ECHR”), in particular Articles 2 and 14. This analysis may be informed by an understanding of the International Convention on the Elimination of all forms of Racial Discrimination (“ICERD”), in particular Articles 1, 2 and 4; and the International Covenant on Civil and Political Rights (“ICCPR”), in particular Articles 2 and 26. This note should be read in conjunction with the Law & Practice Note on the Equality Act 2010 (SBPI-00615 - Law and Practice Note – Equality Act 2010) and section iv of the PIRC post incident management Law and Practice Note (SBPI-00450). This note is prepared for the hearings on race, during which the Inquiry will examine (as part of its terms of reference) *“the extent (if any) to which the events leading up to and following Mr Bayoh’s death, in particular the actions of the officers involved, were affected by his actual or perceived race and to make recommendations to address any findings in that regard”*<sup>1</sup>.

---

<sup>1</sup> [Terms of reference | Sheku Bayoh Inquiry](#)

## 2. HRA 1998

### 2.1 *Legislative purpose of the HRA 1998*

The HRA 1998 was signed on 9 November 1998 and came into effect in the UK on 2 October 2000. It was enacted to “*give further effect to rights and freedoms guaranteed under the European Convention on Human Rights*”<sup>2</sup>, and does so by incorporating into domestic law ECHR rights<sup>3</sup>. This includes Articles 2 (the right to life) and 14 (prohibition of discrimination) of the ECHR.

The HRA 1998 made the ECHR enforceable in the UK courts, providing “*a positive impact on the enforcement and accessibility of [ECHR] rights in the UK*”<sup>4</sup>. Under the HRA 1998, individuals seeking enforcement and remedy for violations of their rights under the ECHR can bring proceedings in the domestic courts<sup>5</sup>, including the Scottish courts. In Scotland, the Scotland Act 1998 provides that an Act of the Scottish Parliament “*is not law*” if it is “*incompatible with any of the [ECHR] rights*”<sup>6</sup>, and that Scottish Ministers have “*no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the [ECHR] rights*”<sup>7</sup>.

### 2.2 *Relevant provisions of the HRA 1998*

Sections 1, 2, 3, and 6 of the HRA 1998 are particularly relevant to this Inquiry.

Section 1(1)(a), supported by Schedule 1 of the HRA 1998, confirms that “*Convention rights*” in the HRA 1998 means “*the rights and fundamental freedoms*” as set out in Articles 2 to 12 and 14 of the ECHR, alongside certain ECHR protocols<sup>8</sup>. Relevant to

---

<sup>2</sup> Human Rights Act 1998 (“HRA 1998”), Introductory Text

<sup>3</sup> See HRA 1998, section 1(1) confirming the ECHR rights incorporated in the HRA 1998 are Articles 2 to 12 and 14 of the ECHR, Articles 1 to 3 of the First Protocol and Article 1 of the Thirteenth Protocol

<sup>4</sup> *The Government’s Independent Review of the Human Rights Act*, 8 July 2021, Joint Committee on Human Rights ([The Government’s Independent Human Rights Act Review \(parliament.uk\)](https://www.parliament.uk/publications/2021/07/13), Summary

<sup>5</sup> See HRA 1998, sections 7 and 8 of HRA 1998 on proceedings and judicial remedies

<sup>6</sup> Scotland Act 1998, section 29

<sup>7</sup> Scotland Act 1998, section 57(2); this provision came into force on 6 May 1999, thus shortly pre-dating the UK-wide protection under the HRA 1998

<sup>8</sup> See HRA 1998, section 1(1)(a) and Schedule 1

this Inquiry are Articles 2 (right to life) and 14 (prohibition of discrimination) of the ECHR.

Sections 2 and 3 of the HRA 1998 provide interpretative guidance. Section 2 states that any UK “court or tribunal” must “**take into account...any...judgment, decision, declaration or advisory opinion of the European Court of Human Rights**” (the “**ECtHR**”) when “*determining a question which has arisen in connection with*” a Convention right in the HRA 1998 [emphasis added]. In practice, a UK court or tribunal will follow, “*any clear and consistent jurisprudence*” of the ECtHR<sup>9</sup>, but is not bound to do so, for example, where there is no clear and constant line of authority, where the effect of applying an ECtHR decision would be “*inconsistent with some fundamental substantive or procedural aspect of [domestic] law*” or where its reasoning appears “*to overlook or misunderstand some argument or point of principle*”<sup>10</sup>. Following some discussion in the case law<sup>11</sup>, the Supreme Court has stated that UK courts and tribunals should not interpret ECHR protections more expansively than the ECtHR has done.<sup>12</sup>

Section 3 of the HRA 1998 requires that so far as it is possible to do so “*primary and subordinate legislation*” in the UK is to be “*read and given effect in a way which is **compatible with the Convention Rights***”<sup>13</sup> [emphasis added]. This interpretative obligation requires that both current and historic primary and subordinate legislation is interpreted compatibly with the ECHR. What this compatibility obligation practically requires of domestic courts and tribunals is discussed at length in domestic case law. The Court of Appeal has noted the remit of the section 3 compatibility obligation to be “*very wide and [it] can require a court to read in words which change the meaning of the enacted legislation*”<sup>14</sup>. However, it cannot apply where the proposed interpretation is contrary to a fundamental feature, or goes against the ‘grain’, of the legislation<sup>15</sup>.

---

<sup>9</sup> *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, paragraph 26

<sup>10</sup> *Manchester City Council v Pinnock* [2010] UKSC 45, paragraph 48

<sup>11</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 25, paragraph 20

<sup>12</sup> *R (AB) v Secretary of State for Justice* [2021] UKSC 28, paragraph 59

<sup>13</sup> Human Rights Act 1998, section 3(1)

<sup>14</sup> *Smith v Lancashire Teaching Hospital NHS Foundation Trust* [2017] EWCA Civ 1916, paragraph 96

<sup>15</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, paragraph 121

Section 6 of the HRA 1998 sets out the duties owed by public authorities. Section 6(1) of the HRA 1998 states that “*it is unlawful for a public authority to act in a way which is incompatible with a Convention right*” [emphasis added]. A “public authority” includes “a court or tribunal” and “any person certain of whose functions are functions of a public nature”<sup>16</sup>. The meanings of “public authority” and “functions of a public nature” under section 6 of the HRA 1998 have been examined in case law.<sup>17</sup> The boundaries of these categories are outside the scope of this note. However, for Inquiry purposes, the Chief Constable of Police Scotland, the PIRC and the Law Officers are considered a public authority under, and are subject to, the terms of section 6 of the HRA 1998, as is the Chair of this Inquiry.

The obligation on public authorities to not act incompatibly with ECHR rights is not absolute. A public authority will not have acted unlawfully (in acting incompatibly with an ECHR right) if (i) that public authority could not have acted differently as a result of primary legislation<sup>18</sup> or (ii) primary legislation “cannot be read or given effect in a way which is compatible with the Convention rights”<sup>19</sup>.

