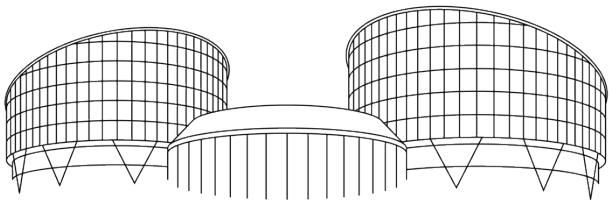

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**DIVISION DE LA RECHERCHE**
**RESEARCH DIVISION**

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# *Article 2*
# *The State's positive obligations under Article 2 of the Convention to protect an individual from self-harm*

COUNCIL OF EUROPE
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**STUDY OF THE CEDH CASE-LAW**
**ARTICLE 2**


## SUMMARY

The report examines the State's obligation under Article 2 of the Convention to take preventive measures in case of a danger of self-harm. It first sets outs the criteria for determining the circumstances in which the obligation to take such measures arises and the context in which it has been applied. The report then looks at the various factors which have been taken into account by the Court in establishing the risk of self-harm. Finally, it outlines the principles governing the scope of the Court's review of the decisions of the national authorities.

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# INTRODUCTION

1. The report examines the State's obligation under Article 2 of the Convention to protect the life of an individual from self-harm. It first sets out the general principles concerning such protection, in particular the criteria for determining the context in which the obligation to take preventive measures arises. The report then looks at the various factors which have been taken into account by the Court in establishing the risk of self-harm. Finally, it outlines the principles governing the scope of the Court's review of the decisions of national authorities.

## I. General principles concerning the scope the State's obligation under Article 2 of the Convention to take preventive measures

2. Already in its early case-law the Convention organs considered that the concept in Article 2 of the Convention that "*everyone's life shall be protected by law*" requires the State not only to refrain from taking life "*intentionally*", but also to take appropriate steps to safeguard life. These steps may require preventive action from the State.[1]

3. In *Osman v. the United Kingdom* (1998), the Court laid down a two-prong test for determining when a positive obligation arises to take operational measures to protect an individual whose life is at risk from the criminal acts of another individual. First, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party, and second, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[2]

4. The Osman test has been subsequently applied in a variety of circumstances, involving not only the protection of particular individuals, detained or at large, but also the protection of society.[3]

5. The test was applied for the first time in a suicide case in *Keenan v. the United Kingdom* (2001), where the Court determined the question to be examined as "*whether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk.*".[4]

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1. *Association of Parents v. the United Kingdom*, no. 7154/75, Commission decision of 12 July 1978, D.R. 14, p. 31, and *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgements and Decisions* 1998-III.
2. *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII.
3. For a comprehensive overview of the different situations, see *Bljakaj and Others v. Croatia*, no. 74448/12, §§ 107-111, 18 September 2014.
4. *Keenan v. the United Kingdom,* no. 27229/95, § 93 ECHR 2001-III.

6. It has however been recognised that the obligation is subject to certain limitations:[5]

1) the obligation should be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, in view of the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Thus, not every claimed risk to life entails on obligation to take operational measures to prevent that risk from materialising;
2) there are inevitable restraints on the preventive action taken by the authorities (e.g. in the context of police action), flowing from the guarantees of Articles 5 and 8 of the Convention.
3) concerning a risk of self-harm by persons under the care and control of the State, the authorities must discharge their protective duties in a manner compatible with the rights and freedoms of the individual concerned, without infringing on personal autonomy**.** Excessively restrictive measures may give rise to issues under Articles 3, 5 and 8 of the Convention.[6]

7. The duty to take measures to prevent self-harm has mainly arisen in the context of detention in prison or in police custody, military service and involuntary hospitalisation, namely in situations where the person concerned is under the control of the State. The majority of these cases concern a risk of suicide in detention.

