Neutral Citation Number: [2015] EWHC 402 (Admin)

Case No: CO/3614/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2015

Before :

MR JUSTICE GREEN

- -

Between :

The Queen on the application of Joanna Letts	**Claimant**
- and -	
The Lord Chancellor	**Defendant**
- and -	
The Equality & Human Rights Commission	**Intervener**

- -
- -

Phillippa Kaufmann QC and **Chris Buttler** (instructed by **Bindmans LLP**) for the **Claimant**
Martin Chamberlain QC and **Malcolm Birdling** (instructed by **The Treasury Solicitor**) for the **Defendant**
Jessica Simor QC (instructed by **EHRC**) for the **Intervener**

Hearing dates: 5th February 2015

- -

Approved Judgment

Index

A. Introduction: Issue and Conclusion 1-19

(a) The Issue 1-4

(b) The Lord Chancellor's Exceptional Funding Guidance (Inquests) ("the Guidance") and the challenge thereto 5-13

(c) Conclusions on scope of Article 2 14-15

(d) Conclusion 16-19

B. The scope of the proceedings and the limits of this judgment 20-32

C. A summary of the relevant facts 33-43

D. The statutory framework 44-51

E. The Guidance 52-57

F. The purpose and object behind the Article 2 duty to investigate and the right of next-of-kin to be represented 58-65

G. The Article 2 duty to investigate includes a right to legal representation in a proper case 66-70

H. The circumstances in which the investigative duty arises automatically, i.e. without evidence of (arguable) breach upon the part of the State 71-91

I. Conclusion as to the scope of Article 2 in the case of the suicide of psychiatric patients 92-103

J. The test to be applied to the legality of Guidance: When should the Court interfere? 104-119

K. The use of the word "most" in the Guidance, paragraph [19] 120-122

L. Appropriate relief 123-124

M. Conclusion 125

Mr Justice Green :

A. Introduction: Issue and conclusion

(a) The issue

1. This application for judicial review concerns the criteria applied by the Legal Aid Agency ("LAA") to determine whether relatives of a deceased should be granted legal aid for representation at an inquest into a death which has arisen in circumstances which might engage Article 2 of the European Convention of Human Rights ("ECHR") as brought into effect in the United Kingdom by virtue of the Human Rights Act 1998. The duty to hold an inquest is governed in domestic law by the Coroners and Justice Act 2009. There is considerable overlap between that Act and Article 2; but the two do not necessarily coincide, as was recognised by the Supreme Court in *R(Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29 at paragraph [204] *per* Lord Mance JSC.

2. The first sentence of Article 2(1) ECHR stipulates that "Everyone's right to life shall be protected by law". There are many facets to this obligation which have been worked out in case law which it is not relevant in this case to delve into. It is common ground that, in broad terms, amongst the obligations that this imposes upon states are (i) a duty to set up systems of laws which are designed to protect life (the "systemic duty") and (ii) a duty in individual cases not to be complicit in the taking of life (the "operational duty"). Once again it is not the purpose of this judgment to examine the nature and scope of these two duties, save to observe that they exist and that the (different) duty which is at the heart of this case is derivative upon their existence.

3. The duty which lies at the core of this dispute is the duty to investigate a death which arises, or which might arise, as a consequence of a breach of one or other of the substantive duties referred to above. This duty of inquiry or investigation is sometimes termed the "procedural duty". Because it arises as a consequence of a violation or possible violation of the substantive obligations it is derivative or parasitic in nature. However, as I set out below, it has nonetheless been accepted as being of very great importance in any democratic society and its secondary character is by no means a reflection or indication of secondary importance.

4. For the investigation which must follow a death arising in Article 2 circumstances to be effective various conditions must be met which relate to such matters as the timing of the investigation following on from the death, the independence of the person conducting the investigation from the state and, of relevance to this case, the right of the next-of-kin to be involved in the investigative process. This latter condition in turn means that in certain cases the next-of-kin require legal representation at the inquest and this, in yet further turn, means that the state might be required to grant legal aid.

(b) The Lord Chancellor's Exceptional Funding Guidance (Inquests) ("the Guidance") and the challenge thereto.

5. The challenge in the present case focuses upon the lawfulness of the "Lord Chancellor's Exceptional Funding Guidance (Inquests)" ("the Guidance") which is promulgated under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

("LASPO"). Section 4 LASPO creates an implied power pursuant to which the Lord Chancellor may promulgate guidance which the "Director of Legal Aid Casework" (an official appointed by the Lord Chancellor under LASPO - "the Director") is required to take into account when determining applications for legal aid.

6. In the Guidance the Lord Chancellor endeavours, in relatively broad terms, to identify the steps that a caseworker, facing an application for legal aid to cover representation at an inquest, must take. The Guidance identifies two steps or conditions which must be passed in order to warrant legal aid. The first is that the case must fall within Article 2; the second, (which assumes that the first step is met), is that representation of the next-of-kin must be necessary to enable them to be properly involved in the inquest.

7. The present case concerns only the first step or condition. The Guidance seeks to define the ambit of an Article 2 case and it does this by directing the LAA to investigate whether there has been an arguable breach by the state of the obligation in Article 2. The Claimant, supported by the Equality & Human Rights Commission ("EHRC"), submits that the way in which the first step or condition has been framed in the Guidance reflects an error of law as to the scope of Article 2 ECHR, or at the very least is materially misleading, and that in practice any caseworker following the Guidance would impose too high a hurdle upon an applicant for legal aid and would therefore be inclined to refuse legal aid where otherwise it would, and should, be granted. It is submitted (i) that there <u>are</u> categories of Article 2 case where for the investigative duty to arise there needs first to be an arguable breach by the state of the substantive obligations; but (ii), that there is <u>also</u> a significant category of cases where if the basic facts of the case fit within a category of case to which Article 2 can in principle apply the investigative duty arises automatically and without there being a need to establish even a hint of culpability on the part of the state. It is argued that the Guidance by failing to even identify this category of case simply does not reflect the law and wrongly treats all Article 2 cases as requiring evidence of arguable breach by the state.

8. This is not, it is submitted, a technical dispute simply about eligibility to legal aid. The Claimant and the Intervener point out that the right for the next-of-kin to be involved, in an appropriate case through legal representation at an inquest, is *itself* a right conferred under Article 2 ECHR and that if therefore the LAA refuses legal aid this can result in the State being in breach of its duties under the Convention.

9. The dispute before this Court has two discrete aspects to it which I need to address. The first aspect or issue concerns the scope of Article 2 and in particular the question whether there does exist a category or categories of case(s) where the duty to investigate a death (and in this jurisdiction conduct an inquest, that being the way in which deaths are primarily inquired into in the United Kingdom) arises automatically without the need for there to be any proof that the state is or might be in breach of Article 2. The second aspect flows out of my conclusion on the first issue and asks whether the Guidance adequately reflects the position in law.

10. In relation to the first issue there was consensus between the parties that there are such categories of "*automatic*" case but there was disagreement as to the exact scope of those categories, or as to its "contours" (as Mr Martin Chamberlain QC, for the Lord Chancellor put it). I use the phrase "*automatic*" in this context to connote

categories of case where the duty to investigate arise without there being a need for proof that the state is arguably in breach.

11. In relation to the second issue concerning the adequacy of the Guidance in reflecting whatever conclusions are arrived at in respect of the first issue, there was acute disagreement. The Lord Chancellor submits that the Guidance (albeit not worded as clearly as they might have been) are perfectly adequate and are intended to operate only at a very general level and not as a text book on Article 2, and that the Claimant and Intervener's criticisms are, in substance, semantic or stylistic and not such as to render the Guidance unlawful. Ms Phillippa Kaufmann QC (for the Claimant) and Ms Jessica Simor QC (for the EHRC) submit to the contrary that the Guidance is not only erroneous and would lead to the adoption of incorrect decisions but in any event is thoroughly misleading and confusing.

12. The very specific facts which have given rise to the dispute concern a man who committed suicide during a temporary release from a mental hospital, where he was a voluntary admission. The Claimant submits that such a person falls within the category of persons in respect of whom the investigative duty under Article 2 ECHR arises. It is also submitted that the duty arises the moment that it is established, *ipso facto*, that the death arose in circumstances where the State had or ought to have had control over the patient and that there was no need for a caseworker to consider whether in the circumstances of the case the state (*in casu* the hospital authorities and the relevant medical professionals) were in arguable breach of their duty towards the deceased.

13. It is therefore submitted that for a caseworker to be directed to take account of whether there was an arguable breach of Article 2 wrongly conflates the existence of the duty with its breach.

(c) Conclusions on scope of Article 2

14. In actual fact, as the hearing progressed, it became apparent that the differences between the parties were less than at first appeared. It is common ground that there does exist a category of case relating to the suicide of psychiatric patients where the duty to investigate can be said to arise, more or less, automatically. There is also common ground that the contours of these "circumstances" are not always capable of being defined in black and white terms. There is some dispute however about where the fuzzy edges exist.

15. As the case was initially framed there was the prospect that I was going to be invited to form conclusions as to the actual outer limits of the circumstances when the automatic duty to investigate arose not only in respect of mental health patients but also in other cases. As I explain below (see paras [20ff] below) at the outset of the hearing I indicated the limited adjudicatory process that I considered was appropriate. In the event there was no real objection to this from the Claimant or EHRC and it accorded with the Defendant's position. I have confined my analysis in this case to whether there is a category of automatic case surrounding the death of psychiatric patients. Even here it is not necessary to express any concluded view on the precise outer-limits of the investigative duty since on the facts of the case the LAA did grant legal aid to the deceased's next-of-kin so that it is unnecessary to examine the correctness or legality of the LAA's decision. I have also not attempted to address the

limits of the Article 2 duty in other circumstances such as deaths in police custody, or the deaths of conscripts or the deaths of voluntary soldiers during armed conflict. On the other hand it has been necessary to examine the relevant case law on Article 2 which necessarily includes cases relating to deaths in a wide range of circumstances.