If a public authority breaches its obligations under section 6 of the HRA 1998, a claimant can bring proceedings against that public authority, or refer to that breach in other proceedings<sup>20</sup>. Proceedings can be brought in judicial review or as a claim for damages under section 7 HRA 1998. To bring a claim, the claimant must (i) show that the relevant public authority “acted (or proposes to act) in a way” that is “unlawful”; with “unlawful” being “incompatible with a Convention right” and (ii) be the “victim” of the proposed or actual unlawful action of the public body<sup>21</sup>. Various judicial remedies may be available to claimants following a breach of the HRA 1998, including judicial

---

<sup>16</sup> HRA 1998, section 6(3)

<sup>17</sup> See, for example *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37 and *R (Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)* [2009] EWCA Civ 587.

<sup>18</sup> HRA section 6(2)(a). Primary Legislation in this case is defined in s.HRA 21 and does not include Acts of the Scottish Parliament, which are ‘subordinate legislation’ under that section, and under s.29 of the Scotland Act 1998 “are not law” if incompatible with Convention rights

<sup>19</sup> *Ibid*, section 6(2)(b); see also *Constitutional Law of Scotland (1<sup>st</sup> Edition, 2015)*, *The Human Rights Act*, section 3-22

<sup>20</sup> HRA 1998, section 7

<sup>21</sup> HRA 1998, section 7

review remedies of the public authority's action, proposed action or failure to act and damages/compensation<sup>22</sup>.

### 3. ECHR

#### 3.1 *Legislative purpose of the ECHR*

As the HRA 1998 incorporates the ECHR, understanding the rights protected, and obligations owed by public bodies under the HRA 1998 requires review of the ECHR and the ECtHR's jurisprudence and supporting guidance. The ECHR "*is the prime instrument on human rights within Europe*"<sup>23</sup>. Signed on 4 November 1950 and entered into force in September 1953, the ECHR was developed by the Council of Europe to build on the rights framework proclaimed in the Universal Declaration on Human Rights" (the "**UDHR**"). Adopted in 1948, the UDHR was the "*first international instrument in which rights to be accorded to all peoples were articulated*"<sup>24</sup>, including the right to life<sup>25</sup> and protection from discrimination<sup>26</sup>. The UDHR is not legally binding. However, many of its provisions have reached the status of customary international law and are now recognised as binding. Many provisions are also referenced or supplemented in various international human rights law instruments, including the ECHR, the ICCPR, and the ICERD.

The ECHR sets out in "*considerably more detail*"<sup>27</sup>, the rights contained in the UDHR, including the right to life (Article 2) and a prohibition of discrimination in the enjoyment of ECHR rights (Article 14). Crucially, the ECHR was also "*the first instrument to provide an effective enforcement mechanism for human rights protection*" by establishing the ECtHR as a supervisory body<sup>28</sup>. Any "*person, non-governmental organisation or group of individuals claiming to be a victim of a violation*" may bring a claim under the ECHR provided certain admissibility criteria are fulfilled including, crucially, that "*all domestic remedies have been exhausted*"<sup>29</sup>. The ECHR was ratified

---

<sup>22</sup> HRA 1998, section 8; see also *Constitutional Law of Scotland (1st Edition, 2015)*, *The Human Rights Act, section 3-27*

<sup>23</sup> Page 87, Chapter 6, *International Human Rights Law*, Rhona K.M. Smith, 10<sup>th</sup> edition

<sup>24</sup> Page 60, Chapter 4, *International Human Rights Law*, Rhona K.M. Smith, 10<sup>th</sup> edition

<sup>25</sup> Universal Declaration on Human Rights ("UDHR"), Article 4

<sup>26</sup> *Ibid*, Article 7

<sup>27</sup> Page 88, Chapter 6, *International Human Rights Law*, Rhona K.M. Smith, 10<sup>th</sup> edition

<sup>28</sup> *Ibid* and ECHR, Preamble and Article 19

<sup>29</sup> ECHR, Articles 34 and 35

by the United Kingdom in 1951 and in 1966 the United Kingdom accepted the right of individuals to take a case to Strasbourg and the jurisdiction of the ECtHR<sup>30</sup>.

### 3.2 *Relevant provisions of the ECHR*

Articles 2 and 14 of the ECHR are of key relevance to the Inquiry and are discussed in detail below.

We note that Article 3 of the ECHR which prohibits torture, inhuman or degrading treatment or punishment may be relevant to both use of force by state agencies, and to the treatment of bereaved families following a death in state custody<sup>31</sup>. However, a full discussion of Article 3 of the ECHR is outside the scope of this Note.

## 4. **Article 2 of the ECHR – the right to life**

Article 2 (right to life) of the ECHR states that:

*1. 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 of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

*(a) in defence of any person from unlawful violence;*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

---

<sup>30</sup> See for example, 'The UK and the European Court of Human Rights (Research report 83, 2012), Equality and Human Rights Commission, pages v-vi

<sup>31</sup> *Janowiec v Russia* App No 55508/07 (ECtHR 21 October 2013) (2014) 58 EHRR 30

Article 2 is “*one of the most fundamental provisions*”<sup>32</sup> of the ECHR. It is non-derogable in peacetime<sup>33</sup> and places substantive and procedural obligations on the State.

Article 2 imposes both negative and positive substantive obligations on the State. It prohibits the State from depriving an individual of their life intentionally<sup>34</sup>, except for in limited situations<sup>35</sup> (a negative obligation). It requires the State to protect everyone’s life by law (a positive obligation)<sup>36</sup>; this encompasses a systems duty to put in place a regulatory framework to protect life and an operational duty to protect individuals in certain circumstances<sup>37</sup>. Article 2 also implies a corollary procedural obligation to investigate suspected breaches of the substantive negative and positive obligations.

#### 4.1 *Negative obligation – not to intentionally deprive an individual of life*

Article 2 sets out the limited circumstances when a deprivation of life will not be unlawful. These circumstances are “*strictly construed*”<sup>38</sup> but can include the “*use of lethal force by police officers*” which “*may be justified in certain circumstances*”<sup>39</sup>. Lawful deprivations of life can include “*intentional killing*” and also situations where it is permitted to “*use force*” which may result, as an unintended outcome, in the deprivation of life<sup>40</sup>.

For a deprivation of life to be lawful under Article 2(2), two conditions must be satisfied. First, the death “*must “result[s] from the use of force which is **no more than absolutely necessary**”* [emphasis added]. Second, that “*use of force*” must be

---

<sup>32</sup> See the detailed *Guide on Article 2 of the ECHR, the European Court of Human Rights* (updated 31 August 2023) [echr.coe.int/documents/d/echr/Guide\\_Art\\_2\\_ENG](https://echr.coe.int/documents/d/echr/Guide_Art_2_ENG) (“Guide on Article 2”), page 6 section I.A.2

<sup>33</sup> No derogation from Article 2 is permissible except in respect of deaths resulting from lawful acts of war; Article 15(2) ECHR

<sup>34</sup> ECHR, Article 2(1)

<sup>35</sup> ECHR, Article 2(1), which allows a State to intentionally deprive a life for a death penalty, and Article 2 (2), which sets out limited circumstances when deprivation of life may be justified.