8. The Court has on numerous occasions emphasised that **persons in custody** are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies. [7]

9. However, the vulnerability of detainees, including the higher risk of suicide amongst them compared to the general population, does not mean that every prisoner should be treated as a real and immediate suicide risk. To do so would impose not only a disproportionate burden upon the authorities, but possibly also an unnecessary and inappropriate restriction on the liberty of the individual prisoner.[8]

10. There are, nonetheless, certain basic precautions which the detaining authorities are expected to take in respect of detained persons in order to minimise any potential risk of self-harm and suicidal attempts at escape, even where it is not established that they knew or ought to have known about any such risk.[9] Whether any more stringent measures are necessary in respect of a detainee and whether it is reasonable to apply them will depend on the circumstances of the case.[10]

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5. See *Osman*, cited above, § 116; *Keenan*, cited above, § 92, both cited above.
6. See *Hiller v. Austria*, no. 1967/14, § 55, 22 November 2016.
7. *Keenan*, cited above, § 91; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 56, ECHR 2002-III; and *Erikan Bulut v. Turkey*, no. 51480/99, § 33, 2 March 2006.
8. *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I.
9. See, for example, *Eremiášová and Pechová v. the Czech Republic*, no. 23944/04, § 110, 16 February 2012, reiterated in *Keller v. Russia*, no. 26824/04, § 88, 17 October 2013.
10. *Keenan*, cited above, § 92; *Robineau v. France* (dec.), no. 58497/11, 3 September 2013.

11. As with persons in custody, individuals undergoing **compulsory military service** are within the exclusive control of the authorities of the State who are under a duty to protect their life.[11] In particular, the military authorities must exercise special diligence and afford treatment appropriate to military conditions for soldiers who had psychological problems.[12]

12. As regards **mentally ill persons**, the Court has considered them to be particularly vulnerable.[13] More generally, Article 2 obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved.[14] When the authorities decide to place a person with disabilities in detention or psychiatric institutions, they should demonstrate special care in ensuring conditions which correspond to the special needs resulting from the person's disability.[15]

13. Patients in **voluntary psychiatric care** equally fall under the protection of Article 2 concerning a duty to take preventive measures in case of risk to life. In *Reynolds v. the United Kingdom* (no. 2694/08, 13 March 2012), where the applicant's son had killed himself by jumping out of a sixth-floor window of a medical establishment where he had been admitted with psychotic symptoms, the Court found that the position of the applicant's son was such that an operational duty had arisen to take reasonable steps to protect him from a real and immediate risk of suicide and that that duty was not fulfilled.[16] Indeed, the States' positive obligations in the sphere of public health, require them to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives.[17]

14. The context - custodial or otherwise - in which a death takes place is nonetheless relevant for the assessment of the authorities' conduct.[18]

15. Regardless of the particular context, under the *Osman/Keenan* test it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have knowledge.[19]

16. The Court has rejected several suggestions from the parties to apply a different standard or to lower the threshold of foreseeability.

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11. See, as the recent authority, *Malik Babayev v. Azerbaijan*, no. 30500/11, § 66, 1 June 2017.
12. See, for example, *Lütfi Demirci and Others v. Turkey*, no. 28809/05, § 35, 2 March 2010, and *Ataman v. Turkey*, no. 46252/99, § 61, 27 April 2006.
13. See, among many other authorities, *Renolde v. France*, no. 5608/05, § 84, 16 October 2008.
14. *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011.
15. *Hiller*, cited above, § 44.
16. See also *Dodov v. Bulgaria*, no. 59548/00, 17 January 2008 concerning the State's duties in respect of the disappearance of a patient from a nursing home (adequacy of the police reaction and lack of accountability of the staff).
17. *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I.
18. See, for example, *Mikayil Mammadov v. Azerbaijan*, no. 4762/05, § 119, 17 December 2009, concerning the applicant's wife's suicide during her eviction from home, where the Court distinguished this situation from a death in custody. See also *Dimcho Dimov v. Bulgaria*, no. 77248/12, § 60, 29 June 2017 concerning attacks in prison.
19. *Osman*, cited above, § 116; *Tanribilir v. Turkey*, no. 21422/93, § 72, 16 November 2000. In some cases, the Court has considered that there must be "convincing evidence" to support the allegation that the authorities should have known of the risk to life. See, for example, *Uçar v. Turkey*, no. 52392/99 § 86, 11 April 2006.