(d) Conclusion

16. What this case boiled down to was a consideration of how Article 2 applies to the suicide of mental health patients and an assessment of the (in)adequacy of the Guidance in reflecting the law. I have come to the conclusion that in one material respect the Guidance is inadequate and both incorporates an error of law and, also, provides a materially misleading impression of what the law is. I am satisfied that these errors could lead to erroneous decisions being taken by caseworkers within the LAA.

17. In my judgment the essential thrust of the Guidance conveys to the typical caseworker that in every case where legal aid was sought the caseworker had to make an assessment (leading to a decision) of whether the state was <u>arguably in breach</u> of the underlying substantive obligation (whichever one it was) and that <u>only</u> if the conclusion was that there <u>was</u> such an arguable breach would the caseworker <u>then</u> proceed to decide whether on the facts of the case there was a need to give the next-of-kin legal aid. The Guidance, albeit that it is drafted at a high level, nonetheless purports to set out an accurate general description of the law. But in the absence of a clear recognition that there is a category of case where the investigative duty arises quite irrespective of the existence of arguable breach by the state the Guidance is materially misleading and inaccurate.

18. The error is one that does not have to be cured with a <u>detailed</u> analysis of each and every category of case that might automatically trigger an investigation and its parameters or "contours". Nor would there be a need to lay down any canonical definition of the "automatic" type of case. I do not for instance accept that the Guidance is in error because it lacks sufficient detail. It would suffice for there to exist a paragraph or two which identified that there were certain categories of case where the caseworker should not assess whether there was an arguable breach and where it was recognised that the duty to investigate was triggered by entirely different facts. It does not take a great deal to place the caseworker on notice and to flag up that in certain types of case the caseworker must, if needs be, conduct some legal research or seek assistance. The Guidance could helpfully provide high level guidance on those categories and the sorts of facts that the caseworker would need to consider in order to identify them. However, as matters presently stand in those types of case where the duty to investigate arises automatically the caseworker is wrongly directed to apply the arguable breach test.

19. For this reason I take the view that the Guidance is materially in error. I have concluded however that I should not quash the Guidance. I will hear submissions on whether there is utility in my proceeding formally to make a declaration or whether the reasoning set out in this judgment suffices and makes clear what should now occur. This is not a case where a person's rights are at stake; the family of the deceased (Christopher Letts) were, as I explain below, ultimately granted legal aid to be represented at the inquest into his death so that no individual's rights would now

be vindicated by a formal declaration. The application for judicial review continued because of the importance of the point of law arising.

B. The scope of the proceedings and the limits of this judgment

20. A preliminary dispute arose as to the proper scope of the Claimant's challenge and the intervention by the EHRC. The Lord Chancellor objected to various evidential disputes being aired and to the breadth of the Claimant's submission, in that they extended beyond inquests arising out of the suicide of persons suffering from some mental disability.

21. The Claimant is the sister of Christopher Letts. He committed suicide on 19th August 2013 following discharge from a psychiatric hospital. The original Grounds for Judicial Review challenged: (1) the decision of the Director of Legal Aid Casework refusing to grant legal aid to enable the Claimant to be represented at the inquest on behalf of the family; and (2) the lawfulness of the Guidance upon the basis that it: (i) failed to give adequate guidance upon the circumstances in which the Article 2 investigative duty arose ("the Article 2 point"); and, (ii), wrongly set the threshold too high as to when a bereaved family would need legal representation in order to participate effectively at the inquest ("the need point").

22. On 11th August 2014 the Director of Legal Aid Casework conceded the claim and by a consent order dated 19th September 2014 agreed to grant to the Claimant legal aid in order for her to be represented at the inquest into her brother's death. This addressed the "need" point at least in substance.

23. On 20th August 2014 the Lord Chancellor lodged an Acknowledgement of Service contesting the claim upon the basis that it was now academic. The matter came before Kenneth Parker J on 2nd September 2014 who adjourned the application for permission to be heard in open court. He noted that the Lord Chancellor contended that the claim was academic, the Claimant having received the primary relief sought. However, he also observed that the Claimant maintained that the claim, in so far as it challenged the Guidance, should continue. The Judge stated:

> "It seems to me that this is a significant issue, particularly as other similar claims can be expected, and requires consideration at a short oral hearing".

He referred to the point as having "potential wider implications".

24. The matter came before Andrews J on 2nd October 2014 when she granted permission to apply for judicial review to challenge the lawfulness of the Guidance. It is clear that permission was granted in full knowledge that the particular dispute between the Claimant and the LAA was academic but that there was, notwithstanding, a wider dispute of public importance between the Claimant and the Lord Chancellor with regard to the proper scope and effect of the Guidance.

25. On 8th December 2014 the Treasury Solicitor wrote to the Claimant's solicitor indicating that relevant ministers had decided to amend the Guidance to take account of the Claimant's submission about the need point. In particular, it was explained that paragraph 19 of the Guidance would be amended to remove the reference and quote

from *Khan v Secretary of State for Health* [2003] EWCA Civ 1129. It is accepted by the Claimant that this modification adequately addressed the specific criticism made about "need".

26. This left outstanding the Claimant's first ground of challenge – the Article 2 point. It was said that the Guidance was inaccurate and misleading because it failed to give adequate guidance as to the scope of the State's obligations pursuant to Article 2 ECHR.

27. On 14th January 2015 Leading Counsel for the Claimant notified Leading Counsel for the Defendant that the Claimant's challenge to the Guidance, as to the circumstances in which the Article 2 investigative duty arose, would be modified and elaborated upon. It was intimated that a new, and fuller, basis of challenge would be articulated in amended grounds.

28. On 16th January 2015 the EHRC applied to intervene in support of the challenge to the Guidance and it lodged written submissions. The EHRC has a residual point (about the word "*most*") which it submits is improperly addressed in the Guidance. I address this in Section K below.

29. On 19th January 2015 the Claimant served upon the Defendant amended Grounds of Judicial Review upon which it sought permission to rely at the oral hearing. At the same time the Claimant also served four witness statements which dealt with the facts of particular cases and the handling by the LAA of applications for exceptional funding in those cases. The witness statements included criticisms of the decision making of the LAA. There was also a witness statement from Inquest (a charity providing expert services in relation to contentious deaths to the bereaved).

30. Mr Chamberlain QC, on behalf of the Lord Chancellor, contended that given that the Claimant was in fact granted legal aid, that alterations to the Guidance had been agreed to, and that the LAA had withdrawn from the litigation (by consent), this new evidence was no longer relevant and should not be admitted. He argued that the remaining issue was now a much narrower dispute over the law. Mr David Holmes, a Policy Manager within the Ministry of Justice, working in the Legal Aid Policy Team, in a witness statement stated as follows:

> "The Lord Chancellor is under a statutory duty (under Section 4(4) LASPO) to ensure that the Director acts independently of him in individual cases. Therefore neither the Lord Chancellor nor his officials have had any involvement in any of the cases referred to so I am therefore unable to comment on those decisions or the role the relevant parts of the Guidance may have played in them. Likewise, I am not able to respond to the general criticisms of the Legal Aid Agency's decision-making that are made in these and other witness statements served in these proceedings. My inability to comment on such allegations should certainly not be taken as an acceptance that there might be any force in them. However I do not in any event consider such allegations to be relevant to Ground 1, which is concerned specifically and only with the assertion that the Guidance "*suggests that there will only be a breach of the Art 2*

> *substantive duty if there has been a systemic failure and/or fails properly to set out the nature of the operational duty*" and so "*fails to give adequate guidance on the scope of the State's substantive duties under Art 2 ECHR*"".

31. In my view the proper focus of this judicial review is the important point of law arising as to whether the Lord Chancellor, in the Guidance, has correctly interpreted the scope and effect of the phrase "the operational duty under Article 2" in the context of the facts which have arisen in the present case. I agreed with Mr Chamberlain QC that, given the stage at which the litigation has arrived, it would be inappropriate to adjudicate upon the actual decision making of the LAA both in relation to the Claimant and more generally. Such an investigation and evaluation was not necessary to decide the broader point of law; but, equally, it was not fair to the LAA to engage in such an exercise when that authority was no longer a party and the Lord Chancellor was unable to mount a defence on the authority's behalf.

32. The amended Grounds did, however, elaborate upon the residual point of law in a more precise and focused manner than was hitherto the case in the initial Grounds. As I have already observed when the hearing commenced there was no significant opposition to the hearing being confined to the central issue of law arising. I granted permission to amend the Grounds but upon the basis that the judicial review was limited to the point of law which arises, which is to be assessed in the context of the facts relating to Christopher Letts and his suicide and the rights of his family, as next-of-kin. To the extent that there are implications which might arise from this judgment for other scenarios which might engage Article 2 (for example prisoners in custody) those will be for the Lord Chancellor to consider independently from this litigation, or for other cases to resolve.

C. A summary of the relevant facts

33. Given that this application has transcended from the particular to the abstract it is not strictly necessary to set out, in any detail, the underlying facts. However, because, as case law has demonstrated, even the abstract must be viewed in its own particular factual context, it is still useful to set out the background facts which have led to this litigation being lodged in the first place.

34. Christopher Letts had a history of mental illness. He was known to South London and Maudsley NHS Trust ("the Trust"). On 14th May 2012 he was detained for assessment and treatment in accordance with section 2 of the Mental Health Act 1983 ("MHA"). He suffered from a delusional belief that he was involved in a competition which led to some extraordinary behaviour such as collecting rubbish from neighbouring gardens and bins, travelling to York and Cambridge to collect rubbish and hailing a taxi to bring a wheelie bin back to London. Mr Letts was initially admitted to a private hospital in Sussex due to a shortage of beds in an appropriate hospital. He was discharged from liability to detention on 31st May 2012 and he left hospital on 8th June 2012. Although he was initially provided with follow-on support in the community he subsequently disengaged from this.