<sup>36</sup> ECHR, Article 2(1)

<sup>37</sup> (*Maguire*) v HM Senior Coroner for Blackpool and Fylde [2023] 3 WLR 103, paragraphs 9-10

<sup>38</sup> *McCann and Others v United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) (1996) 21 EHRR 97, paragraph 147

<sup>39</sup> *Nachova and Others v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 94

<sup>40</sup> *McKerr v United Kingdom* App no 28883/95 (ECtHR, 4 May 2001) (2002) 34 EHRR 20 at paragraph 110; see further *Sweet & Maxwell Human Rights Practice, Article 2*, section 2.015

absolutely necessary “for the achievement of one [or more] of the purposes”<sup>41</sup> contained in Article 2(2)(a) - (c) ECHR. These purposes are (i) self-defence (Article 2(a))<sup>42</sup>; (ii) “to effect a lawful arrest or to prevent the escape of a person lawfully detained” (Article 2(b)) and (iii) a lawful action “taken for the purpose of quelling a riot or insurrection” (Article 2(c)).

This test of “absolute necessity” is linked to a strict test of proportionality. Meeting the threshold of “absolute necessity” requires that “the force used must be strictly proportionate to the achievement of the [permitted] aims”<sup>43</sup>. Therefore, when assessing the proportionality of the use of force, “...a balance must be struck between the aim pursued and the means employed to achieve it”<sup>44</sup>.

In cases concerning use of force during arrest, the ECtHR has determined that the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. Accordingly, “where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence”, the threshold of absolute necessity is not met<sup>45</sup>. This includes situations where “a failure to use lethal force may result in the opportunity to arrest the fugitive being lost”<sup>46</sup>.

In assessing necessity, whether other (non-lethal) force could have been used will be considered. In *Nachova v Bulgaria*, use of lethal force to effect arrest (i.e. fatally shooting the deceased) was determined as “grossly excessive” partly due to the “other means available to effect arrest”<sup>47</sup>. The planning and control of the law enforcement operation involving lethal force may also be considered. In *Nachova v Bulgaria*, the ECtHR criticised the law enforcement operation planning as “arresting officers were

---

<sup>41</sup> See Guide on Article 2, paragraph 104 for detailed case law

<sup>42</sup> *Sweet & Maxwell Human Rights Practice, Article 2*, section 2.015

<sup>43</sup> *McCann and Others v United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) (1996) 21 EHRR 97, paragraph 149. See Guide on Article 2, paragraphs 102-108 for more detail

<sup>44</sup> *Güleç v Turkey* App no 21593/93 (ECtHR, 27 July 1998) (1999) 28 EHRR 121, paragraph 71

<sup>45</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 95

<sup>46</sup> *Ibid*, paragraph 95

<sup>47</sup> *Ibid*, paragraphs 94, 108

*instructed to use all available means to arrest*” the deceased, failing to “*minimise the risk of loss of life*”<sup>48</sup>.

The ECtHR will also consider whether the State agent that used force had “*an honest and genuine belief that the use of force was necessary*”<sup>49</sup>. Such a use of force “*may be justified...where it is based on an honest belief which is perceived, for good reason, to be valid at the time but **subsequently turns out to be mistaken***”<sup>50</sup> [emphasis added]. However, the reasonableness of that “*honest and genuine belief*” will be considered by the ECtHR<sup>51</sup>. Without there being good reasons, taking into consideration surrounding circumstances, the ECtHR may not accept that a belief in the necessity of force “*was honest and genuinely held*”<sup>52</sup>.

Courts must “*subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used*”<sup>53</sup> by State agents. This requires consideration of the actions of the state agent using force and the surrounding circumstances<sup>54</sup>. In *Frančiška Štefančič v Slovenia*, considering surrounding circumstances including assessing whether the State provided “*special care*” to a “*vulnerable*” individual with known medical conditions<sup>55</sup>. Frančiška Štefančič died as a result of asphyxiation during use of force by police and medical staff to effect psychiatric hospitalisation<sup>56</sup>. This case confirms that states have a “**positive obligation to take all reasonable measures to ensure that the health and well-being of persons in detention, police custody or under arrest...are adequately secured**”<sup>57</sup> [emphasis added]. This can include the prompt provision of “*medical assistance required by their condition*”<sup>58</sup> to individuals while under police arrest.

---

<sup>48</sup> *Ibid*, paragraph 103

<sup>49</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 248

<sup>50</sup> *Ibid*, paragraph 244, see also Guide on Article 2, paragraph 109;

<sup>51</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraphs 248, 251

<sup>52</sup> *Ibid*, paragraph 248

<sup>53</sup> *McCann and Others v United Kingdom* App No 18984/91 (ECtHR, 27 September 1995) (1996) 21 EHRR 97, paragraph 150

<sup>54</sup> *Ibid*, 150

<sup>55</sup> *Frančiška Štefančič v Slovenia* App no 58349/09 (ECtHR, 24 October 2017), paragraph 66

<sup>56</sup> *Ibid*, paragraphs 76-82

<sup>57</sup> *Ibid*, paragraph 66

<sup>58</sup> *Ibid*, paragraph 66

#### 4.2 *Positive obligation - duty to provide a regulatory framework*

In *Nachova v Bulgaria*, the ECtHR confirmed that “*Article 2 implies a primary duty on the State to secure the right to life by putting in place an **appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in light of the relevant international standards***”<sup>59</sup> [emphasis added]. In cases involving lethal force by police officers, “*relevant international standards*” can include non-legally binding standards, such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials<sup>60</sup>.

Factors that may indicate a State has failed to provide an appropriate legal and administrative framework include lax regulations and absence of effective safeguards to prevent the arbitrary deprivation of life in national law, including the law regulating policing<sup>61</sup>.

#### 4.3 *Positive obligation - operational duty*

Article 2(1) can also imply a positive obligation on States to take preventative operational measures where there is a known real and immediate threat to the life of an individual. This duty derives from the case of *Osman v United Kingdom*<sup>62</sup>, relating to risk of criminal violence by a third party, and extends in some circumstances to protection from risk of suicide<sup>63</sup>. A full discussion of the operational duty is outside the scope of this note.

#### 4.4 *Procedural obligation - duty to investigate*

---

<sup>59</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) 42 EHRR 43, paragraph 96

<sup>60</sup> *Sweet & Maxwell Human Rights Practice, Article 2*, section 2.014; *ibid*, paragraphs 71, 96

<sup>61</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 97

<sup>62</sup> App no (23452/94) (ECtHR, 28 October 1998) (2000) 29 EHRR 245

<sup>63</sup> *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74

States also have a procedural obligation to carry out effective official investigations into certain deaths, the circumstances of which engage Article 2<sup>64</sup>. This duty to investigate use of lethal force by State agents was articulated in *McCann v United Kingdom*<sup>65</sup>:

*The Court confines itself to noting, like the Commission, that a **general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.** The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by **implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State** [emphasis added]<sup>66</sup>.*

Article 2 investigations have two broad purposes. First, they "secure the effective implementation of the domestic law safeguarding the right to life"<sup>67</sup>. Second, they "ensure their [States/State agents] accountability for deaths occurring under their responsibility"<sup>68</sup>.

