



Child Abuse Inquiries – A Ticking Bomb

The Inquiry to which Justice Goddard has recently been appointed to the chair is now on a statutory footing. Its terms of reference and its scope have not yet been finalised. However, it and other investigations into historic child sexual abuse will be faced with calls to comply with the investigative obligations of Article 3 ECHR. The purpose of this article is to examine what that may mean for local authorities.

The State is under a duty not to subject anyone within the jurisdiction to inhuman or degrading treatment. That substantive duty under Article 3 is similar to the one under Article 2 in that it extends to “*a positive obligation on the authorities to take preventive operational measures to protect an individual ... from the criminal acts of another individual...*”¹

The obligations under Article 2 and 3 have also been interpreted as including an obligation to investigate. This investigative obligation arises “*where ...it is arguable that there has been a breach of [the substantive duty]*”²

In *R (AM) v Secretary of State for the Home Department ex p. Kalyx Ltd* [2009] EWCA Civ 219 Sedley LJ said:

“A body of European and domestic case-law has established that, when there is credible evidence of a breach of art. 2, the state has an obligation to provide or to institute an effective official investigation. The purposes of such an investigation were described by Lord Bingham in [R \(Amin\) v Home Secretary \[2004\] 1 AC 653](#), §31:

“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 learnt from his death may save the lives of others.”

It is also well established that an analogous duty is created by art. 3 where credible evidence suggests that one or more individuals have been subjected by or with the connivance of the state to treatment sufficiently grave to come within the article.”

Even where the treatment was allegedly perpetrated by individuals without the connivance of any official, if the children were in care or the abuse should have been noticed by social workers that would provide good grounds to conclude that the Article 3 obligation is engaged.³

Where the abuse allegedly took place prior to the coming into force of the Human Rights Act 1998 the obligation to hold a compliant investigation will nevertheless be found to arise where significant procedural steps (such as new inquiry) take place after the Act came into force⁴.

¹ See *Osman v United Kingdom* (1998) 29 EHRR 245 at paragraph 115.

² See *R v SSHD ex p Amin* [2003] UKHL 51 at paragraph 25. See also *Mastromatteo v Italy* [Application number 37703/97] at paragraph 74.

³ *DSD, NBV v Commissioner of the police of the Metropolis* [2014] EWHC 436, (see paragraphs 212-224).

⁴ *In Re McCaughey and Anor* [2011] UKSC 20



In order to satisfy the obligation, an investigation must be independent; it must be effective; it must be reasonably prompt; there must be a sufficient element of public scrutiny; and the victim must be involved to the extent necessary to protect his legitimate interests⁵

The extent of the involvement of the victim (or their family) that is sufficient to meet the state's obligations under Article 2 and 3 is decided on a case by case basis and will depend on a variety of factors. The existence of systemic failures, including the likelihood that there were serious human failings at higher levels which had not been publicly identified, is frequently considered as pertinent to the level of victim participation required. In *Amin* Lord Bingham considered and later approved the judgment of Hooper J which noted:

It seems likely (and it is certainly arguable) that there were serious human failings both at the wing level and at higher levels which have not been publicly identified. On the facts of this case the obligation to hold an effective and thorough investigation can, in my judgment, only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses

It follows that some conclusions can tentatively be drawn about how the Goddard Inquiry and other investigations may affect local authorities where it is alleged that children in their area were abused:

- If the alleged abuse is at all serious then it is likely to be regarded as amounting to inhuman and degrading treatment.
- If any of the following characteristics are present, it is likely that the investigative duty under Article 3 will arise, namely a degree of custody or control over the child by the local authority; a credible allegation of abuse by a local authority employee; or a credible allegation that the local authority knew or ought to have known of continuing abuse.
- Where the investigative obligation arises the purposes of the inquiry will include bringing the full facts to light; exposing culpable and discreditable conduct and bringing it to public notice; allaying suspicion of deliberate wrongdoing (if unjustified); and rectifying dangerous practices and procedures.
- In order to achieve those aims the inquiry will use its powers of compulsion to ensure that it is provided with all relevant documents and witnesses.
- That material will be given to the alleged victims, who will be entitled to legal representation so as to challenge the local authority's evidence.
- The process will be very time-consuming, expensive and public.
- The need will be to prepare early and thoroughly. To devote adequate resources, including early access to legal advice. To gather/order documentation. To anticipate issues. To make early decisions: on witnesses to call, evidence to be presented, stances to take and admissions to make.

⁵ See paragraph 25 of *Amin*.



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