35. On 10th August 2013 the Claimant contacted the Trust's Emergency Team Leader and explained that Christopher was expressing paranoid ideas. The advice given was that he should attend A&E at the Trust hospital and he did so and was prescribed

Zopiclone (sleeping tablets) and then discharged. The Claimant, once again, contacted the Emergency Team Leader on 11th August 2013 to the effect that Christopher was feeling increasingly paranoid. That same day he deliberately cut his forearm with a piece of glass. Later he ran in front of a bus and banged his head against the vehicle until he was let in. When police and ambulance services arrived Christopher did not believe that they were who they said they were. He was taken to hospital and seen by the Mental Health Liaison Team. He told them that he had cut himself in order to stop his brain from thinking.

36. At that time there were no specialist beds available to the Trust in London and Christopher was sent to Cygnet Kewstoke, a private hospital in Weston-Super-Mare. On 12th August 2013 he was admitted as an informal patient, i.e. he was not detained under the MHA.

37. Upon admission a psychiatric assessment was performed which recorded that Christopher was admitted with symptoms of "psychotic relapse". It was reported that he was feeling paranoid and that he had cut himself because he wanted to "end up [in] this situation" before others killed him.

38. The hospital records note that on 12th August 2013 at 17.50hrs Christopher attempted to jump off the terrace. He was, apparently, tearful, frustrated and experiencing a sense of hopelessness. He had suicidal thoughts. He was, in consequence, placed on Level 3 observation, i.e. he was at arm's length from the nurse conducting the observation. One of the goals recorded for the exercise was to reduce the risk of Christopher impulsively committing suicide by deliberate or accidental conduct.

39. On 13th August 2013 Christopher again climbed on to the terrace and this time he leapt off and ran away from the hospital; he suffered minor injuries. At 17.05hrs he was formally detained under section 5(2) MHA. This power of detention may be exercised only upon a relevant clinician forming the opinion that it is necessary to detain the patient.

40. On 15th August 2013 Christopher Letts was assessed by an approved mental health practitioner and two doctors for liability to detention pursuant to sections 2 or 3 MHA. The rationale behind the assessment was that he would be at risk if he was discharged. A criticism that the Claimant makes of the assessment process that was conducted was that it was performed by doctors who were not involved in his treatment within the hospital and who did not have access to his full medical records. Neither of the assessing doctors considered that Christopher had present symptoms of mental disorder and his detention was not recommended. In the original Grounds for Judicial Review the circumstances which then led to the departure of Christopher from the hospital were put in the following way:

> "The [approved mental health practitioner] was from Somerset and was not familiar with Christopher. This was a consequence of the Trust placing Christopher out of area. The Trust's subsequent investigation found that "the AMHP reported that it was not able to identify CL's nearest relative due to limited time and information not being on the referral" and "it is likely the contact with the family may have been helpful to the

> assessment process as there was no one involved in the assessment that had any prior knowledge of CL".
>
> Neither doctor considered that Christopher had present symptoms of mental disorder and did not recommend his detention. In his statement for the inquest, Dr Clark (one of the two assessing doctors) indicates that it was material to his decision that Christopher stated that he was prepared to stay at the Hospital until his health improved.
>
> On 16 August 2013, Christopher changed his mind and asked to leave the Hospital and was allowed to do so. No further assessment was conducted. Staff bought him a ticket and put him on a train to London. There had been no opportunity to observe whether the anti-psychotic treatment, started the day before, was working. The Trust's investigators observed: "CL final admission was very brief and it is not clear that the course of CL's change in presentation had been fully explored prior to him taking his discharge…"".

41. For whatever reason there was no community care programme arranged for Christopher prior to his discharge. On 16th August 2013 Christopher went to stay with his girlfriend.

42. On 19th August 2013 the Claimant contacted the Trust to report that Christopher had mounted the roof of the house threatening to kill himself and that he had gone missing for hours at a time.

43. On the same day Christopher went jogging and returned with one trainer, saying that he did not need the other one. At 12.11hrs he jumped in front of a train at Tooting Bec Underground Station and was killed.

D. The statutory framework

44. Article 2(1) ECHR is entitled "right to life", and in its first sentence provides:

> "1. Everyone's right to life shall be protected by law".

45. Within that short statement of principle has been held to exist a series of other principles, one of which is the duty to investigate deaths where there is even a possibility of State complicity. Further, as a sub-component of this duty to investigate is the right of the next-of-kin to participate in the investigation, where necessary with legal representation and hence, in a proper case, backed by legal aid.

46. The provision of legal aid generally is governed by LASPO. Pursuant to section 4 thereof the Lord Chancellor must designate a civil servant as a "Director of Legal Aid Casework" ("the Director").

47. There is no duty on the Lord Chancellor to give guidance. Indeed there is no express power to that effect. Mr Chamberlain QC for the Defendant agreed that there was an implicit power in section 4(3)(a) LASPO. Section 4(3) LASPO concerns the duty (cf

"*must*") of the Director to have regard to guidance given by the Lord Chancellor. It is in the following terms:

> "(3) The Director must -
>
> > (a) comply with directions given by the Lord Chancellor about the carrying out of the Director's functions under this Part, and
> >
> > (b) have regard to guidance given by the Lord Chancellor about the carrying out of those functions".

48. Section 4(4) makes clear that the Lord Chancellor is not entitled to give directional guidance about the carrying out of those functions in respect of an individual case and must, moreover, ensure that the Director acts "*independently of the Lord Chancellor when applying a direction or guidance under subsection (3) in relation to an individual case*".

49. Section 4(5) LASPO states that the Lord Chancellor must publish any directions and guidance given under this section and such directions and guidance may be revised or withdrawn from time to time.

50. Under section 9 LASPO civil legal aid is generally available to individuals only if the services are "*described in*" Part 1, Schedule 1 to LASPO. Services not described there can be provided only through the Exceptional Case Funding ("ECF") mechanism provided for in section 10.

51. Section 10 LASPO governs such exceptional cases. Sub-paragraph (3) (set out below) links the availability of legal aid to the enforcement of ECHR rights. Section 10 is in the following terms:

> "10. Exceptional cases
>
> (1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.
>
> (2) This subsection is satisfied where the Director—
>
> > (a) has made an exceptional case determination in relation to the individual and the services, and
> >
> > (b) has determined that the individual qualifies for the services in accordance with this Part,
>
> (and has not withdrawn either determination).
>
> (3) For the purposes of subsection (2), an exceptional case determination is a determination—

(a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

(i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or

(ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

(4) This subsection is satisfied where—

(a) the services consist of advocacy in proceedings at an inquest under the Coroners Act 1988 into the death of a member of the individual's family,

(b) the Director has made a wider public interest determination in relation to the individual and the inquest, and

(c) the Director has determined that the individual qualifies for the services in accordance with this Part,

(and neither determination has been withdrawn).

(5) For the purposes of subsection (4), a wider public interest determination is a determination that, in the particular circumstances of the case, the provision of advocacy under this Part for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family.

(6) For the purposes of this section an individual is a member of another individual's family if—

(a) they are relatives (whether of the full blood or half blood or by marriage or civil partnership),

(b) they are cohabitants (as defined in Part 4 of the Family Law Act 1996), or

(c) one has parental responsibility for the other".

E. The Guidance

52. In this section of the judgment I set out the relevant parts of the Guidance and, then, provide an analysis of its contents.

53. The relevant provisions of the Guidance are as follows:

> "1. This guidance is issued by the Lord Chancellor to the Director of Legal Aid Casework under section 4(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act"). The Director must have regard to this guidance in determining whether civil legal services in relation to an inquest are to be made available under section 10 of the Act. As, in practice, applications will be considered by caseworkers on the Director's behalf, this guidance is addressed to caseworkers.
>
> 2. This guidance sets out some of the factors that caseworkers should take into account in deciding exceptional funding applications in relation to inquests. It is not intended to be an exhaustive account of those factors. In particular, it is not intended to replace the need for consideration of representations in individual cases and new case law that arises. Applications should be considered on a case by case basis.
>
> 3. The Government has retained Legal Help, the advice and assistance level of legal aid, for inquests into the death of a member of the individual's family. Legal Help can cover all of the preparatory work associated with the inquest, which may include preparing written submissions to the coroner. Legal Help can also fund someone to attend the inquest as a "Mackenzie Friend", to offer informal advice in Court, provided that the coroner gives permission.
>
> 4. Funding for representation at an inquest is not generally available because an inquest is a relatively informal inquisitorial process, rather than an adversarial one. The role of the coroner is to question witnesses and to actively elicit explanations as to how the deceased came by his death. An inquest is not a trial. There are no defendants, only interested persons, and witnesses are not expected to present legal arguments. An inquest cannot determine civil rights or obligations or criminal liability, so Article 6 ECHR is not engaged.
>
> 5. There are two grounds for granting legal aid exceptionally for representation at an inquest. The first is that it is required by Article 2 ECHR. The second is where the Director makes a "wider public interest determination" in relation to the individual and the inquest. These are dealt with in turn below.
>
> Article 2 ECHR
>
> *Funding Criterion*

6. Pursuant to section 10(3) of the Act, Article 2 ECHR may require legal aid to be granted for representation before the Coroners Court. Funding will be granted where:

> *The procedural obligation under Article 2 ECHR arises and, in the particular circumstances of the case, representation for the family of the deceased is required to discharge it.*

7. In effect this is a two tier test. Caseworkers should first be satisfied that there is an arguable breach of the State's substantive obligation under Article 2 ECHR. Where the caseworker is satisfied, he or she will then decide whether funded representation is required to discharge the procedural obligation.