What amounts to an effective official investigation under Article 2 is partly guided by the fact specific circumstances<sup>69</sup>, with the ECtHR cautioning against a "check-list" approach as to what is meant by effectiveness<sup>70</sup>. However, the ECtHR has applied

---

<sup>64</sup> See Guide on Article 2, section IV for detailed guidance on the procedural obligation. This procedural obligation is implied in Articles 1 and 2 of the ECHR, as set out in ECtHR case law including *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 110

<sup>65</sup> *McCann and Others v United Kingdom* App No 18984/91 (ECtHR, 27 September 1995) (1996) 21 EHRR 97, paragraph 161

<sup>66</sup> *Ibid*, paragraph 161

<sup>67</sup> Guide on Article 2, paragraph 145

<sup>68</sup> See for example *Nachova and Others v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 110; see also *Anguelova v Bulgaria* App No 38361/97 (ECtHR, 13 June 2022) paragraph 137; Guide on Article 2, paragraph 145

<sup>69</sup> See for example *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 234; as quoted in *Dunne & Anor, R (On the Application Of) v Independent Office for Police Conduct (Rev 1)* [2023] EWHC 3300 (Admin) paragraph 54

<sup>70</sup> *Lakatošová and Lakatoš v Slovakia* App No 655/16 (ECtHR, 11 December 2018), paragraph 73

general principles when assessing the effectiveness of an Article 2 investigation. These principles are broadly summarised as adequacy, independence and impartiality, promptness, family involvement and public scrutiny<sup>71</sup>.

#### 4.4.1 Requirement 1: adequate investigation, including determinative analysis of the use of force

To be considered effective, the investigation must be “adequate”<sup>72</sup>. Practically, this means the investigation “*must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and—if appropriate—punishing those responsible*”<sup>73</sup> [emphasis added]. This adequacy obligation “*is not an obligation of result, but of means*”<sup>74</sup>.

For an investigation to be adequate, “*the authorities must take whatever reasonable steps they can to secure the evidence and reach their conclusions on thorough, objective and impartial analysis of all relevant elements*”<sup>75</sup> [emphasis added]. Practically, what amount to reasonable steps will be guided by the case facts. However, examples of reasonable steps in ECtHR case law include securing “*eye-witness testimony and forensic analysis and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death*”<sup>76</sup>. Examples of States not taking all relevant steps include failure to examine the link between cause of death and use of force and the necessity and proportionality of the force<sup>77</sup>. In *Nachova v Bulgaria*, the State failed to take a “*number of indispensable and obvious investigative steps*”<sup>78</sup>

---

<sup>71</sup> These principles are discussed in the context of police investigations specifically in *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009.

<sup>72</sup> See *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009; *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 233; and *R (Dunne) v Independent Office for Police Conduct* [2023] EWHC 3300 (Admin), paragraph 53

<sup>73</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 233

<sup>74</sup> *Ibid*, paragraph 233

<sup>75</sup> *Ibid*, paragraph 233

<sup>76</sup> *Ibid*, paragraph 233

<sup>77</sup> *Frančiška Štefančič v Slovenia* App no 58349/09, paragraph 79

<sup>78</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraphs 115-116

including staging a reconstruction of events and questioning a relevant officer on “*highly*” relevant facts indicating “*grossly excessive force*”, effectively shielding the individual from prosecution.

#### 4.4.2 Requirement 2: “*independent and impartial*”<sup>79</sup> investigation

Article 2 investigations must also be independent and impartial. This applies to the persons “*responsible for and carrying out the investigation*” who “*must be independent and impartial, in law and in practice*”<sup>80</sup> [emphasis added]. They must be “*independent from those implicated in the events*”<sup>81</sup>. Practically, this requires “*a lack of hierarchal or institutional connection*” and “*practical independence*”<sup>82</sup>.

The findings of the investigation must also be impartial, “*based on thorough, objective and impartial analysis of all relevant elements*”<sup>83</sup> [emphasis added], which can include securing “*relevant physical and forensic evidence*” and seeking “*the relevant witnesses*”<sup>84</sup>. The independent and impartiality of Article 2 investigations is given particular importance by the ECtHR given “*what is at stake here is nothing less than public confidence in the state’s monopoly on the use of force*”<sup>85</sup>.

#### 4.4.3 Requirement 3: “*promptness and reasonable expedition*”<sup>86</sup>

Article 2 investigations must also be “*prompt...with reasonable expedition*”<sup>87</sup>, required for “*maintaining public confidence in their [state authorities] adherence to the rule of*

---

<sup>79</sup> *Ibid*, paragraph 115; see also See Guide on Art 2, section F paragraphs 158-165; *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009 paragraph 8

<sup>80</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 112

<sup>81</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 232; see also the case summary - [Armani Da Silva v the United Kingdom \[GC\] \(coe.int\)](#)

<sup>82</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 232

<sup>83</sup> *Ibid*, paragraph 234

<sup>84</sup> *Ibid*, paragraph 258

<sup>85</sup> *Ibid*, paragraph 232

<sup>86</sup> See Guide on Article 2, paragraphs 171-175; *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009 paragraphs 70-73

<sup>87</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 237; see also Guide on Article 2, paragraphs 171-175

*law and in preventing any appearance of collusion in or tolerance of unlawful acts*<sup>88</sup>. What is considered prompt will partly depend on the facts of the case. It is the responsibility of the State, and not the next-of-kin or family members, to instigate and pursue Article 2 investigations<sup>89</sup>.

#### 4.4.4 Requirement 4: involvement of the victim and victim's family members

Article 2 investigations must also be accessible to the victim's family members/next of kin, *"to the extent necessary to safeguard their legitimate interests"*<sup>90</sup>. The ECtHR found an investigation was sufficiently accessible where there the victim's family received *"regular detailed verbal briefings"* on the investigation, were *"represented at the inquest at the State's expense"* and were able to engage in judicial review<sup>91</sup>.

#### 4.4.5 Requirement 5: public scrutiny<sup>92</sup>

Effective Article 2 investigations also require *"a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice"*<sup>93</sup>. This *"degree of public scrutiny may well vary from case to case"*<sup>94</sup>. However, ensuring public scrutiny does not require all investigative materials to be automatically disclosed or published publicly, particularly if they *"involve sensitive issues with potential prejudicial effects"*, or for every family request for an *"investigative measure"* to be fulfilled<sup>95</sup>.

