OUTER HOUSE, COURT OF SESSION

[2007] CSOH 184

OPINION OF LADY SMITH

in the Petition of

ALICE EMMS

Petitioner;

for

Judicial Review of the Lord Advocate's refusal to hold a Fatal Accident Inquiry

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Petitioner: Bovey Q.C., Caskie; Thompsons

Respondent: Moynihan Q.C., Smith; M Sinclair, Solicitor to the Scottish Executive

16 November 2007

Introduction

[1] This petition for judicial review is brought by the mother of the late George Emms ("the deceased") who died whilst a patient in St John's Hospital Livingston. He was aged 49 years at the date of his death.

[2] First orders were granted on 1 April 2007 and the petition was served on the Lord Advocate, who is the only respondent, on 2 May 2007.

[3] The petition arises out of the refusal of the procurator fiscal at Linlithgow to hold a Fatal Accident Inquiry ("FAI") under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 ("the 1976 Act") in respect of the death of the deceased. The Lord Advocate also refused to order that such an inquiry be held. She had, however, made no decision on the matter at the time the present petition was served. She had the issue of whether or not to do so under consideration at that time, had instructed an independent expert report and was, to the knowledge of the petitioner, awaiting that report. On 6 June 2007, after having received that report, she decided not to hold such an inquiry. Following amendment to the original petition it is that decision and only that decision which the petitioner seeks to have reviewed.

[4] The orders sought by the petitioner are:

1. reduction of the respondent's decision of 6 June 2007;

2. declarator that the respondent's refusal is incompatible with Article 2 of the European Convention on Human Rights and that the petitioner is entitled to an independent, effective and reasonably prompt public inquiry into the death of the late George Emms, at which his next of kin can be legally represented, provided with the relevant material and able to cross examine the principal witnesses; and

3. an order ordaining the respondent to cause such an inquiry to be held.

Background

[5] The deceased was admitted to hospital on 25 August 2004 with a history of breathlessness and pyrexia. He had a complex medical history including pre-existing brain damage, diabetes mellitus, and he suffered from hepatitis C and epilepsy, the latter as a result of having had encephalitis during childhood and a stroke in 1993. He had learning difficulties and was an adult to whom the provisions of the Adults with Incapacity (Scotland) Act 2000 applied. He was having difficulty in swallowing when he was admitted to hospital. Subsequent to his admission, it was decided that he needed to be fed artificially. On 1 September 2004, a percutaneous endoscopic gastrostomy ("PEG") was inserted through his abdomen into his stomach. A PEG involves a tube and valve via which the patient can be fed, hydrated and have liquid medication administered.

[6] On 8 September 2004, the deceased died. A post mortem was carried out by Professor Busuttil and he concluded that the cause of death, as recorded on the death certificate was:

"1(a) Septicaemia

(b) Combined effects of Inhalation of Gastric contents and peritonitis

(c) Insertion of a Feeding Gastric Tube

(d) Encephalitis and Stroke

II Diabetes Mellitus; Hepatitis C; Chronic Pancreatitis and Cholelithiasis."

[7] Professor Busuttil's post mortem report is dated 13 September 2004 and concludes with the following commentary:

"This man had swallowing difficulties brought on by brain changes resulting from his encephalitis and strokes. To deal with this a PEG was passed into his stomach under a local anaesthetic. He had required surgery to his upper abdomen in the past and an upper abdominal scar was present as well as nylon sutures within the tissues. As such, the local anatomy was distorted due to the presence of the adhesions and other changes consequent on this surgery. The tube, although appropriately sited, has leaked and as a consequence there was inflammation of the lining of the abdominal cavity (a peritonitis). This in turn led to systemic infection, i.e. blood poisoning (a septicaemia).

He was also a diabetic and as such his immunity would have been deficient and thus he would have been less able to deal with any intra- abdominal infection."

[8] Whilst Mr Bovey sought to suggest that Professor Busuttil could be read as, in his last paragraph, voicing some criticism of the deceased's treatment, I do not see that it can. He seems there to state no more than that the deceased's pre existing diabetes would have rendered him more vulnerable to the effects of infection.