Article 2 – Background and caselaw concerning inquest funding

8. Article 2 ECHR confers a "right to life". It imposes on States a "substantive obligation" both not to take life without justification, and also to establish a framework of laws, precautions, and means of enforcement which will, to the greatest extent reasonably practicable, protect life.

9. Article 2 also imposes a "procedural obligation" on the State. However, this only arises in a narrow range of circumstances where the evidence suggests that it is arguable that the State has breached its substantive obligation to protect life. In *R (Gentle) v Prime Minister* [2008] 1 A.C. 1356 Lord Bingham said that:

> *"the procedural obligation under article 2 is parasitic upon the existence of the substantive right, and cannot exist independently".*

10. This position has been recently reiterated in *R (Claire Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479:

> *"...article 2 will be engaged in the much narrower range of cases where there is at least an arguable case that the state has been in breach of its substantive duty to protect life; in such cases the obligation is proactively to initiate a thorough investigation into the circumstances of the death." (para 67)*

Has there been an arguable breach of the substantive obligation?

11. As explained in paragraph 7, in assessing applications for inquest representation under section 10(3) of the Act, caseworkers must first determine whether there has been an

arguable breach of the State's substantive obligation under Article 2 ECHR.

12. It is *likely* that there will be an arguable breach of the substantive obligation where State agents have killed the individual: for example, a police shooting. It is also likely that an arguable breach of the substantive obligation will occur where the individual has died in State custody other than from natural causes: for example, killings or suicides in prison.

13. It is *unlikely* that there will be an arguable breach of the substantive obligation where there is no State involvement in the death, for example, the fatal shooting of one private individual by another private individual (where the authorities had no forewarning or other knowledge prior to the death). Another example is a death (in State detention) through natural causes.

14. There *may* be an arguable breach of the substantive obligation where it is alleged that the State has played some role in the death, including a failure to take reasonable steps to prevent the death.

15. In the context of allegations against hospital authorities *Humberstone* makes clear that there will not be a breach of the substantive obligation where a case involves only allegations of ordinary medical negligence as opposed to where the allegations of negligence are of a systemic nature. The judgment also emphasises the necessity for care to be taken to ensure that allegations of individual negligence are not dressed up as systemic failures.

16. Coroners may express a view as to whether they consider there has been an arguable breach of the substantive obligation and whether they intend to conduct a "*Middleton* inquiry". It should be noted that, should the coroner choose to express their views, they are material and not determinative. There is no expectation that the coroner's views should be actively sought.

> *If there has been an arguable breach of the substantive obligation, is funded representation for the family of the deceased required to discharge the procedural obligation?*

17. In cases where a caseworker has decided that there is an arguable breach of the substantive obligation, he or she must then consider the second tier of the test for funding under Article 2 ECHR.

18. Where there is an arguable breach of the substantive obligation, and the "procedural obligation" does arise, *Middleton* (*R (Middleton) v HM Coroner for Western Somerset*

(2004) 2 AC 182) makes clear that a *Jordan* compliant inquest is necessary. *Jordan* is a reference to the case of *Jordan v UK [2003] 37 EHRR 2*. This case concerned the shooting by police in Belfast of a young, unarmed man in 1992. The court established in *Jordan* that in order to satisfy the requirements of Article 2, any investigation had to satisfy the following five criteria to be effective:

• The inquiry must be on the initiative of the State, and it must be independent;

• It must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death;

• It must be prompt and proceed with reasonable expedition;

• It must be open to public scrutiny to a degree sufficient to ensure accountability; and

• The next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.

19. In most cases the coroner can conduct an effective investigation, with the family's participation, without the family of the deceased needing to be legally represented. In the case of *Khan*, the court found that:

> *"…the function of an inquest is inquisitorial, and in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself without there being any need for the family of the deceased to be represented…" (para 74., Khan v Secretary of State for Health [2003] EWCA Civ 1129).*

20. In considering whether funded representation may be necessary to discharge the procedural obligation, all the individual facts and circumstances of the case must be taken into account by caseworkers, including: i) the nature and seriousness of the allegations against State agents; ii) previous investigations into the death; and iii) the particular circumstances of the family".

54. The following features of the Guidance are, in my view, relevant to the issues arising.

i) First, the Director is duty bound to have regard to the Guidance in determining applications for legal aid and this, in practice, means that the Guidance is "*addressed to caseworkers*" (para [1]). It is not intended to be exhaustive and it is not a substitute for the proper consideration of individual cases and

representations. In particular caseworkers will need to consider "*new case law that arises*" (para [2]).

ii) Secondly, the Guidance recognises (para [5]) that legal aid may be "*required by Article 2 ECHR",* in other words it is not optional. This is also reflected in para [6] where the Guidance states that legal aid may be required to be granted where *"…the procedural obligation under Article 2 ECHR arises*".

iii) Thirdly, in order to determine whether the procedural obligation in Article 2 requires legal aid there is a two tier "test". The first part of the test is whether: *"…there is an arguable breach of the State's substantive obligations under Article 2 ECHR*". This is quite plainly intended by the Lord Chancellor to be a test of general application. This can be seen from the location of this test in the overall structure of the Guidance. It comes as a preface to the more detailed analysis which follows and is under the heading "*Funding Criterion*". The typical caseworker who read this would construe it as "the" test or criterion to be applied and no exceptions or caveats to that test are elsewhere laid down or contemplated in the Guidance.

iv) Fourthly, paras [8] – [10] are concerned with background matters and "*case law concerning inquest funding*". As such a caseworker would look to these paragraphs for a broad summary of the existing case law. It is notable that paragraph 2 does instruct the caseworker to look out for "*new case law*"; but this would serve to highlight in the caseworker's mind that the Guidance was intended to be – in broad terms at least - a fair summary of the *existing* law (i.e. old case law). As to the existing law para [9] states in unqualified terms that the Article 2 "*procedural obligation*" on the State "*only arises in a narrow range of circumstances where the evidence suggests that it is arguable that the State has breached its substantive obligation to protect life.*" Two words here are of particular significance. First the word "only" (in para [9]) is important because the reasonable caseworker would construe this as strong guidance that there were no exceptions to the need to conduct an arguability of breach test. Secondly, the word "evidence" is also important because, in its context, it is clear guidance to the caseworker that evidence must be collected and only if it has been and is sufficient to show an arguable case of breach is the first threshold test to be treated as met. The citation of the dictum in *Humberstone* of the expression *"at least an arguable case"* (cf para [10]) reinforces this conclusion. The Guidance portrays this case as a recent reiteration of what is presented as a basic principle.

v) Fifthly, as to what has to be shown, arguably, to have been breached the Guidance indicates that it is the substantive obligation. I note that the Guidance uses the singular "obligation" when, in law, it is clear that Article 2 imports numerous sub-duties and obligations. I do not however criticise the Guidance for this since, it seems sufficiently plain, the gist of the Guidance is that the caseworker must look for an arguable breach of *any* of the constituent duties found within Article 2.

vi) Sixthly, paragraph [11] would be viewed by any caseworker as a reinforcement of the obligation upon him/her to assess the evidence to see whether there was a case of arguable breach by the state because the Guidance

explicitly equates evidence of arguable breach with the statutory duty under section 10(3) LASPO.

vii) Seventhly, paragraphs [12] – [14] give a steer to the caseworker in five specific and important factual circumstances. In each case the Guidance classifies the case in terms of the probability of the caseworker finding an arguable breach on the evidence. The Guidance identifies types of case where it is "*likely*" that there would be an arguable breach, or "*unlikely* that there would be an arguable breach, or, where there "*may*" be such an arguable breach. The case types are: (a) a killing committed by a state agent (para [12]); (b) a death in police custody other than from natural causes (para [12]); (c) deaths where there is no state involvement whatsoever (para [13]); (d) deaths where the state might in some degree be complicit because there was a failure to prevent death (para [14]); and (e), deaths caused in hospital where there are allegations of negligence but not systemic failures (para [15]). In each case the Guidance is clear that the assessment of probability is based upon the likelihood of there being "*an arguable breach*" or "*a breach*" of a substantive obligation. This conclusion is buttressed by the terms of para [6] which focuses upon the relevance of a conclusion by a coroner that "*there has been an arguable breach of the substantive obligation"*. The significance of this is that, as I set out below, these types of case include those where the courts have made clear that the trigger for the investigation is automatic, i.e. not arguable breach. The consequence of this is that the only place in the Guidance where these types of case are referred to is <u>still</u> in the context of the arguability test.

viii) Eighthly, para [17] is important. Here the Guidance makes clear to the caseworker that they are not to proceed to the second step (which involves a consideration of the need for funding) unless he/she has "*decided that there is an arguable breach*". The indication that the caseworker must make a <u>decision</u> on arguability as the threshold for moving to stage two (need) is, in fact, no more than a repetition and reinforcement of the point made throughout the entirety of the Guidance which is that the Article 2 procedural obligation is triggered by "evidence" showing that there has been an arguable breach by the State. However, the notion of a "decision" implies a degree of formality about a conclusion that there must be an arguable breach and entrenches the importance of that test.

ix) Ninthly, para [18] makes the conducting of a *Middleton* type inquest conditional upon the existence of an arguable breach cf "…*<u>where</u> there is an arguable breach*".

55. In my view, in the light of the above, the typical caseworker would find the conclusion that he or she had to take a <u>decision</u>, based on <u>actual evidence</u> that the State was <u>arguably in breach</u> as a <u>precondition to a consideration of need</u>, an irresistible one. References to arguability of breach as the lynchpin of the right to funding permeate the entire Guidance. There is no reference to there being any other possible test or to there being exceptions to this rule. Indeed, it is explicitly said that the procedural obligation arises (in a narrow range of circumstances) "*<u>only</u>*" (cf para [9]) where evidence suggests an arguable breach by the state. There is hence no room on the basis of the Guidance for the possibility that the duty might arise in other circumstances not involving arguable breach.