17. In particular, it has not accepted the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to "*gross negligence or wilful disregard of the duty to protect life*", finding such a standard too rigid and incompatible with the requirement of practical and effective protection of Convention rights.[20]

18. It has also rejected the applicant's suggestion that the test should be adapted by lowering the threshold for State responsibility when the State created the relevant risk for the deceased and placed the individual in a vulnerable position (e.g. in confinement). In its view, the fact that the deceased belonged to a category of particularly vulnerable persons was but one of the relevant circumstances to be assessed in order to answer the question of actual or imputed knowledge.[21]

19. The Court has further considered it inappropriate to apply a "*real possibility*" test, as it puts the threshold too low for the purposes of determining whether there has been a violation of Article 2.[22]

20. Finally, a mere "*condition sine qua non*" or "*but for*" does not suffice to engage the responsibility of the State.[23]

## II. Factors relevant for determining the risk of self-harm and appropriate measures

21. The Court has consistently held that the two questions which make up the *Osman/Keenan* test can only be answered in the light of all the circumstances of a particular case.[24]

22. Concerning, in particular, suicide risks, the Court has had regard to a variety of factors in order to establish whether the authorities knew or should have known that the life of particular individual was under a real and immediate risk, triggering the obligation to take appropriate preventive measures. As demonstrated below, these factors commonly include previous attempts at suicide or self-harm, suicidal thoughts, signs of physical or mental distress, a history of mental health problems or psychological fragility and the gravity of a mental condition. The acknowledgement of a risk of self-harm by the domestic medical experts weighs heavily in the Court's assessment which also takes into account the variations in the individual's mental condition (improvement or deterioration) as well as the sequence and speed of the events in a concrete case. The obligation to protect life should not impose an impossible or disproportionate burden on the authorities considering the unpredictability of human conduct.

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20. *Osman*, cited above, § 116.

21. *Van Colle v. the United Kingdom*, no. 7678/09, § 91, 13 November 2012.

22. *Younger* (dec.), cited above, where the applicants argued that, had the deceased been seen by a doctor, there was a real possibility that the authorities would have become aware that he was at a real and immediate risk of suicide.

23. This applies particularly in the context of violent acts by other individuals: see *Mastromatteo v. Italy*, no. 37703/97, § 74, 24 October 2002; *Jean Pearson v. the United Kingdom* (dec.), no. 40957/07, § 72, 13 December 2011.

24. See, for example, *Osman*, § 116; *Tanribilir*, § 72; *Uçar*, § 85, all cited above, and *De Donder and De Clippel v. Belgium*, no. 8595/06, § 69, 6 December 2011.

23. In the seminal case of *Keenan v. the United Kingdom*, cited above, concerning the suicide of a mentally ill prisoner, the Court found the knowledge by the authorities of the risk to life established on the following basis:

> "95. The Court finds that the prison authorities were aware, however, that Mark Keenan's problem was chronic and involved psychosis, with intermittently recurring flare-ups. His **behaviour** after admittance at Exeter Prison **put the authorities expressly on notice that he exhibited suicidal tendencies**. This is shown by **the remarks** he made on 17 April and 1 May 1993 [indicating that he was feeling suicidal] and is a significant, although not the only possible interpretation of his **conduct in making the noose** which was found in his cell on 16 April 1993. The Court is satisfied, therefore, that the prison authorities knew that Mark Keenan's mental state was such that he posed a potential risk to his own life."

24. Having determined that the risk was real, it went on to consider whether it was also immediate:

> "96. The Court considers that his mental state was such that his threats had to be taken seriously and were therefore to that extent real. **The immediacy of the risk varied, however**. Mark Keenan's behaviour showed periods of apparent normalcy or at least of ability to cope with the stresses facing him. It cannot be concluded that he was at immediate risk throughout the period of detention**.** However, **the variations in his condition required that he be monitored carefully in case of sudden deterioration**."

25. On the facts of the case, the Court found that the authorities' response was adequate and in compliance with their obligation under Article 2, especially having regard to the lack of any sign of a potential suicide on the deceased's last day when he appeared calm and relaxed:

> "99. The Court finds that, on the whole, the authorities responded in a reasonable way to Mark Keenan's conduct, **placing him in hospital care and under watch when he evinced suicidal tendencies**. …**There was no reason to alert the authorities on 15 May 1993 that he was in a disturbed state of mind rendering an attempt at suicide likely**. In these circumstances, it is not apparent that the authorities omitted any step which should reasonably have been taken, such as, for example, a fifteen-minute watch."

