



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

Annual Judicial Seminar 2022 of the ECHR

Positive obligations on States during a pandemic

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Strasbourg, 24 June 2022

1. Overview

In this contribution I discuss the concept of the positive obligation on a state, principally under Article 2 of the Convention, in the context of the COVID pandemic. I argue that the principles are: equality, fairness and practicality.

2. State's duty in managing risk to enjoyment of Convention rights

The leading authority on positive obligations in the context of the right to life is ***Osman v. UK (Case 87/1997/871/1083)***. It did not concern the pandemic: it arose from a murder committed by a non-state actor. The facts were that a schoolteacher who had demonstrated obsessive and disturbing feelings for a pupil killed the pupil's father. The family had already requested police protection. There was no remedy against the police under UK domestic law for not having provided that protection.

The Grand Chamber held that the positive duty was violated if 5 conditions were fulfilled:

1. There was a risk to life
2. The life was that of identified individuals
3. The risk was real
4. The risk was immediate and
5. The state knew or ought to have known of the existence of this risk.

The Grand Chamber (GC) of the European Court of Human Rights (the Court) clearly considered that in deciding what the state had to do in the interests of society on the one hand and in the interests of the individual on the other hand would have to be balanced, but that the Convention did not impose a duty on the state to do more than was reasonable. Not every claimed risk to life would lead to a reasonable suspicion that the state needed to take steps to protect life. The GC held:

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising....For the Court, and having regard to the nature of the right protected by Art 2, a right fundamental in the scheme of the

Convention, 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 have or ought to have knowledge.

The question whether the state had failed to discharge this positive obligation was fact sensitive:

“This is a question which can only be answered in the light of all the circumstances of any particular case.”(*Osman*, para 116)

That is important because on the facts, the Grand Chamber held that the state had not breached its duty. The police had taken concrete measures which were reasonable to avoid the real and immediate risk to life materialising.

There are four notable points of principle for present purposes.

1. the state had a positive obligation to protect the right to life, not just a negative one. There is nothing in the Convention to show that a state’s Convention obligations should be restricted to negative obligations. *Osman* is now a long-standing authority.
2. The critical issue is whether there was a real and immediate risk and whether the state to reasonable steps to address it. A real risk is not necessarily an immediate one but what is immediate will depend on the context. Moreover, because of the focus on “risk”, positive obligations in this context are not so much about compensating for the results as examining the nature of the risk. The obligation is not one of result but of means.
3. In *Osman*, there was a conflict between the interests of society (the application of resources for policing) and the interests of the individual. The GC resolved this conflict by balancing the risk to individual rights, including the risk to the absolute right to life, against the interests of society. The margin of appreciation for the state is wide. Notwithstanding this, where there is more than one potential victim, the steps must not discriminate between them without proper justification. The Court will scrutinise the action which the state takes with great care (see *Safi v. Greece*, App no 5418/15, 7 July 2022, para 152).
4. There has been some refinement of the second condition in that it is no longer necessary to show a need to protect specific individuals, as opposed to society in general (see *Cevrioglu v. Turkey* (69546/12)).

3. During the COVID crisis, there were numerous issues facing governments

COVID was unlike any natural disaster recently seen in Europe. Here are some examples to remind of the difficulties governments faced:

- Should masks be made compulsory?
- Should there be a lockdown (confinement)?
- Should regular healthcare services be suspended to allow for the hospitalization of COVID patients?
- What should be done to protect the vulnerable during any lock down?
- What provision should be made for school children whose education might be severely affected?
- What should be done to protect prisoners and those in immigration detention?
- How should hospital treatment be prioritised between the young and the vulnerable?
- Should visiting friends and family in hospital or care homes be prohibited?

- Should elderly people be moved to or from rest homes?
- Should courts remain open and should the public be admitted?
- Should vaccination against COVID be compulsory and if so for whom?
- Should immigration and tourism be permitted?

And so on. There was plenty of room for error by the state. At the start of the pandemic, in the UK there was a considerable shortage of PPE (personal protective clothing) and there were appalling stories about health workers being inadequately protected against the risk of infection. The measures taken to address that shortage were widely criticised. In the UK, there are also issues as to the abuse of power by the executive acting under emergency powers without Parliamentary scrutiny. Moreover, on several occasions the legislation was unclear or contradictory. An official inquiry is due to start in January 2023 with Baroness Hallett as Chair to examine the UK's COVID response and the impact of the pandemic in the UK, and to identify the lessons for the future.