56. Further some of the circumstances where the law, quite clearly, lays down that breach is irrelevant (e.g. deaths in custody) are explained and analysed in terms of the probability of the evidence leading to a conclusion of arguable breach.

57. I turn now to consider whether the inferences that I have drawn from the Guidance (that arguability of breach is a universal test) are correct in law. I then go on to consider how my conclusions on the law impact upon the law which governs the circumstances when a court will grant relief against governmental guidance.

F. The purpose and object behind the Article 2 duty to investigate and the right for next-of-kin to be represented

58. I start my assessment of the law by identifying the purpose and object behind the duty to investigate and, it necessarily follows, the duty to enable the next-of-kin to have effective involvement in the investigation. Both the European Court of Human Rights ("the Strasbourg Court") and the domestic courts have had occasion to consider the objectives which lie behind the Article 2 duty to investigate a death. These are important because they provide an optic through which to interpret (purposively) both the scope of the duty to investigate and also the scope of the legitimate interests of the next-of-kin to be involved in the post death investigation.

59. The right or legitimate interest of the next-of-kin to involvement in the procedure is viewed as a concomitant of the imperative for there to be an element of public scrutiny of the investigation in order to secure accountability. This in turn is an ingredient of the overriding need to maintain public confidence in the adherence of the State to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts. It necessarily follows that the right of the individual to participate, which triggers the consequential obligation upon the State to consider whether legal aid is needed, is an integral part of the Article 2 duty.

60. The importance attached to the investigative duty in Article 2 was underscored by the judgment of the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 ("*Middleton*"). In that case Lord Bingham, having (ibid paragraphs [2] and [3]) identified the substantive obligations in broad terms, but which specifically included the "procedural obligation" to investigate, stated:

> "5. Compliance with the substantive obligations referred to above must rank among the highest priorities of a modern democratic state governed by the rule of law. Any violation or potential violation must be treated with great seriousness".

61. The case of *Middleton* concerned the suicide of a prisoner in custody. Lord Bingham (at paragraph [5]) charted the statistics recording deaths in custody and explained that one salutary purpose behind the holding of an investigation included the need to learn lessons:

> "5. 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".
>
> (Emphasis added)

62. In *R(Amin) v Home Secretary* [2003] UKHL 51; [2004] 1 AC 653 ("*Amin*"), Lord Bingham identified five different purposes behind the duty to investigate:

> "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 …. 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 … 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*".
>
> (Emphasis added)

63. This line of jurisprudence makes clear that an inquest is by no means limited to the attribution of blame to the State. It has other, very important, purposes such as to learn lessons and thereby protect those who are in custody or detained in vulnerable circumstances. The successful outcome of an investigation might also be a conclusion that the State was neither complicit in nor in any way to be blamed for the death. As Lord Bingham explained in *Amin* an object of an investigation might be "*that suspicion of deliberate wrongdoing (if unjustified) is allayed".* In *Jordan v United Kingdom* (2003) 37 EHRR 2 at paragraph [107] the Strasbourg Court, in considering what was meant by an investigation that had to be "effective", stated that it had to be effective: *"…in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances*". It cited as authority for the former proposition *Kaya v Turkey* (1999) 28 EHRR 1 at paragraph [86]. All of this makes plain that one critical purpose of an investigation will be achieved if it transpires that the State was <u>not</u> at fault.

64. This analysis of the purposes behind the duty to investigate reveals, to my mind, an important conclusion: The right of a next-of-kin to be involved and where necessary represented is <u>not</u> limited to showing that the State is culpable. The family might

simply wish to do no more than discover the truth. They might wish to obtain comfort that suspicions that they harbour or which are circulating in the press or on social media that the state was complicit are unfounded. They might crave for lessons to be learned to prevent what happened to their loved one happening to the loved ones of other families.

65. This puts into context the Guidance which assumes that the only basis upon which a family can ever be represented is where there is some (arguable) culpability on the part of the State. If there is no case of breach by the state the family cannot, following the Guidance, obtain legal aid; notwithstanding that a recognised purpose for the families' involvement in an investigation may be to establish precisely the opposite (to exculpate not inculpate) or to see lessons learned or simply to learn the truth. As drafted the Guidance precludes representation in such cases.

G. The Article 2 duty to investigate includes a right to legal representation in a proper case

66. The duty to investigate has been said to be derivative or parasitic (on breach of a substantive duty) and, it follows, the duty to permit next-of-kin to be involved is doubly derivative and, it again follows, the right to legal aid is triply derivative. Nonetheless all these rights are within Article 2. The expression "Everyone's right to life should be protected by law", in Article 2, has been interpreted by the Strasbourg Court as imposing three distinct duties upon the State. First, a negative duty to refrain from taking life (save in the exceptional circumstances described elsewhere in the Article). Secondly, a positive duty to conduct a proper and open investigation into deaths for which the State "might be responsible". Thirdly, a positive duty to protect life in certain circumstances. This latter duty (the duty of protection) itself contains two distinct elements. The first is a general duty upon the State to put in place a legislative and administrative framework designed to provide effective deterrents against threats to the right of life; and the second is what has been termed the "operational duty" which refers to a positive obligation to take preventative operational measures to protect an individual whose life is at risk. In the present case the Court is concerned with only the second of the three duties referred to above, i.e. the positive duty to conduct a proper and open investigation into deaths for which the State might be responsible and then, only, with the derivative consequences thereof.

67. Lord Slynn at paragraph [41] of *Amin* (ibid) explained that the investigative duty was one owed in part to the next-of-kin as representing the deceased but that it also extended to others who might in similar circumstances be vulnerable:

> "41. The duty to investigate is partly one owed to the next of kin of the deceased as representing the deceased: it is partly to others who may in similar circumstances be vulnerable and whose lives may need to be protected".

68. The *extent* of the right of the next-of-kin to be involved in the investigation was addressed by Lord Philips in *R(L(a patient)) v Secretary of State for Justice* [2008] UKHL 68; [2009] 1 AC 588 (hereafter "*L*"). There the claimant was charged with an offence and remanded in custody where he attempted to hang himself. Although he was resuscitated he suffered permanent brain damage. The Prison Service conducted an internal investigation. No relative or representative of the claimant was aware of or

involved in the investigation. The investigators submitted a written report to the Prison Service area manager which was not published. The claimant challenged, in judicial review proceedings, the decision of the Secretary of State not to conduct an investigation compliant with Article 2. The Secretary of State resisted the claim upon the basis that the Article 2 investigative obligation 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 at first instance granted a declaration that there was a requirement to conduct an Article 2 compliant investigation which judgment was upheld by the Court of Appeal. The Secretary of State appealed to the House of Lords which dismissed the appeal. Lord Phillips summarised the constituents of the investigative duty. It will be seen from (vi) below that Article 2 confers a right of involvement and it is accepted that, in some cases, this can extend to the grant of legal aid.

> "(i) The investigation must be initiated by the State itself;
>
> (ii) The investigation must be prompt and carried out with reasonable expedition;
>
> (iii) The investigation must be effective;
>
> (iv) The investigation must be carried out by a person who is independent of those implicated in the events being investigated;
>
> (v) There must be a sufficient element of public scrutiny of the investigation or its results;
>
> (*vi) The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests".*
>
> (Emphasis added)

69. In *L* the House of Lords endorsed the statement in the judgment of the Strasbourg Court in *Edwards v United Kingdom* (2002) 35 EHRR 487 at paragraph [73] which clearly acknowledged that the right of involvement was a part of Article 2 and elaborated upon the role of the next-of-kin:

> "72. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.
>
> 73. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure

> accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. *In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests*".
>
> (Emphasis added).

70. The case law thus quite clearly recognises a legal right for the next-of-kin to be involved to protect "legitimate interests"; and the analysis of purposes and objects above informs what those interests may be. The right to legal aid flows directly from this recognition since in many cases if it were not available the right to involvement would be rendered nugatory and the purpose behind Article 2 thwarted by a decision of the state.

H. The circumstances in which the investigative duty arises automatically i.e. without evidence of (arguable) breach upon the part of the state

71. This brings me to the case law on when the Article 2 investigative duty arises and, in particular, when it does so automatically. This involves a consideration of what facts must exist in order to trigger the duty. *Prima facie* the investigative duty arises where the State bears some potential responsibility for a death. In *Middleton* Lord Bingham used the expression "*has been or may have been violated*" when summarising the jurisprudence of the Strasbourg Court:

> "3. 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".

72. In the early days of the evolution of this line of case law cases such as these gave rise to the suggestion that the investigative duty under Article 2 arises *only* where there was an arguable case of breach on the part of the State. However that suggestion has now been long put to bed. The jurisprudence has evolved and there are certain categories of circumstance where it is recognised that the duty arises, more or less, automatically.

73. The "automatic" trigger for the duty in Article 2 was expressed by Lord Phillips in *R(Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29 ("*R(Smith)*") at paragraph [84] in terms of "*ground for suspicion that the State may have breached a substantive obligation imposed by Article 2*". In para [98] of the same judgment Lord Hope stated as follows:

> "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 health illness who have been detained under the Mental Health Act: *Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2009] AC 681".