26. The Court also observed that the risk of committing suicide was well known and high among schizophrenics, but that in the present case there was no formal diagnosis of schizophrenia provided by a psychiatric doctor who treated the prisoner.[25]

27. In *Renolde v. France* (no. 5608/05, ECHR 2008 (extracts)), the applicant's brother had been suffering from psychotic disorders at the time of his arrival in prison. Eighteen days before his death (on 2 July 2000) he had attempted suicide by cutting his arms and had subsequently continued to show signs of worrying behaviour despite his medical supervision and treatment. For the Court, the previous suicide attempt clearly put the authorities on notice that there was a risk to life:

[25]. *Keenan*, cited above, § 94.

> "89. In the light of the above considerations, the Court concludes that from 2 July 2000 onwards, the authorities knew that Joselito Renolde was suffering from psychotic disorders capable of causing him to commit acts of self-harm. Although his condition and the immediacy of the risk of a fresh suicide attempt varied, the Court considers that that risk was real and that Joselito Renolde required careful monitoring in case of any sudden deterioration…"

28. It noted in this connection that certain mental illnesses, such as psychosis, entailed especially high risks and that the applicant's brother suffered from acute psychotic disorders.[26]

29. The Court went on to find that the authorities had failed to take measures to protect the right to life of the applicant's brother: the question of his admission to a psychiatric hospital was never considered; there was a failure to ensure that he was taking his daily medication; and he was punished with detention in a punishment cell three days after his initial suicide attempt, which had aggravated the risk of suicide.

30. In *Trubnikov v. Russia* (no. 49790/99, 5 July 2005), the applicant's son - a person with psychological problems - had also attempted suicide before his death in prison and had showed a tendency to self-harm. However, in finding no violation of Article 2, the Court took into account that his mental condition was not serious and had stabilised following his treatment after his suicide attempt 3 years previously. The sudden deterioration of his mental state had not been foreseeable to the authorities. The Court found as follows:

> 74. … it has not been established that Viktor Trubnikov's conduct was associated with any **dangerous psychiatric condition**. Moreover, no opinion had ever been expressed – by Viktor Trubnikov's psychiatrist or other officials involved in his supervision – that Viktor Trubnikov was likely to make a serious attempt to commit suicide or inflict self-harm in the future. Accordingly, there was **no formal acknowledgement** which would lead the Court to conclude that the authorities were aware of the imminent threat to Viktor Trubnikov's life.
>
> 75. As to whether the authorities ought to have known of the risk, the Court observes that for the last three years of Viktor Trubnikov's life, when he was under psychiatric supervision, he did not reveal any dangerous symptoms, such as the persistence of his suicidal tendency. On the contrary, the records reflected a certain improvement in his attitude towards his previous suicide attempt**.** Viktor Trubnikov's **mental and emotional state, in general, apparently stabilised after the initial intensive treatment he received in 1995, and remained unchanged for more than three years**. During that period no substantial variations were registered, and Viktor Trubnikov's state was consistently described as stable. Against such a background, the Court accepts that it would have **been difficult to predict any quick and drastic deterioration** that would lead to Viktor Trubnikov's suicide.[27]

31. Although some risk existed, this was not sufficient to engage the responsibility of the State.

32. By contrast, in *Çoşelav v. Turkey* (no. 1413/07, 9 October 2012), the psychological problems of the applicant's son, combined with his dangerous behaviour during the year preceding his suicide, were found by the Court to be sufficient signs of alarm:

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[26]. § 105 of the judgment.

[27]. Concerning a deterioration of health, see also *Jasińska v. Poland*, no. 28326/05, § 69, 1 June 2010, where the Court considered that the deterioration of the mental state of a detainee with mental health problems, established by an expert three days before his death, should have led the authorities to give some thought to the risk of suicide.

> "57. In the light of the documents detailing his **two suicide attempts, his repeated requests for help and the incidents of self-harm,** the Court considers that the prison authorities had been given ample indication that Bilal Çoşelav was at risk of suicide. Indeed, the fact that he had been suffering with **psychological problems was documented** by almost every national authority who dealt with him or his death, and every prisoner and prison officer was aware of his problems.
>
> 62. Having regard to the fact that the national authorities were aware of Bilal Çoşelav's problems, the Court considers that those authorities were under an obligation to take "measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"…. In the circumstances of the present application, that obligation did not only require them to **keep a constant watch** on Bilal Çoşelav, but also to provide adequate medical help for his psychological problems."