4. Different approaches of governments across the world to controlling the public healthcare risk

A further difficulty for the application was that different governments adopted different policies for dealing with COVID. For example, New Zealand closed its borders and had a policy of "zero covid", but once someone brought in Omicron, the population was vulnerable. By contrast the Swedish government considered that only limited legislation was necessary. The rest was down to individual responsibility. There were also considerable scientific advances in treating the disease and in knowing how it spread and how it should be treated. The Court is not well qualified to assess which is the right policy in many situations. If it is reasonably open to a government to take a particular policy, it is not open to the Court to hold that it would have taken some different policy. It must respect the government's choice in most situations.

5. The text of the Convention provides little help

Nothing is said in the Convention about any right to healthcare. The state's obligations must be deduced from the other provisions of the Convention, such as articles 2 and 3, and the Court's jurisprudence.

There is no obvious mention of the rights at stake in a pandemic in the text of the Convention although art 5 (1)(e) permits the lawful detention of persons "for the prevention of the spreading of infectious diseases". Protection of those in detention may well be implicit in this, but no wider positive obligation towards the public at large can be inferred from art 5 (1)(e). Importantly and relevantly, detention under this head must be a matter of last resort: *Enhorn v. Sweden (56529/00)*.

6. Some specific cases:

***Vavricka v. The Czech Republic (47621/13)* (Seminar background paper page 10)**

This was not a case about COVID but it is about vaccination. Under Czech law, children must be vaccinated against some well-known diseases. If not, the parents face a criminal penalty and children, who could be vaccinated, cannot attend nursery school unless they have been vaccinated. The parents brought an article 8 challenge, but this was rejected. The Court

considered the evidence in great detail and concluded that vaccination was in the interests of both the children and in the interests of society, since it was internationally supported and approved and was effective in promoting public health. It would not have been effective if it were voluntary only.

Vavricka was a bold and innovative decision in the field of public health, but it was not an instance of mandatory vaccination. Vaccination raises the question of the individual versus the collective interest. There have been attempts in Europe and the US to impose COVID vaccination in relation to certain categories of workers but in Europe as I understand it those measures have not been pursued.

The voluntary COVID vaccination programme in the UK, as elsewhere, has been successful. It was accompanied by a substantial publicity campaign about the safety and benefits of vaccination against COVID. This was in part to ward off arguments raised by anti-vaxxers on social media and elsewhere. Measures also made it inconvenient in some circumstances for people not to be vaccinated. Mandatory vaccination, by contrast, would involve invading a person's bodily integrity and it would therefore be difficult to justify. Nonetheless, if a person chooses to work in a particular sector, and they are exposed to people who are vulnerable to COVID, then it would seem possible as a general rule (but not imposing an arbitrary blanket ban) to require employees to be vaccinated or wear masks where possible.

Q and R v. Slovenia (19938/20) (background paper page 23)

Communauté genevoise d'action syndicale (GCAS) v. Switzerland 21881/20 (background paper page 7)

R(Gardner) v. Secretary of State for Health and Social Care [2022 EWHC 967. In this very recent case from the Divisional Court of England and Wales, there was a challenge to two sets of guidance by the secretary of state concerning the discharge of elderly patients from hospital to care homes. The claims based on Convention rights failed, but a challenge on domestic principles succeeded as the guidance did not point out that persons admitted to care homes could be asymptomatic and should be quarantined.

7. Drawing the threads together – key features of the duty to protect in a pandemic

What are the relevant key features of the duty to protect?

1. **Inaction is not an option.** Where there is a real and immediate threat to life, the government cannot bury its head in the sand and say that COVID is just a form of flu and nothing to worry about. It must take steps to protect people's lives.
2. **Balancing:** Where the rights of the individual may conflict with those of society, there must be a balancing exercise. Regard should be had to resources. Some states are better placed, for example to provide vaccines, than others.
3. **Public health measures:** The government should not discriminate without justification.
4. **Wide margin of appreciation:**
 - a. **Resources and priorities** In public health, measures often require massive resources. In most situations, governments must be able to decide for themselves what needs to be done and what priority to give to various calls on public expenditure – funding hospitals or keeping in good health those who can no longer earn a living because of a lock-down or ensuring the minimum disruption to education, the economy and so

on. The question is whether the government acted reasonably because of what they knew or should have known about the risks.

- b. **Forms of protection:** *Osman* is about risk mitigation, not a duty to avoid all risks or to protect life in every circumstance. There are different ways in which the state can provide protection. In some contexts, it may be enough to put a regulatory system in place, but it must be an effective system. In other contexts, it may be enough to provide a civil remedy or to criminalise conduct.

- 5. **Duty to keep measures under review:** While there is no room for the judgment of hindsight, governments must keep pace with developments in science. Also, when the measures cease to be necessary, states should reduce or remove them.

In short, for the state to perform its positive obligations under art 2 of the Convention in response to the existential threat posed by a pandemic, there must be fairness, equality and practicality.