Further, Lord Mance at para [210] identified five categories of death where the substantive rights contained within Article 2 have been held to be potentially engaged "*...with the result that the procedural obligation has been held to exist*". These categories were: killings by State agents; deaths in custody; conscripts; and, mental health detainees. The fifth category is "… *other situations where the State has a positive substantive obligation to take steps to safeguard life*". With regard to the category of mental health patients Lord Mance cited *Savage* of which he stated:

> "…although concerned not with any duty to investigate under Article 2, but with responsibility in a claim for damages for the suicide of a mental health detainee who succeeded in absconding and committed suicide – highlights the analogy between the State's duty towards persons in custody and persons in detention for mental health reasons as well as conscripts".

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.

76. In 2009 the issue was again addressed explicitly in *L* (supra) this time in relation to the suicide of prisoners in custody. Lord Rodger (at paragraphs [58]-[59]) stated:

> "58. Precisely because the obligation on the prison authorities to protect a prisoner from himself is not absolute and depends on the particular circumstances, a suicide can occur without there having been any violation of the prison authorities' obligations under article 2 to protect the prisoner. Focusing on that point, Mr Giffin QC argued on behalf of the Secretary of

> State that article 2 did not require an independent investigation to be held unless there was some positive reason to believe that the authorities had indeed been in breach of their obligation to protect the prisoner.
>
> 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".

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 <u>any</u> degree.

78. Later (ibid paragraph [61]) Lord Rodger stated that in his view "*an independent investigation is required in all cases of suicide*", but he posed the question of whether the same applied where a prisoner had attempted to commit suicide but had failed. As to this he did not wish to express a concluded view but pointed out (at paragraph [62]) that there might be many circumstances where it did not necessarily follow that a prisoner who attempted to commit suicide would possess an Article 2 right to have the Secretary of State set up an independent investigation or that he would act unlawfully if he declined so to do.

79. Lord Mance summarised the consistent position of the Court when he stated, as follows:

> "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".

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.

81. In *R(Smith)* (supra) in 2010 Lord Phillips in a somewhat different context (the death on active service of a soldier) analysed the duty in terms of the existence of presumptions of breach. He said that this particular category of death did not raise *"…a presumption that there has been a breach of those obligations"* (paragraph [84]). He continued:

> "Troops on active service are at risk of being killed despite the exercise of due diligence by those responsible for doing their best to protect them. Death of a serviceman from illness no more raises an inference of breach of duty on the part of the State than the death of a civilian in hospital. For these reasons I reject the submission that the death of a serviceman on active duty…automatically gives rise to an obligation to hold an article 2 investigation".

82. In the same case Lord Hope endorsed *L* reiterating that it was the fact of death which triggered the duty in the case of a suicide/near suicide of a prisoner in custody: See paragraph [98].

83. This brings me to the analysis of this issue in the specific context of mental health patients. In *R(Rabone) v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 AC 72 ("*Rabone*") the Supreme Court made clear that Article 2 can apply to the suicide of voluntary psychiatric patients. When this judgment is placed alongside the judgments of the Supreme Court in *L* and *R(Smith)* Ms Kaufmann QC and Ms Simor QC submit that it is quite clear that the duty to investigate can apply automatically (i.e. without there being arguable evidence of breach) to categories of voluntary mental health patients who commit suicide.

84. The particular issue in *Rabone* was whether Article 2 applied in the case of the suicide of a psychiatric patient subject to voluntary admission to hospital. It is helpful to set out, briefly, the background facts. M was a voluntary psychiatric patient who was known to be suicidal. The claimants, who were the parents of M, commenced proceedings for damages against the NHS Trust. The Trust admitted negligence and paid damages and costs to settle the claim but denied liability under Article 2. Hospital staff had authorised a two day home visit for M during which he had committed suicide. The issue arose as to whether the "*operational obligation*" could be owed to a hospital patient who was mentally ill but who was not detained under the MHA (see paragraph [14]). The "operational obligation" is one of the two elements of the third component of Article 2 namely, "a positive duty to protect life in certain circumstances" (ibid paragraph [12] *per* Lord Dyson). The reason for emphasising this is that *Rabone* did not concern the scope of the investigative duty, which is also a component part of Article 2. The Claimant nonetheless relies upon paragraphs [28]-[30] which it is said establishes that the Article 2 substantive duties can apply to

voluntary mental health patients, and, as such, it follows that this must include the investigative duty. Those paragraphs are in the following terms:

> "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 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*, where at paras 73-74 the court placed emphasis on the availability of the statutory power to take the child into care and the statutory duty to protect children. No such powers exist, or are necessary, in the case of the capable patient in the ordinary healthcare setting.
>
> 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 OUP) 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".

85. Later (ibid paragraph [33]) Lord Dyson pointed out that the Strasbourg Court had not considered whether an operational duty existed to protect against the risk of suicide by informal psychiatric patients but that the jurisprudence of the Court showed that there was such a duty to protect persons from a real and immediate risk of suicide where they were under the control of the State. Lord Dyson then, in paragraph [34], came to the following conclusion which was that Article 2 applied:

> "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".

86. In the same case Baroness Hale also pointed out (ibid paragraph [93]) that the duty to conduct a proper investigation did not arise on the facts before the court. However, Baroness Hale described that obligation as: "…*a positive obligation to conduct a proper investigation into any death for which the State might bear some degree of*

responsibility". It is notable that Baroness Hale did not pose the test in terms of arguability but in terms of "*any death*" for which the State "*might*" bear "*some degree*" of culpability. As for the issue before the Court she agreed that Article 2 could apply to voluntary mental health patients in circumstances such as those before the Court (see paragraph [105]).

87. Lord Brown endorsed the judgments of Lord Dyson and Baroness Hale. He added that simply because the particular question had not, hitherto, arisen in the jurisprudence of the Strasbourg Court was not a reason for not extending the case law to cover the situation of the voluntary psychiatric patient. He described as "*absurd*" (ibid paragraph [112]) the proposition that it was necessary to await an authoritative ruling of the Strasbourg Court more or less directly on point before finding a Convention violation. In his view the question was whether the conclusion which a domestic court was content to arrive at was a conclusion which flowed "*naturally*" from existing Strasbourg case law.

88. *Rabone* is thus authority for the proposition that the Article 2 substantive obligations can apply to psychiatric patients, both voluntary and involuntary. It does not address the investigative duty but the logic of the judgment would indicate that the triggers for the Article 2 duties, including the investigative duty, centre upon the sorts of facts and matters referred to by Lord Dyson in para [34]. This conclusion, in my view, is consistent with the logic in *L*, and *R(Smith)* and with the objects and purposes which guide Article 2 and which therefore explain what the "legitimate interests" of the next-of-kin are.

89. Further support for this conclusion is found in *R(Antoniou) v Central and North West London NHS Foundation Trust & Others* [2013] EWHC 3055 (Admin) where a claim for judicial review arose out of the suicide of Mrs Jane Antoniou. She was at the time detained in a Mental Health Unit under section 3 MHA 1983. The claimant was the widower of the deceased. She had suffered over a long period of time from a mental disorder. Under the Coroners Act 1988 there was no statutory obligation to perform an inquest in relation to a death in psychiatric custody, as opposed to a death in prison. After the relevant provisions of the Coroners and Justice Act 2009 came into force, when a person who is detained under the MHA committed suicide or died as a direct result of self-harm, an "enhanced" inquest would take place, i.e. one conducted upon an expanded basis leading to a narrative verdict. The case concerned the Article 2 duty to investigate but not the factors triggering it. The principal question in the case was whether Article 2 further obliged the State to conduct an immediate and independent investigation into the circumstances of the detained patient's death prior to an inquest. On the facts of that case, although there was an investigation into the circumstances of the death by the hospital and strategic health authority, there was no "independent" investigation prior to or subsequent to the inquest. As the Court stated:

> "The extent of the procedural obligation of [the] State in relation to inquiries after such MHA deaths is therefore a matter of public interest and importance".

90. In paragraphs [52]-[79] the Court considered, in detail, the scope of the Article 2 procedural obligation as it arose in the case of MHA detained patients who commit suicide whilst in the care of the hospital. The issue for determination was not specifically the nature of trigger (arguability or something lower) for the investigative

duty; it concentrated more on what would comprise an "effective" public investigation and whether an inquest sufficed to meet that obligation standing by itself. Nonetheless the judgment gives some guidance as to the issue which arises in the present case. The following points of significance may be drawn from the judgment. First, in paragraph [56] the Court cited the judgment of the Grand Chamber of the Strasbourg Court in *Ramsahai v Netherlands* (2008) 46 EHRR 43 to the effect that the procedural, investigative, obligation arose "*…when individuals have been killed as a result of the use of force by a State agent, which might be unlawful*". The reference to *"might be unlawful*" does not give much guidance as to whether the "*might*" is satisfied by evidence relating to the arguability of breach, or, some lesser threshold based upon the mere fact of death. In paragraph [58] the Court cited *Silih v Slovenia* (2009) 49 EHRR 37 to the effect that: "*…where there had been death of a patient in the care of the medical profession (whether in the public or private sector) there was a procedural obligation under Article 2 that required the State to set up an effective independent judicial system so that the cause of death…can be determined and those responsible made accountable*" (ibid paragraph [192]). The tenor of this suggests that the trigger for an investigation is a "death…in care" which is quite different to arguability of breach by the State as the trigger for the investigative duty. Thirdly, in paragraph [64] the Court cited *Amin* (ibid) for the proposition that an inquest is the means by which the State's procedural, investigative, duty under Article 2 "*…to provide an independent and effective investigation of deaths in custody is to be discharged*". Again the tenor of this is that the investigative duty arises upon proof of no more than that there was a death in custody. Fourthly, in paragraph [66] the Court cited Lord Phillips in *L* that in a case of attempted suicide of a prisoner in custody resulting in serious injury the investigative duty arose "*whether or not at that stage there is an arguable case of fault on the part of the authorities*". In paragraph [69] the Court referred to the judgment of Lord Rodger also in *L* that the investigative duty arose "*…because the very fact of such suicide*" made the possibility that the State had breached Article 2 "*inherently possible*".