33. Similarly in *Ketreb v. France* (no. 38447/09, 19 July 2012), the suicide of a detainee suffering from a personality disorder was preceded by two suicide attempts while placed in the punishment block, incidents of self-harm, open talk about his intention to kill himself and an alarming deterioration in his state of health during his last days. The authorities should have thus anticipated a suicidal frame of mind when placing him again in a disciplinary cell.

34. In addition to self-harming behaviour, **suicidal thoughts or threats** are also capable of putting the authorities on notice of a risk to life, especially when voiced by persons with mental problems. In *Reynolds v. the United Kingdom,* cited above, the applicant's son, who was suffering from schizophrenia, had no history of self-harm or attempted suicide but was hospitalized on a voluntary basis because he had heard voices ordering him to kill himself. On the first night of his stay he died after jumping out of the sixth floor window of the psychiatric facility. For the Court, the applicant's known precarious condition gave rise to a duty to protect him from a risk of suicide. In *Kilinç and Others v. Turkey* (no. 40145/98, 7 June 2005), which concerned a suicide by a conscript during his military service, the Court considered that the conscript's mental illness combined with the expression of suicidal thoughts should have made the authorities aware of the risk of suicide, even though his behaviour was at times normal.[28]

35. By contrast, in *Volk v. Slovenia* (no. 62120/09, § 92, 13 December 2012), the authorities could not have reasonably foreseen the applicant's son's decision to commit suicide following his threat to kill himself more than six months earlier, considering inter alia that he had never been diagnosed with any psychiatric condition or attempted to kill or harm himself, so that there had been no need for strict surveillance.[29]

36. In *Mitić v. Serbia* (no. 31963/08, 22 January 2013), the suicide of the applicant's son in prison was considered by the Court to be unforeseeable on the following grounds:

> "49. The Court notes that JM did not have **any known history of mental health problems or suicidal tendencies**… All the time during imprisonment **he acted in a normal fashion, showing no particular signs of physical or mental distress.** He had constant access to medical assistance, was always examined by the same prison doctor and had contact with other prison officers and inmates, none of whom ever reported anything unusual in his behaviour. … **On the morning of the day he killed**

[28]. §§ 48-49 of the judgment. On the question of foreseeability of suicide in the context of military service see the recent case of *Malik Babayev*, cited above, §§ 71-75, containing a comparison with earlier cases.

[29]. § 92 of the judgment.

> **himself, he was seen by the prison doctor and two other prison officers** …. According to their statements given during the investigation, there was **nothing strange in his demeanour**. Neither did JM's relatives ever alert the prison authorities to any risk of suicide. For these reasons, the Court does not find that the authorities could have reasonably foreseen JM's decision to hang himself."[30]

37. Indeed, in the context of detention, the lack of any suicidal tendencies and normal behaviour means that the Court will not criticise the authorities for not taking special measures to prevent suicide, such as round-the-clock surveillance or confiscation of clothing, blankets, etc.[31] In the absence of any specific cause for caution or alarm regarding a detainee's mental state, standard precautionary measures to prevent suicide and supervise prisoners (routine monitoring, confiscation of sharp objects, belts) are considered sufficient.[32] Even when a risk of suicide has been acknowledged by the authorities, the special measures required to protect the life of an individual do not go beyond what is reasonable in the particular circumstances.[33]

38. Factors such as psychological fragility,[34] emotional immaturity,[35] family problems[36] or a refusal to eat meals[37] have not in themselves been enough to alert the authorities to a risk of suicide.

39. Importantly, in *De Donder and De Clippel v. Belgium* (no. 8595/06, 6 December 2011), the Court considered that the lack of any prior suicidal thoughts and behaviour did not preclude a risk of suicide of a detainee who was suffering from paranoid schizophrenia. In establishing the existence of such a risk, the Court had regard to the following factors. Firstly, the applicants' son had been doubly vulnerable: as a person deprived of his liberty since the suicide rate was very high among the prison population, and, even more so, as a person suffering from mental disorders making him incapable of controlling his actions. Secondly, the gravity of the mental illness was an important consideration since the risk of suicide was high among schizophrenics and inherent in the illness. The fact that applicant's son had been "*compulsorily admitted*" to the prison under the Social Protection Act demonstrated his considerable fragility as he was considered to pose a danger to himself and society and was incapable of controlling his actions. Finally, his behaviour towards staff and his cellmates was aggressive, his therapy did not work and his state of mind was agitated, nervous and anxious.