## 5. Article 14 of the ECHR – Prohibition of Discrimination

### 5.1 Prohibition of racial discrimination under Article 14 ECHR

---

<sup>88</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 118; see also Guide on Article 2, paragraph 172

<sup>89</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 111

<sup>90</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 235; see also *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009 paragraph 30; see also Guide on Article 2, paragraph 177

<sup>91</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 241

<sup>92</sup> *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009 paragraph 30; Guide on Article 2, paragraphs 176-179

<sup>93</sup> *Lakatošová and Lakatoš v Slovakia* App No 655/16 (ECtHR, 11 December 2018), paragraph 74

<sup>94</sup> *Ibid*, paragraph 74

<sup>95</sup> *Armani Da Silva v United Kingdom* App no 5878/08 (ECtHR, 30 March 2016) (2016) 63 EHRR 12, paragraph 236

Article 14 ECHR is also relevant to the inquiry. It states that:

*“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” [emphasis added].*

Article 14 allows individuals to enjoy their ECHR rights and freedoms (including the right to life under Article 2) without discrimination on various grounds. These protected grounds include race and religion.

Article 14 is distinct from the other rights and freedoms set out under the ECHR as it “has no independent existence”<sup>96</sup> and “does not apply unless the facts at issue fall within **the ambit of another Convention right**”<sup>97</sup> [emphasis added]. As a result, Article 14 does not provide a general or free-standing prohibition of discrimination and must be read in conjunction with other ECHR rights.

In practice, the ECtHR has examined alleged violations of Article 14 (based on racial discrimination) in conjunction with various ECHR rights, including Article 2 (the right to life), Article 3 (prohibition on torture, inhuman or degrading treatment and punishment) and Article 8 (respect for private and family life). Only violations of Article 14 in conjunction with Article 2 are considered within the scope of this note. The case law on what falls within the ‘ambit’ of a Convention right is discussed further below.

## 5.2 Comparison to the Equality Act 2010

Article 14 ECHR protections differ from those contained in the Equality Act 2010. Two

---

<sup>96</sup> See *Sweet & Maxwell Human Rights Practice, Article 14*, section 14.004; *The European Convention on Human Rights and Policing: A handbook for police officers and other law enforcement officials* (2013), page 19; also the detailed [Guide on Article 14 of the ECHR](#), *the European Court of Human Rights* (updated 29 February 2024) (“Guide on Article 14”), paragraph 3

<sup>97</sup> *Sweet & Maxwell Human Rights Practice, Article 14*, section 14.002; *Guide on Article 14*, paragraph 3

key differences are the scope of grounds protected and the operation of the prohibition.

Under the Equality Act 2010, discrimination based on a closed list of specific protected characteristics (including race) is prohibited. This prohibition exists independently and does not require an individual to link that discrimination to the enjoyment or exercise of another right, as is required under Article 14 ECHR. Less favourable treatment done because of a protected characteristic (i.e., direct discrimination) cannot be justified.

By contrast, under Article 14 ECHR, ECHR rights are to be enjoyed without discrimination based on an “*open-ended list of grounds*”<sup>98</sup>. As a result, the scope for protected grounds is broader under Article 14 ECHR. However, as discussed above, Article 14 only applies where the facts fall within the ambit of another ECHR right. A difference in treatment done because of a protected ground will not amount to a breach of Article 14 where there is an objective and reasonable justification for it.

More detail on the protections offered under the Equality Act 2010 can be found in the Equality Act 2010 law and practice note (SBPI-00615 - Law and Practice Note – Equality Act 2010).

### 5.3 Race under Article 14 ECHR

Race and colour are protected grounds under Article 14 ECHR. These terms are not defined in Article 14 ECHR. However, ECtHR case law and guidance provides the following summary definition of race:

*“Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by*

---

<sup>98</sup> See Guide in Article 14, section V, including paragraph 96

*common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.*<sup>99</sup>

The ECtHR considers “*discrimination on account of a person’s ethnic origin is a form of racial discrimination*”<sup>100</sup>. Discrimination based on race and/or ethnicity can be based on both actual and/or perceived ethnicity and/or race<sup>101</sup>.

#### 5.4 Definition of discrimination

The term discrimination is not defined in Article 14 ECHR. However, ECtHR case law and guidance establishes that discrimination can take many forms, including<sup>102</sup>:

(i) Direct discrimination – meaning a “*difference in treatment of persons in analogous, or relatively similar situations*” and “*based on identifiable characteristic, or status*”<sup>103</sup> without objective and reasonable justification. This can include “*harassment and instruction to discriminate*”<sup>104</sup>.

(ii) Indirect discrimination – for example, when “*a general policy or measure that has disproportionately prejudicial effects on a particular group...even where it is not specifically aimed at that group and there is no discriminatory intent*”<sup>105</sup>.

(iii) A failure to treat different situations differently – sometimes referred to as ‘*Thlimmenos discrimination*’.<sup>106</sup> This is similar to indirect discrimination but does not require a general policy or measure to be established. A state may discriminate if it fails to “*attempt to correct inequality through different treatment...without objective an*

---

<sup>99</sup> *Timishev v Russia* App nos 55762/00 55974/00 (ECtHR, 13 December 2005) paragraph 55; also *Sejdić and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009) paragraph 43; Guide on Article 14, section B paragraph 115

<sup>100</sup> *Sejdić and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009) paragraph 43 which also references the ICERD.

<sup>101</sup> *Zăicescu and Fălticaneanu v Romania* App no 42917/16 (ECtHR, 23 April 2024) paragraph 142; see also Guide on Article 14, section B paragraph 116

<sup>102</sup> See Guide on Article 14, section II paragraphs 32-53 for detailed breakdown of types of discrimination

<sup>103</sup> *Ibid*, paragraph 32

<sup>104</sup> *Ibid*, paragraph 34

<sup>105</sup> *Ibid* paragraph 35; also for example *Biao v Denmark* App No 38590/10 (ECtHR, 24 May 2016) (2017) 64 EHRR 1, paragraph 91

<sup>106</sup> *Thlimmenos v Greece* (2001) 31 EHRR 15 at paragraph 44; see also *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 at paragraphs 40-44 and 48

*objective and reasonable justification*<sup>107</sup>. States therefore have positive, as well as negative, obligations to ensure individuals enjoy ECHR rights without discrimination.

(iv) Discrimination by association - this occurs when someone is discriminated against based on the actual or perceived protected characteristic (such as race) or status of another person. The person discriminated against can be, or can be perceived to be, associated or affiliated with the person with the actual or perceived protected characteristic<sup>108</sup>.

### 5.5 Test for unlawful discrimination under Article 14

Not all differences in treatment constitute discrimination; only those which lack objective and reasonable justification. The following test is applied by the ECtHR to determine if the difference in treatment amounts to unlawful discrimination:

*“1. Has there been a **difference in treatment** of persons in analogous or relevantly similar situations – or a **failure to treat differently** persons in relevantly different situations?*

*2. If so, is such difference – or absence of difference – **objectively justified**?*

*In particular,*

*a. Does it pursue a **legitimate aim**?*

*b. Are the means employed **reasonably proportionate** to the aim pursued?” [emphasis added]<sup>109</sup>*

The correct approach has also been expressed by Lady Hale in *R (DA) v Secretary of State for Work and Pensions* as follows:

*“(i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?*

---

<sup>107</sup> See *Sejdić and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009) paragraph 44; Guide on Article 14, paragraphs 44-47

<sup>108</sup> *Molla Sali v Greece* App no 20452/14 (ECtHR, 19 December 2018) (2020) 71 EHRR SE3. See also Guide on Article 14, section II paragraphs 41-43

<sup>109</sup> See guide on Article 14, section III, paragraph 54

(ii) Does the ground upon which the complainants have been treated differently from others constitute a 'status'?

(iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?

(iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear 'a reasonable relationship of proportionality' to the aims sought to be realised...?"<sup>110</sup>

## 5.6 Within the ambit of another ECHR right

As discussed above, to pursue a claim for discrimination under Article 14 ECHR, a claimant would need to show the facts of that discrimination came within the ambit of another ECHR right. For example, in *R (Tigere) v Secretary of State for Business, Innovation and Skills*, a claim for discrimination in the provision of university funding could be brought under Article 14 because the facts fell within the ambit of the Article 2 Protocol 1 right to education.<sup>111</sup>

A factual scenario can come within the ambit of another Convention right without amounting to a contravention of that right. In *Tigere*, there was no infringement of the Article 2 Protocol 1 minimum entitlement to educational provision but nonetheless discriminatory arrangements for access to further education (over and above the minimum standard) breached Article 14.

However, Article 14 will not be engaged if there is only a tenuous connection with another ECHR right<sup>112</sup>. Whether the link is tenuous such that the situation does not fall within the ambit of the right is a matter of fact and degree.<sup>113</sup>

---

<sup>110</sup> [2019] UKSC 21 at paragraph 163

<sup>111</sup> *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57

<sup>112</sup> *R (G) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795 at paragraph 53; see further *Sweet & Maxwell Human Rights Practice, Article 14*, section 14.006, detailed case law is discussed at footnote 7

<sup>113</sup> *Wandsworth LBC v Vining* [2017] EWCA Civ 1092 at paragraph 55

## 5.7 Protected status

ECtHR case law confirms that “*only differences in treatment based on identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14*”<sup>114</sup>. Difference in treatment can be based on many grounds, given Article 14’s “*non-exhaustive*”<sup>115</sup> grounds. As discussed further below, discrimination on the basis of a ‘core’ listed status will be more difficult to justify than a less intrinsic characteristic. The ECtHR has also recognised that discrimination can occur on the ground of combined statuses.<sup>116</sup> There is considerable case law on what qualifies as a protected status for the purposes of Article 14, but as race is a listed ground, it is not relevant for the purposes of this note.

## 5.8 Difference in treatment to those in analogous situation

Unlawful discrimination requires there to have been a difference in treatment of persons in relatively similar or analogous situations, or failure to treat differently those in different situations.

Establishing who the “comparator” persons are in relatively similar or analogous situations will be guided by the facts of the case. In the ECtHR’s guidance on Article 14, the ECtHR has suggested that assessment of a comparator:

*“...is both specific and contextual; it can only be based on objective and verifiable elements, and the comparable situations must be considered as a whole, avoiding isolated or marginal aspects which would make the entire analysis artificial”*<sup>117</sup>.

There is a degree of overlap between assessment of *comparability* and *justification*; a difference in the factual circumstances may justify a difference in treatment, and in relation to both a court must consider what the reasons for the treatment were. Lady

---

<sup>114</sup> *Carson and Others v UK* App no 42184/05 (ECtHR, 16 March 2010) (2010) 51 EHRR 13, paragraph 61; Guide on Article 14, paragraph 89

<sup>115</sup> *Biao v Denmark* App No 38590/10 (ECtHR, 24 May 2016) (2017) 64 EHRR 1, paragraph 89; see also Guide on Article 14, paragraph 49

<sup>116</sup> *BS v Spain* (47159/08) (ECtHR, 12 July 2012) at paragraph 62

<sup>117</sup> Guide on Article 14, paragraph 60

Hale has suggested that “*unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification*”.<sup>118</sup>

### 5.9 Objective and reasonable justification

For discrimination to be unlawful, there must be “*no objective and reasonable justification*”<sup>119</sup> for the difference in treatment. To be objective and reasonably justified, that difference in treatment must “*pursue a “legitimate aim” and be reasonably proportionate*”<sup>120</sup>.

A court or tribunal must consider:

- “(i) *does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right;*
- “(ii) *is the measure rationally connected to that aim;*
- “(iii) *could a less intrusive measure have been used; and*
- “(iv) *bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?”*<sup>121</sup>

States have some discretion in this assessment as they “*enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment*”<sup>122</sup>. This is reflected in a similar margin of discretion afforded by domestic courts and tribunals to public authorities.<sup>123</sup> A wider margin is usually afforded where the matter under challenge is an economic or social

---

<sup>118</sup> *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, paragraphs 23-25

<sup>119</sup> *Molla Sali v Greece* App no 20452/14 (ECtHR, 19 December 2018) (2020) 71 EHRR SE3, paragraph 135

<sup>120</sup> *Willis v The United Kingdom* App No 36042/97 (ECtHR, 11 June 2002) (2002) 35 EHRR 21, paragraph 39

<sup>121</sup> *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at paragraph 33

<sup>122</sup> *Willis v The United Kingdom* App No 36042/97 (ECtHR, 11 June 2002) (2002) 35 EHRR 21, paragraph 39

<sup>123</sup> *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at paragraphs 115 and 142-143,

policy measure, where the standard of review is restrained to consideration of whether the measure is “*manifestly without reasonable foundation*”.<sup>124</sup>

However, justification requires ‘very weighty reasons’ if the ground for the difference in treatment is a ‘core’ characteristic such as race, sex or sexual orientation.<sup>125</sup> Indeed, while a difference in treatment based on nationality is capable of being justified by very weighty reasons<sup>126</sup>, the ECtHR has held that:

*“No difference in treatment based exclusively or to a decisive extent on a person’s ethnic origin is capable of being justified in a contemporary democratic society. Discrimination on account of, inter alia, a person’s ethnic origin is a form of racial discrimination”*<sup>127</sup>.

## **6. Article 14 in conjunction with Article 2**

As set out above, the Article 14 prohibition on discrimination applies where the subject matter falls within the ambit of one of the substantive Convention rights, including the Article 2 right to life. Article 2 comprises both substantive and procedural rights and duties. These include an obligation on the State to conduct an effective investigation where an individual has been killed by use of force.<sup>128</sup>

The jurisprudence was significantly developed in *Nachova v Bulgaria*<sup>129</sup>. The case concerned the deaths of two 21-year-old Roma men, Mr Angelov and Mr Petkov, shot by a military police officer whilst attempting to escape conscription. A witness alleged that the police shooter had made a racist comment (“*you damn Gypsies*”) to him shortly after the shooting. This should have alerted the authorities to the need to investigate

---

<sup>124</sup> *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at paragraphs 117-129, and *Stec v United Kingdom* (2006) 43 EHRR 1017 at paragraphs 51-52

<sup>125</sup> *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at paragraphs 115(2) and (4) and 129(2) and (4)

<sup>126</sup> *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 September 1996) (1997) 23 EHRR 364, paragraph 42

<sup>127</sup> *Biao v Denmark* App No 38590/10 (ECtHR, 24 May 2016) (2017) 64 EHRR 1, paragraph 94

<sup>128</sup> *Çakici v Turkey* (23657/94) (2001) 31 EHRR 5 at paragraph 86.