91. In paragraph [77] the Court, drawing the various threads together, stated that those detained in mental hospitals under the MHA posed a high suicide risk and that, in such circumstances, the authorities, to be regarded as agents of the State, were bound by the Article 2 substantive obligation to take reasonable care to ensure that such patients did not commit suicide by putting in place systematic precautions against that eventuality. The Court also accepted that if those precautions failed, i.e. there was a death by suicide, then the State's Article 2 procedural obligations "*will be triggered*". It is clear, in my judgment, that no element of arguability of breach, is injected into the process of deciding whether the investigation should take place. On the contrary, an investigation is required in the case of any suicide by a person detained under the MHA.

I. Conclusion as to the scope of Article 2 in the case of the suicide of psychiatric patients

92. In the light of these authorities it can be said that the suicide of an involuntary psychiatric patient is capable (depending upon 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. Nonetheless, as paragraph [34] of *Rabone* demonstrates, the precise outer limits of this principle are hard to define. The factors considered relevant by the

courts concentrate upon 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.

93. This conclusion is, in the context of the Defendant's justification for the drafting of the Guidance, important. As I have already observed Mr Chamberlain QC for the Lord Chancellor did not demur from the basic proposition that there were categories of case where the duty to investigate was triggered automatically including in some cases involving the suicide of psychiatric patients. But he did submit that the precise contours of the circumstances where such a duty arose were far from clear and he urged me not to engage in *ex cathedra* statements about such limits, which did not arise on the facts of the case.

94. I have set out at paragraph [54] above my analysis of the Guidance and as to the extent to which it rests upon a test of arguable breach. For the reasons that I have set out above in my judgment this contains a number of errors.

95. First, the Guidance indicates that there is but one trigger for Article 2, namely evidence of arguable breach by the State: See, e.g. para [54(iv)] above. This is incorrect in that case law identifies a variety of circumstances and types of case of real public importance and significance where the duty arises independently of the existence of evidence of arguable breach.

96. Secondly, where the Guidance refers to case types where the test may be modified (for example in the case of death in custody) it persists in articulating the test upon the basis of arguability of breach. Since these case types include cases where the law now makes clear that the duty can arise automatically the reference to the arguability test is wrong in law: See para [54(vii)] above.

97. Thirdly, and related to the first two errors, is the failure even at a broad level to acknowledge the existence of cases where the test is other than arguability.

98. In arriving at these conclusions I need to put down a marker as to the limits of my judgment.

99. The present case concerns the death of a voluntary psychiatric patient. I have found it valuable to consider the facts relating to Mr Letts, largely by way of context. But even here it has not been necessary in order to determine this application for judicial review to proceed to determine whether on the facts before the Court there was or was not a breach, or even an arguable breach, by the state in the events which led up to the tragic death of Christopher Letts and equally I have not been required to decide whether the initial refusal to grant legal aid was unlawful. The position in relation to different categories of case (i.e. other than mental health) is also fact sensitive and on the state of the present case law complex. By way of illustration the Claimant submits that deaths in custody trigger the automatic duty but the Claimant also conceded that it was not entirely clear whether the duty to investigate was automatically triggered in respect of "*all such deaths*". Mr Chamberlain QC for the Defendant submitted that this showed the dangers of over-reaching the issue and trespassing into issues which were not squarely before the court; and I agree. Indeed, even in relation to mental health suicides the outer limits of the automatic duty are not crystal clear. For example, would Article 2 apply to the case of a voluntary mental health patient who

had been discharged from hospital but who committed suicide 6 weeks later? Would the answer differ if the patient was under the care of community mental health specialists?

100. Nonetheless the error of law in the Guidance is material and this conclusion is unaffected by the fact that the "automatic" cases are not precisely delineated. It is not necessary to fix the *exact parameters* of the types of case where the automatic duty arises in order to be able to say that there are such categories and it is the failure to acknowledge the existence of the categories that is the real error in this case.

101. It is also possible to conclude that the error in the Guidance will be likely to lead caseworkers to make wrongful decisions. In the present case, following the existing Guidance, in order to decide whether the arguability of breach threshold was met in a case such as the present, a caseworker would need to examine such facts and matters as: the extent of the suicide risk presented by the patient; the extent to which he was or could have been or should have been subject to MHA detention; the reason why no MHA order was in fact made; the wisdom of the placement of the patient in the hospital environment in which he found himself; the assessments made by the medical professionals into whose care the patient was entrusted; whether there were flaws (systemic or operational) in the care provided; whether the patient should have been allowed to be discharged; and whether community care should have been put into place etc. These facts would need to be evaluated in order to determine whether the state was arguably in breach of its substantive obligation under Article 2. However, if the test is the lower test and based only on the circumstances surrounding the death then different and more limited facts would need to be considered. These might focus upon such matters as: whether the death was natural or self-inflicted; whether the deceased was or could have been subject to the MHA; whether the patient was at some proximate time under the care of a hospital (as agent or proxy for the state). These facts focus upon the circumstances of the death and the narrower question of whether the patient was still under state control or care; and not the acts or omissions of the state which might be causative of it. It will be seen that the two sets of facts are different. The latter seeks to determine the circumstances in which the death arose and accordingly to do no more than determine whether this is the *type* of case to which Article 2 might apply whereas the former focus upon the potential culpability of the State. It is in my view evident that, as a hurdle to be overcome, this latter formulation is materially lower than the arguability of breach threshold.

102. There is a yet further reason why an arguability test might lead to error. It assumes that the caseworker is equipped effectively to form a valid judgment as to whether the state is or is not arguably in breach at the point in time at which the decision to grant or refuse legal aid arises. As a rule for the right to representation to be effective it needs to be granted <u>before</u> the investigative process is underway (or at least at an early stage), otherwise the right to involvement becomes illusory or denuded. But this also implies that the decision to grant or refuse legal aid will be taken before the evidence has been fully collected or presented or examined. So that begs the question as to how, from the perspective of evidence collection, the caseworker is actually able to form a properly considered view. I recognise that, even on the Claimant's case, there are circumstances where arguability of breach is a valid part of the stage 1 test. Accordingly, this might be an unavoidable problem; it is not a show stopper. Nonetheless, it seems to me still to be a valid point since in these "automatic" cases

really quite complex issues of fact and evidence can arise and I have difficulty in seeing how a caseworker can make a truly effective decision on arguability of breach at such an early stage in the process.

103. I would add one final rider to the effect that the gravamen of the objection is not to the injection of an "arguability" test *per se*; it is to the linkage of arguability *to breach* of the substantive obligation *by the State* which is objectionable. I accept that even with the lower threshold arguability might play a part. Thus, the first limb of the test is met if, *arguably*, the case falls within the category of cases where an automatic investigation arises.

J. The test to be applied to the legality of guidance: When should the Court interfere?

104. Having concluded that there are errors in the Guidance I turn now to the test to be applied to the Guidance in the light of my conclusion as to the law.

105. Mr Chamberlain QC advanced four main reasons why, he said, I should refrain from interfering with the Guidance.

106. First, he submitted that the Lord Chancellor has a broad discretion as to the content of Guidance, subject of course to statutory limits. As a starting point that must be right. The level of detail that the Lord Chancellor, when he exercises his power to issue guidance, chooses to include in Guidance must be subject to a wide margin of discretion. No doubt there is a bare minimum that must be included in order to satisfy Parliament's requirement (which in this case is to guide the Director in the exercise of his duties and powers) and below which the Guidance becomes lacking in sensible utility. But it is not submitted in this case that the Guidance is defective in this respect.

107. Secondly, Mr Chamberlain QC submitted that in this case the Lord Chancellor had two options open to him. First, to draft Guidance at a very high level; and secondly, to write a text book. As to the latter he submitted that had the Lord Chancellor decided to draft a text book it would have been a large loose leaf document requiring frequent modification to take account of the frequent evolution in judicial thinking. He explained, and it is of course quite clear, that the text book option was not adopted. The approach which, it is argued, the Lord Chancellor adopted was the high level, broad brush, approach. Mr Chamberlain QC drew my attention in particular to paragraph [2] of the Guidance which makes clear that the Guidance refers to only "*some of the factors that caseworkers should take into account*" and that this list was not intended to be "*exhaustive"* and was not a substitute for an analysis of "*new case law*". He submitted that these caveats and qualifications sufficed to make clear to the Director and the caseworkers that they should not read the Guidance as definitive. In response to a question from me as to whether a reasonable caseworker would read paragraph [12] of the Guidance as providing a definitive answer on the question of deaths in custody or by State agents Mr Chamberlain responded that the caseworker would have to go and supplement the Guidance with recourse to case law.

108. Thirdly, he submitted that the Lord Chancellor was not empowered (under LASPO) to lay down rigid constraints as to how the Director's caseworkers should approach any individual case or exercise decision making on the Director's behalf. This he

submitted highlighted the point that the Director and the caseworkers were to form their view unaffected by the Guidance.

109. Finally, he submitted that complaints about the level of detail in which the Guidance set out points would not give rise to judicial review.

110. These points do not in my judgment go to the heart of the objection made by the Claimant and Intervener to the Guidance.

111. Under LASPO the Director "*must have regard*" to the Guidance when determining whether legal aid should be granted and the Director would hence act unlawfully if he failed to have regard to those guidelines. Equally, the Guidance itself makes it clear that it sets out factors which the caseworkers "*should take into account*" and it is indeed specifically addressed to caseworkers. The Guidance has forensic bite. Parliament has stipulated that when it is issued it cannot be ignored and must be taken into account; its very purpose is to be influential and it would be most surprising if it were not viewed by the Director and by caseworkers as an important guide as to the manner in which they were to exercise their discretion and take decisions to grant or refuse legal aid. As such whilst it is important not to overplay its significance, it is also important not to underplay the role that it plays, and is intended to play.