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30. For similar reasoning and conclusion see *Younger* (dec.), cited above, where the Court observed that the deceased "*did not have any known history of mental health problems or suicidal tendencies*" and his demeanor up to the fatal day was **"***normal, compliant, calm, rational and responsive, with no particular signs of mental or physical distress*." For more recent cases, see *Castro and Lavena v. Italy* (dec.), no 46190/13, 31 May 2016 and *Jagiełło v. Poland* (dec.), no. 21782/15, 24 January 2017 (Committee), where there were also no prior indications of a suicide risk or a diagnosis of psychiatric illness.

31. See, among numerous authorities, *Tanrıbilir*, cited above, §§ 76-77; *A.A. v. Turkey*, no. 30015/96, §§ 49-50, 27 July 2004; *Akdoğdu v. Turkey*, no. 46747/99, § 50, 18 October 2005.

32. See *Uçar*, § 87, and *A.A. v. Turkey*, § 47, both cited above.

33. See the recent case of *Ouafi v. France* (dec.), no. 42571/14, 19 October 2017, where the authorities had placed a suicide-risk detainee under close surveillance by checking on his cell every hour at night, the last control taking place 35 minutes before his suicide.

34. *Salgın v. Turke*, no. 46748/88, § 81, 20 February 2007.

35. *Tikhonova v. Russia*, no. 13596/05, § 75, 30 April 2014.

36. *Seyfi Karan v. Turkey* (dec.), no. 20192/04, 23 February 2010.

37. *Robineau* (dec.), cited above.

40. Although the immediacy of the risk had been difficult to determine, the Court considered that that criterion should not be applied categorically in cases of suicide:

> « 76. Ensemble, ces éléments conduisent la Cour à considérer que, lors de sa détention dans la prison de Gand, il y avait un risque réel que Tom De Clippel, particulièrement fragilisé sur le plan mental, attente à ses jours. **Certes l'immédiateté d'un tel risque était difficile à percevoir, mais ce critère**, que la Cour a dégagé dans des cas où le risque de mort était dû à un facteur extérieur à la victime (voir tout particulièrement l'arrêt *Osman c. Royaume-Uni* du 28 octobre 1998, Recueil des arrêts et décisions 1998-VIII, § 116), **ne saurait entrer péremptoirement en jeu en matière de suicide** (voir, précités, *Keenan*, § 96, et *Renolde*, § 89). »

41. In addition, it could not be inferred from the prisoner's lack of previous suicide attempts that the authorities could not have known that such a risk existed. In the Court's view:

> « 77. Ensuite, s'il est vrai que la chambre des mises en accusation a écarté l'affirmation des requérants selon laquelle Tom De Clippel avait déjà tenté de se suicider – et avait de la sorte envoyé aux autorités un signal dont elles auraient dû tenir compte – et s'il est vrai également qu'aucun élément du dossier ne vient à l'appui de cette hypothèse, **l'on ne saurait déduire de l'absence de tentative antérieure de suicide que les autorités ne pouvaient savoir qu'un tel risque existait. Il s'agit là d'une question dont la réponse dépend de l'ensemble des circonstances de la cause. …**
>
> 78. Bref, même **s'il n'apparaît pas que Tom De Clippel avait précédemment commis des tentatives de suicide dont les autorités avaient eu connaissance, et même s'il n'a semble-t-il pas donné de signe alarmant dans les instants précédant son acte fatal, les autorités auraient dû savoir qu'il existait un risque réel que, détenu dans l'environnement carcéral ordinaire de la prison d**e Gand, Tom De Clippel attente à ses jours. »

42. The Court went on to find a breach of Article 2 of the Convention as the applicants' son was kept in the ordinary section of a prison outside the rules of domestic law and was treated without regard for his mental disorder or his status as an involuntary detainee.

43. In *Hiller v. Austria* (no. 1967/14, 22 November 2016), the applicant's son also suffered from paranoid schizophrenia and on 19 March 2010 was involuntarily committed to a psychiatric hospital by court order because he posed a danger to himself and others. By 2 April his mental state had improved and he was transferred to the open ward of the hospital where he was authorised to take walks. His hospitalisation, which was scheduled to end on 21 May, was recommended only because of the threat he still posed to others, but no longer to himself. However, on 12 May, the applicant's son escaped from the hospital premises and killed himself by jumping in front of a train.