<sup>129</sup> App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43

possible racist motives, but no such investigation had been undertaken<sup>130</sup>. A military prosecutor concluded that the shooter had committed no offence and closed the case.

The ECtHR Grand Chamber considered that it had insufficient evidence from which to conclude that race was a motive for the killing<sup>131</sup> but went on to analyse whether the State's failure to adequately investigate a possible racial motive was in itself a breach of Article 14, read in conjunction with the Article 2 procedural obligation to conduct an effective investigation and concluded that:

*“[W]hen investigating violent incidents, and in particular, deaths at the hands of State agents, State authorities have the **additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events**”*<sup>132</sup>  
[emphasis added].

The ECtHR considers this additional duty on States to be particularly important, given *“the need to continuously reassert society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence”*<sup>133</sup>.

The ECtHR has acknowledged that “proving racial motivation will often be extremely difficult in practice”<sup>134</sup>. The State’s duty *“to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute”*<sup>135</sup>. However, in *Lakatošová and Lakatoš v Slovakia*, the ECtHR summarised that:

*“the authorities must do what is reasonable, given the circumstances of the case... in particular to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and*

---

<sup>130</sup> *Ibid*, paragraph 127

<sup>131</sup> *Ibid*, paragraph 150

<sup>132</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 160; also *Lakatošová and Lakatoš v Slovakia* App No 655/16 (ECtHR, 11 December 2018), paragraph 75

<sup>133</sup> Guide on Article 14, paragraph 110

<sup>134</sup> *Lakatošová and Lakatoš v Slovakia* App No 655/16 (ECtHR, 11 December 2018), paragraph 76

<sup>135</sup> *Ibid*, paragraph 76

*objective decisions, without omitting suspicious facts that may be indicative of racially induced violence*<sup>136</sup>

Several factors can alert a State to the need to verify and investigate potential racial discrimination in use of force under Article 2<sup>137</sup>. These include allegations of “*racial verbal abuse*” or “*racial insults*” by law enforcement officers during or after using force or eye-witness accounts testifying to the racist nature of the attack and state agent using lethal force<sup>138</sup>. In *Ognyanova v Bulgaria*, the “*occurrence of violent incidents against Roma in Bulgaria*”<sup>139</sup> was also considered.

In *Lakatošová and Lakatoš v Slovakia*, the ECtHR confirmed wide circumstances can trigger an investigation into potential racial motives, noting “*any specific information capable of suggesting that there had been a racial motivation would suffice to open an investigation into a possible causal link between alleged racist attitudes and a death*”<sup>140</sup>. Where relevant factors arise, States must seek to verify, and where necessary, investigate possible racial motivations or “*overtones*”<sup>141</sup>.

Investigating racist motives in use of force may require the State to review the relevant State agents’ records and history. In *Nachova v Bulgaria*, the State was criticised for not investigating and verifying whether the state agent accused of racial abuse had “*been involved in similar incidents*” or previously displayed “*anti-Roma sentiment*”<sup>142</sup>.

A State’s failure to investigate racial motivations to violence, including use of lethal force, is treated with particular gravity by the ECtHR. In its guidance and case law, the ECtHR has emphasised that “*racial violence is a particular affront to human dignity*

---

<sup>136</sup> *Ibid*, paragraph 76; see also *Ciorcan v Romania* App no 29414/09 (ECtHR 27 January 2015), paragraphs 158-159

<sup>137</sup> *Gjikondi and Others v Greece* App No 17249/10 (ECtHR, 21 December 2017) paragraph 137

<sup>138</sup> *Gjikondi and Others v Greece* App No 17249/10 (ECtHR, 21 December 2017) paragraph 137

<sup>139</sup> *Ognyanova v Bulgaria* App no 46317/99 (ECtHR 23 February 2006) (2007) 44 EHRR 7, paragraph 40

<sup>140</sup> *Lakatošová and Lakatoš v Slovakia* App No 655/16 (ECtHR, 11 December 2018), paragraph 84

<sup>141</sup> *Ibid*, paragraph 85

<sup>142</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 167

and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction”<sup>143</sup>.

## 7. The ICERD and ICCPR

The United Kingdom is also a party to various international human rights law conventions and treaties which concern protection of race. This includes the ICERD and the ICCPR which are relevant to this Inquiry.

The United Kingdom is bound by the ICERD and ICCPR in international law. By signing and ratifying these treaties, “the UK [including Scotland] has pledged to make sure its domestic laws and policies comply with them”<sup>144</sup> and to “respect, protect and fulfil the human rights contained in”<sup>145</sup> these treaties. However, as the provisions of the ICERD and ICCPR have not been directly incorporated into domestic law, these treaties are not directly binding in domestic law, including in Scots law.

Despite this, the ICCPR and ICERD are still relevant to domestic law, as they “may guide the interpretation of Convention rights”<sup>146</sup>. As set out by the Supreme Court in *R (SG) v Secretary of State for Work and Pensions*, provisions of similar international unincorporated treaties may become relevant to English law in various scenarios, including when the domestic courts are applying the ECHR via the HRA 1998<sup>147</sup>. When considering potential breaches of ECHR rights, the ECtHR may interpret the ECHR “in appropriate cases, in light of generally accepted international law in the same field, including multi-lateral treaties”<sup>148</sup>. For example, provisions of the ICERD on racist violence were considered by the ECtHR in *Nachova v Bulgaria*<sup>149</sup> and in *Lakatošová and Lakatoš v Slovakia*<sup>150</sup>.

---

<sup>143</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 145; Guide on Article 14, paragraph 110

<sup>144</sup> Paragraph 101 - [Getting Rights Right: Human Rights and the Scottish Parliament](#)

<sup>145</sup> Paragraph 102 - [Getting Rights Right: Human Rights and the Scottish Parliament](#)

<sup>146</sup> 2.014 sweet and maxwell chapter on Article 2

<sup>147</sup> Paragraph 137 - [R \(SG\) v Secretary of State for Work and Pensions \[2015\] UKSC 16](#)

<sup>148</sup> Paragraph 137 - [R \(SG\) v Secretary of State for Work and Pensions \[2015\] UKSC 16](#)

<sup>149</sup> *Nachova v Bulgaria* App nos 43577/98 & 43579/98 (ECtHR, 6 July 2005) (2006) 42 EHRR 43, paragraph 76

<sup>150</sup> *Lakatošová and Lakatoš v Slovakia* App No 655/16 (ECtHR, 11 December 2018), paragraphs 63-64

As at May 2024, the Scottish Government remains in consultation regarding a Scottish Human Rights Bill. This proposed bill seeks to incorporate into Scots Law, in so far as devolution powers allow, the rights contained within the ICERD, amongst other international human rights law treaties<sup>151</sup>.