112. Further, paragraph 2 of the Guidance in particular says that case workers should take into account "*new case law that arises*". The inference that the Director and caseworkers would draw is that the Guidance is a reasonably accurate summary of the "*old*" case law under Article 2 and that there is no need to go searching in such old case law for answers as to (at least) the broad scope of Article 2.

113. In my judgment the Guidance is predicated upon the legal errors I have described above.

114. If Guidance is predicated upon an error then this, in principle, can sound in judicial review. In *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7; [1986] AC 112 Lord Bridge and Lord Templeman made clear that the Court had jurisdiction to grant relief to cure errors of law made in departmental advice and guidance. They both however cautioned strongly against becoming embroiled when the issues were intertwined with moral, social or political issues. But there was no impediment where the issue was a clearly defined issue of law. Lord Bridge (ibid., pages 193F-194B) stated:

> "Your Lordships have been referred to the House's decision in Royal College of Nursing v. Department of Health and Social Security [1981] A.C. 800. The background to that case was exceptional, as only becomes fully clear when one reads the judgment of Woolf J at first instance, reported at [1981] 1 All E.R. 545. The Royal College of Nursing ("R.C.N.") and the D.H.S.S. had received conflicting legal advice as to whether or not it was lawful, on the true construction of certain provisions of the Abortion Act 1967, for nurses to perform particular functions in the course of a novel medical procedure for the termination of pregnancy, when acting on the orders and under the general supervision of a registered medical practitioner but

not necessarily in his presence. The R.C.N. had issued a memorandum and a later circular to its members to the effect that it was not lawful. The D.H.S.S. had issued a circular advising that it was lawful. The desirability of an authoritative resolution of this dispute on a pure question of law was obvious in the interests both of the nursing profession and of the public. The proceedings took the form of a claim by the R.C.N. against the D.H.S.S. for a suitable declaration and the D.H.S.S. in due course counterclaimed a declaration to the opposite effect. As Woolf J. pointed out, neither side took any point as to the jurisdiction of the court to grant a declaration. Woolf J. himself felt it necessary to raise and examine certain questions as to the locus standi of the R.C.N. to bring the proceedings and as to the propriety of their form. He answered these questions in a favourable sense to enable him to decide the disputed question of law on its merits. No technical question bearing on jurisdiction attracted any mention in the Court of Appeal or in this House. In the litigation the original conflict between the parties was reflected in a conflict of judicial opinion. On a count of judicial heads a majority of 5 to 4 favoured the R.C.N. But by a majority of 3 to 2 in your Lordships' House the D.H.S.S.. carried the day and obtained the declaration they sought.

Against this background it would have been surprising indeed if the courts had declined jurisdiction. But I think it must be recognised that the decision (whether or not it was so intended) does effect a significant extension of the court's power of judicial review. *We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration.* Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances, as the Royal College of Nursing case [1981] A.C. 800 itself well illustrates. But the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or preferring answers to hypothetical questions of law which do not strictly arise for decision".

(Emphasis added)

115. Later Lord Templeman (page 206C-G) stated in very similar vein:

> "These defects in the memorandum constitute in my opinion a mistake of law on the part of the D.H.S.S. The memorandum assumes and asserts that the doctor is entitled by himself to decide whether an unmarried girl under the age of 16 shall be provided with contraceptive facilities and that the doctor is entitled to conceal that decision from the parent. In my opinion the decision cannot lawfully be made without the consent of the parent in charge of the girl unless the parent has abandoned or abused parental powers or is not available. If the memorandum is defective by reason of a mistake of law and if, in consequence, a doctor making a decision in reliance on the views, expressed in the memorandum may unlawfully interfere with the rights of a parent and make and act upon a decision which the doctor is in law not entitled to make, then in my opinion, the D.H.S.S. which is responsible for the memorandum is amenable to the remedies of judicial review. It matters not whether the memorandum constitutes an order or guidance or advice or a mere expression of views directed to the medical profession or directed to doctors who are engaged in the National Health Service. The issue is not whether the D.H.S.S. are exercising a statutory discretion in a reasonable way but whether by mistake of law the D.H.S.S., a public authority, purports by the memorandum to authorise or approve an unlawful interference with parental rights. In this respect I gratefully acknowledge and accept the observations of my noble and learned friend, Lord Bridge of Harwich, and his warning against the involvement of the courts in areas of social and ethical controversy or hypothetical questions".

116. In R *(Tabbakh) v The Staffordshire and West Midlands Probation Trust et ors* [2014] EWCA Civ 827; [2014] 1 WLR 4620 Lord Justice Richards summarised the principle in *Gillick* in the following way:

> "The relevant law was considered by the judge at paragraphs 42-52 of his judgment. He said that the authorities recognise three bases on which a court can conclude that a government policy is unlawful. *First, it is well established that a policy which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, will itself be unlawful: Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Secondly, it was established in *Munjaz* that the test in article 3 cases is whether a policy exposes a person to a significant risk of the treatment prohibited by the article. The third basis is that laid down in the *Refugee Legal Centre* case. The judge said that Sullivan LJ in the *Medical Justice* case "held that despite Silber J referring to a wider test, he had in fact applied the *Refugee Legal Centre* test" and that Sullivan LJ

> "did not support the wider test which Silber J advanced in the course of his judgment" (paragraph 48). The judge then considered the two further first instance cases to which I have referred."
>
> (Emphasis added)

117. Mr Chamberlain QC accepted that this, which added something of a gloss to the formula used in *Gillick* through the addition of the phrase "*or which permits or encourages such acts",* was a fair and accurate encapsulation of the relevant test. Ms Kaufmann QC, for the Claimant, also accepted that it was applicable to a case such as the present.

118. The test is hence: Would the Guidance if followed (i) lead to unlawful acts (ii) permit unlawful acts or (iii) encourage such unlawful acts? In my view for the reasons already given the Guidance would do all of these three things.

119. As something of a postscript to the point Mr Chamberlain at one stage pointed to the statement of Lord Justice Ward in *R(A) v Secretary of State for Health* [2009] EWCA Civ 225 where he found guidance to be unlawful because it was "*seriously misleading*". This was a somewhat off the cuff statement by Lord Justice Ward. I read it as descriptive of his view as to the seriousness of the error arising on the facts of the case before the Court and not as laying down any sort of test or threshold which should apply in other cases before a Court should intervene. It is arguably different to the *Gillick* test in that it introduced a seriousness ingredient and focuses only on whether an error is misleading. Mr Chamberlain QC did not ultimately rely upon this. In any event, Lord Justice Ward also seemed to treat as "*seriously misleading*" Guidance which was "*not clear and unambiguous*" (ibid para [75]) or which was "*materially unclear or misleading*" (ibid para [78]). Further, he criticised Guidance which was silent as to important circumstances (ibid para [75]). As an analogy this judgment supports my conclusions.

K. The use of the word "*most*" in the Guidance paragraph [19]

120. There is one other matter I should address. Miss Simor QC, for the EHRC, submitted that the use of the word "*most*" in paragraph [19] of the Guidance (as a descriptor of the occasions when a need for legal representation was likely to occur in the context of an inquest) was a quantitative limitation which was misleading and unlawful. I can deal with this point briefly. Miss Simor QC submitted that the inclusion of an unproven quantitative assumption was misleading and likely to cause caseworkers wrongly to refuse individual applications for legal aid. For whatever reason this point has not been advanced by the Claimant, though it may be neither worse nor better by reason of being advanced only by the EHRC. I am, however, not able to accept the criticism. First, as I have already explained, the Lord Chancellor has modified paragraph [19] by removal of the reference to the *Khan* case. One is left with the broad statement that in "*most*" cases coroners can conduct an effective investigation which embraces the family's participation but without the need for them to be legally represented. I am unable to express a view as to whether "*most*" is accurate or inaccurate on a purely quantitative basis. There is no evidence before the Court upon this issue and before I could strike this word down there would need to be some clear cut evidence that the phrase was both materially wrong and, moreover, likely to exert

an adverse effect upon decision making in the *Gillick* sense. Secondly, it seems to me important that the word is descriptive not directive. The errors that I have identified above in relation to the Guidance may be loosely described as directive in that they describe the test that caseworkers should apply. In contrast, the alleged error is descriptive; it does not tell caseworkers what to do. It is merely a gloss indicating the Lord Chancellor's view on the characteristics of the typical inquest. Even if the Lord Chancellor were wrong the Guidance still instructs caseworkers to examine applications upon a case by case basis and to take individual factors into account: See Guidance para [20]. As such I am unable to conclude that it would fail the *Gillick* test.

121. In these circumstances it seems to me within the discretion of the Lord Chancellor to express his view in this way. I might have adopted a different view if the Guidance had been in extreme terms, for example saying that in the overwhelming or preponderant portion of inquests no legal representation was required. Such a statement might need to have been justified by quantitative evidence. However, I do not think the same can be said of the more modest "most" which may be said to fall within the confines of a legitimate judgment call.

122. In these circumstances this particular ground of challenge does not succeed. I am fortified in this conclusion by the similar conclusion arrived at in relation to an analogous issue by Lady Justice Smith in *R*(*Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479 at para [78].

L. Appropriate relief

123. The relief contemplated in *Gillick* as the appropriate remedy in a case such as this was a declaration. If a court considers that relief is justified then a declaration is always an obvious option. I do not however read the observations in *Gillick* as, in a proper case, precluding other relief, such as an order quashing the Guidance.

124. In the present case I am not attracted to the idea of an order quashing the Guidance. The issue is whether I should grant declaratory relief (see para [19] above).

M. Conclusion

125. The application for judicial review succeeds to the extent set out above. I will hear submissions about appropriate declaratory relief.