44. In contrast to the *De Donder and De Clippel v. Belgium*, case cited above, the Court, in finding no violation of Article 2 in *Hiller v. Austria*, cited above, attributed decisive importance to the lack of any signs of suicidal thoughts or attempts throughout the applicant's son stay at the psychiatric hospital.[38] The improvement of his condition and his calm behavior in the preceding weeks were also relevant. In agreeing with the

[38]. It is recalled that he was suffering from paranoid schizophrenia, a condition with a high risk of suicide, and was compulsorily committed to the psychiatric institution because of a danger of self-harm.

findings of the domestic authorities as to the assessment of the suicide risk, the Court found as follows:

> "52. The Court considers the assessment of the facts by the domestic authorities comprehensive, relevant and persuasive, and also in line with its case-law on the issue. …In the instant case, **it appears from the hospital records that there had been no signs of suicidal thoughts or attempts throughout M.K.'s entire stay at the institution.** In these circumstances, it would not have been lawful under the Hospitalisation Act for the hospital to keep him in the closed ward any longer (see paragraphs 27 and 30 above). During the weeks preceding M.K.'s death, that is to say from the beginning of April 2010 until 12 May 2010, he had been **calm, inconspicuous** and had taken his medicine voluntarily. When he was given the freedom to take walks by himself from 21 April 2010 – more than three weeks after his previous escape – he had always returned from his walks as agreed. He notified the hospital staff that he was taking a walk before leaving and informed them again upon his return and – as instructed – never left the hospital grounds.
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> 53 … from the documents at hand and from the fact that the hospital kept a detailed record of his treatment, the **Court is convinced that the hospital staff could not at any point have had any reason to expect that M.K. would commit suicide, either on the day of his commitment to the hospital or on any of the other days** during which he remained within their sphere of responsibility. The Court finds the above elements sufficient to allow it to conclude, just like the domestic courts, that M.K.'s escape and subsequent suicide had not been foreseeable for the hospital and was not therefore attributable to it."

45. It further noted that today's paradigm in mental health care was to give persons with mental disabilities the greatest possible personal freedom in order to facilitate their re-integration into society. From a Convention point of view, it was not only permissible to grant hospitalised persons the maximum freedom of movement but also desirable in order to preserve as much as possible their dignity and their right to self-determination. The Court thus accepted that the advantages of an open hospitalisation of the applicant's son outweighed the disadvantages of the closed option.

46. In *Fernandes De Oliveira v. Portugal* (no. 78103/14, 28 March 2017), in somewhat comparable circumstances,[39] the Chamber found a breach of Article 2. The applicant's son suffered from complex mental disorders and on 1 April 2000 was *voluntarily* admitted to a psychiatric hospital as he had attempted to commit suicide. Although he was allowed to spend some weekends at home, on several occasions he left the hospital without authorisation. He had been calm on 27 April 2002, the day on which he committed suicide, after escaping from the hospital premises. In finding a violation of Article 2, the Chamber considered that the deceased's clinical history and his suicide attempt 3 weeks prior to his death together with the incidents of escape should have alerted the hospital staff to the risk of a renewed escape and suicide attempt. In this situation, the hospital should have been expected to adopt safeguards to ensure that he would not leave the premises and to monitor him on a more regular basis. The Chamber distinguished the case from *Hiller v. Austria*, cited above, in that, in the latter case, the lack of any suicidal thought or attempt rendered the suicide of a mentally ill patient unforeseeable. It did not attribute any weight to the normal behavior of the deceased during his last days, a factor which has been considered relevant in certain previous cases.

[39]. Important factual differences exist, in particular, concerning the nature of the hospitalisation (compulsory vs. voluntary), and the assessment of the risk of self-harm at admission and during the hospital stay.

## III. Scope of the Court's review of the decisions of national authorities

47. In the recent case of *Bărbulescu v. Romania* [GC] (no. 61496/08, 5 September 2017 (extracts)), the Court summarised its role in the establishment of the facts as follows:

> "129. ….the Court considers it useful to reiterate that when it comes to establishing the facts, it is sensitive to the subsidiary nature of its task and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 182, 14 April 2015). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B). Though the Court is not bound by the findings of domestic courts and remains free to make its own assessment in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, ECHR 2011 (extracts), and *Aydan v. Turkey*, no. 16281/10, § 69, 12 March 2013)."