## 7.1 ICERD

### 7.1.1 Legislative purpose of the ICERD

The purpose or intention of the ICERD is to “*affirm[s] the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations...*” [emphasis added]<sup>152</sup>. As with the ECHR, the origins of the ICERD are rooted in the UDHR and its proclamation that “*everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin.*”<sup>153</sup>

The ICERD was adopted 21 December 1965 and entered into force 4 January 1969. It was ratified by the UK in 1969. Accordingly, the UK has an “*obligation to uphold and implement all provisions*” of the ICERD, unless the UK has made a “*declaration or reservation on particular articles of ICERD*”<sup>154</sup>. The implementation of the ICERD in relevant states, including the UK, is monitored by the UN treaty body the Committee on the Elimination of Racial Discrimination (“**CERD**”).

### 7.1.2 Relevant provisions of the ICERD

Articles 1, 2 and 4 of the ICERD are most relevant to the Inquiry.

Article 1 sets out an international definition of racial discrimination, stating that it shall mean:

---

<sup>151</sup> [Section Two – What Will Be In The Human Rights Bill? - A Human Rights Bill for Scotland: consultation guide - gov.scot \(www.gov.scot\); G2309300.pdf](#) paragraph 84

<sup>152</sup> See preamble and Article 1

<sup>153</sup> ICERD and CERD: A guide for Civil Society Actors [Final Draft 20 July 2011 for print \(ohchr.org\)](#)

<sup>154</sup> ICERD and CERD: A guide for Civil Society Actors [Final Draft 20 July 2011 for print \(ohchr.org\) 1](#)

*“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” [emphasis added].*

Article 2(1)(a) sets out the obligations on public authorities, stating:

*“Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation” [emphasis added].*

Article 4 sets out a “*prohibition of racial incitement*” and the obligation on public bodies to not promote or incite racial discrimination. Article 4(a) to (c) sets out requirements to take legislative measures to achieve those aims.

The UK on ratifying ICERD issued an interpretive statement to Article 4, balancing the obligations contained therein with the right to freedom of expression:

*“It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.”<sup>155</sup>*

### 7.1.3 Application of ICERD

---

<sup>155</sup> United Nations Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination (1965), accessible at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en#EndDec)

UN issued guidance has commented on the limited definition in the UK of deaths in or following police custody:

*“Submissions also showed that in the United Kingdom of Great Britain and Northern Ireland, the definition of death “in or following police custody” does not include cases where a person was in direct contact with the police prior to their death but had not been arrested or detained. As such, key cases involving deaths in direct police contact, such as those involving use of force and restraint, are lost in a broader category”<sup>156</sup>.*

In 2016, the CERD specifically criticised the lack of representation in the police force in Scotland following the UK’s submissions as part of its periodic review:

*“Additionally, while the Committee welcomes some progress in improving the ethnic diversity of some police forces, it is concerned that the ethnic composition of the majority of the police forces in the State party is not representative of the communities that they serve, particularly in Scotland. It also expresses concern at reports that black police officers and police officers from ethnic minority groups face discriminatory treatment within the police and are underrepresented at senior decision making levels (arts. 2, 5 and 6)”<sup>157</sup>.*

## 7.2 ICCPR

The ICCPR promotes civil and political rights of individuals. It is part of the International Bill of Human Rights, together with the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”) and the UDHR. The ICCPR was adopted in 1966 and entered into force on 23 March 1976. The UK ratified the ICCPR on May 1976.

---

<sup>156</sup> [A/HRC/51/55: Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers – Report of the International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement | OHCHR](#) at p.13

<sup>157</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Concluding observations on the twenty-first to twenty-third periodic reports of United Kingdom\*, August 2016, paragraph 28, [https://www.equalityhumanrights.com/sites/default/files/icerd-concluding\\_observations.pdf](https://www.equalityhumanrights.com/sites/default/files/icerd-concluding_observations.pdf)

Article 6(1) provides that *“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”*

Guidance on the application of Article 6 can be found in General comment No. 36<sup>158</sup>. It stipulates that:

*“In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defence, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed, only against the attacker; and the threat responded to must involve imminent death or serious injury. The use of potentially lethal force for law enforcement purposes is an extreme measure<sup>28</sup> that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat. It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others.<sup>30</sup> The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat”<sup>159</sup>.*

Article 26 provides that *“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

---

<sup>158</sup> [General comment No. 36 - Article 6 \(the right to life\)](#), UN Human Rights Committee, 3 September 2019

<sup>159</sup> *Ibid*, paragraph 12

States are obliged to report periodically on measures taken in compliance with their obligations under ICCPR. The last full review of the UK took place in March 2024. The UN Human Rights Committee's Concluding Observations noted:

*“The Committee is concerned about reports indicating that racial inequality and discriminatory practices against Gypsies, Roma and Travellers, people of African descent and other minority groups remain largely unaddressed and appear to be increasing despite some positive measures taken by the State party, including the Race Disparity Audit, the Inclusive Britain action plan published in 2022, the Gypsy/Travellers action plan (Scotland) 2019–2021, later extended to 2023, and the Racial Equality Strategy 2015–2025 for Northern Ireland. In particular, the Committee is concerned about reports demonstrating that stark inequalities stemming from systemic racism and the disproportionate and discriminatory policing of people of African descent and other ethnic minorities persist, including discrimination in the criminal justice system, the overrepresentation of people of African descent and ethnic minorities in detention, judicial bias, the lack of participation of such minorities in policymaking and decision-making, and unjustified racial and ethnic disparities in stop and search powers”<sup>160</sup>.*

Guidance on the application of Article 26 in the policing context is available from the UN's *Resource Book on the Use of Force and Firearms in Law Enforcement*<sup>161</sup>. It provides that:

*“The principle of non-discrimination must also be built in the assessment of necessity and proportionality of the use of force to avoid that excessive or arbitrary force is used against a person out of prejudice or with discriminatory intent”<sup>162</sup>.*

The UN recommends training on non-discrimination for law enforcement officials:

---

<sup>160</sup> [Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland](#), UN Human Rights Committee., 3 May 2024, paragraph 14

<sup>161</sup> *Resource Book on the Use of Force and Firearms in Law Enforcement*, Office of the UN High Commissioner for Human Rights, UN Office on Drugs and Crime, 2017

<sup>162</sup> *Ibid*, page 18

*“Training and awareness-raising. It is crucial that during training sufficient attention is given to the principle of non-discrimination and more specifically to the obligations law enforcement officials have towards certain groups in society. Training should also address the risk of stereotyping and ethnic profiling”<sup>163</sup>.*

---

<sup>163</sup> *Ibid*, page 38