48. In cases where a violation of Article 2 is alleged, the Court must be "*especially vigilant*"[40] and apply a "*particularly thorough scrutiny*".[41] However, it appears that this level of scrutiny applies mostly to situations concerning a deprivation of life either by State agents or by criminal acts of a third party.[42] Cases concerning protection from self-harm typically make no reference to the need for strict scrutiny. The Court is still prepared to be critical of the conclusions of the domestic courts and will examine all the surrounding circumstances and available evidence, including in particular medical opinions, hospital records and experts reports, to establish a risk of self-harm and the reasonableness of any measures taken by the authorities to counter that risk.

49. As regards, in particular, the question of foreseeability, the Court, in agreeing with the authorities' approach, has occasionally found that there had been no "*manifest omission*" which would have prevented them from making a correct assessment of the risk.[43]

50. It has observed, more generally, that in order to defer to the judgment of domestic authorities, in accordance with the principle of subsidiarity, the Court must be satisfied that they have assessed and scrutinised the pertinent issues thoroughly.[44]

51. In *Hiller v. Austria*, cited above, the Court, in finding no violation of Article 2, considered that the domestic courts had indeed thoroughly examined the case and that their assessment of the facts was

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40. See, for example, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 182, 24 March 2011, and *Lykova v. Russia*, no. 68736/11, § 119, 22 December 2015.

41. *Erikan Bulut*, § 28, and *Van Colle*, § 94, both cited above, where in respect of the application of the *Osman* test by the national authorities the Court stated: "*while [it] must accord a certain margin of appreciation to the legal assessment made by the House of Lords, it must nevertheless apply a particularly thorough scrutiny since the complaint concerns the pre-eminent right to life guaranteed by Article 2*."

42. See, for example, *Bljakaj and Others*. Cited above, § 112.

43. *Trubnikov v. Russia*, no. 49790/99, § 76, 5 July 2005; *Volk v. Slovenia*, no. 62120/09, § 91, 13 December 2012; and *Mitić v. Serbia*, no. 31963/08, § 53, 22 January 2013.

44. *Ťupa v. the Czech Republic*, no. 39822/07, § 51, 26 May 2011.

"*comprehensive, relevant and persuasive, and also in line with its case-law on the issue*."[45]

52. By contrast, in *De Donder and De Clippel v. Belgium*, cited above, the assessment of the suicide risk by the domestic courts did not stand up to the Court's scrutiny. The national authorities had considered that the prisoner's suicide had been unforeseeable on account of his complex personality and his lack of previous suicide attempts. In the Court's view: « *ce raisonnement ne résiste pas à un examen des circonstances de la cause à l'aune des critères dégagés par sa jurisprudence.* »[46] It went to establish the risk of suicide on the basis of a wider range of factors, including the individual's vulnerability, the gravity of his psychiatric condition and his worrying behaviour.

53. In sum, the Court's deference to the conclusions of the national authorities depends on the quality of domestic proceedings, in particular on whether the authorities identified and assessed all the relevant factors in a comprehensive manner, in line with the Court's case-law. This can only be determined on the basis of the facts of a particular case.

## CONCLUDING REMARKS

54. The above overview demonstrates that the answer to the two questions under the *Osman/Keenan* test depends on the circumstances of the particular case. While the Court has identified a number of specific factors to be taken into account when determining the risk of self-harm, the weight to be given to a particular factor (for example, a prior suicide attempt, improvement of the individual's condition, his behaviour on his last day) has varied, depending, as it does, on the context of a case. It is thus difficult to perceive any apparent divergence of approach in the case-law concerning how the positive obligation under Article 2 arises.

In the context of detention, regardless of any identifiable risk of self-harm, basic precautionary measures must still be taken by the authorities to minimise any potential risk.

55. Although the case-law concerning self-harm in a hospital setting, including voluntary hospitalisation, is relatively scarce, it is clear that the duty to take preventive action applies in respect of patients who are under the care or control of public authorities and pose a danger of self-harm. The principles of autonomy and self-determination of patients do not detract from this duty once the authorities have or should have become aware of the risk to life. The assessment of the risk falls first of all on the national authorities which must ensure a thorough and comprehensive examination of all the relevant factors. The Court, as always, retains its power to review the findings of national courts and all surrounding circumstances.

45. Cited above, §§ 52 and 56.
46. Cited above, § 74.