[9] Professor Busuttil provided two further reports. The first is dated 23 November 2004 and in it he states:

"I am not personally familiar with the procedure by which a P.E.G tube is inserted. In retrospect however the fever, which developed a few days after its insertion, may have suggested a leak therefrom. This man had a large number of other medical conditions which predisposed him to infection and to poor healing - not least his diabetes, and as such the complication of his PEG insertion has to be viewed in this context."

[10] The second is dated 11 January 2005 and in it he answers some specific enquiries which had been put to him by Dr Williams, gastroenterologist at St John's Hospital. Dr Williams had been present at the post mortem and had had to respond to enquiries made of him by the procurator fiscal. Professor Busuttil states, in this report:

"I have no doubt whatsoever from what you told me that:

(a) the PEG was essential for this man

(b) it was appropriately inserted

(c) the family knew what it was required for and understood fully the complications inherent in this procedure

This 49 year old man was a person whose immunity and perhaps also his repair processes were impaired due to the large number of concomitant serious conditions that he also suffered from not least his post pancreatic (presumably) diabetes."

[11] He added that he knew the family still had questions they wished answered, particularly in relation to the PEG insertion and he was sure that the procurator fiscal would be seeking expert advice in that respect. He did not feel able to respond from any personal knowledge of the procedure himself.

[12] St John's Hospital carried out a Critical Incident Review ("CIR") in respect of the death of the deceased and of another patient who had also died in September 2004 after the insertion of a PEG. The CIR did not attribute the death of the deceased to any failing on the part of those responsible for his care. It did identify that the deceased had not received insulin on 4 September 2004 but concluded that that had not contributed to his death; his blood sugar readings for that day and the following day were not significantly elevated. It noted that the care he received on 4 September, a weekend day, was not recorded but that was not exceptional and it is evident that his vital signs and blood sugars were recorded. His antibiotic therapy is noted without adverse comment.

[13] It is evident from the documents produced that the deceased's family had a concern about the use of the PEG in the deceased's case and raised it with the procurator fiscal. The procurator fiscal made enquiries of consultants at the hospital and of Professor Busuttil and, having done so, had no particular concerns. He was, however, prepared to instruct an independent expert and appears to have sought confirmation from the petitioner's solicitor, both of her present agents and of her previous agents, that they were happy with the identity of the expert proposed. By letter dated 6 October 2005 to her solicitors, he reminded them that he was still waiting to hear from them in that regard and indicating that if he had not heard from them by the end of the month then the papers would be passed to Crown Office. The agents' response, by letter dated 17 October 2005, was that the instruction of an expert was a matter for the procurator fiscal and that they would be raising with him the matter of a Fatal Accident Inquiry.

[14] The procurator fiscal, by letter dated 9 November 2005, intimated that, in the light of his investigations including what was contained in the hospital's CIR and the content of full discussion with Professor Busuttil, he did not feel it was necessary to seek an expert opinion.

[15] The petitioner's agents continued to press for an FAI.

[16] By letter dated 25 November 2005, under reference to the same matters as relied on in his letter of 9 November and also to having discussed matters with Dr Williams, the procurator fiscal intimated that he did not feel that it was appropriate to hold an FAI. He confirmed that he did not consider that it was in the public interest that he hold one.

[17] All the documents relied on by the procurator fiscal were made available to the petitioner's agents.

[18] The petitioner's agents again continued to press for an FAI.

[19] Correspondence continued between the petitioner's agents and the procurator fiscal during the latter part of 2005 and 2006 in the course of which the petitioner's continued to press for an FAI and the procurator fiscal persisted in his refusal.

[20] At some point, which appears to have been whilst the petitioner's previous agents were acting and therefore probably some time prior to October 2005, the petitioner had intimated a claim to Lothian Health Board, as the body responsible for St John's Hospital and the medical and other staff employed there. By letter dated 4 July 2006, the petitioner's agents confirmed that they would not be claiming in respect of the actings of Wendy Pilkington, a person who was "aware of the deceased ..." but she is the only person in respect of whom they gave such confirmation. They did not, for instance, give any such indication in respect of those responsible for the decision to insert the PEG, for the insertion of the PEG or for monitoring it *in situ*.

[21] The procurator fiscal evidently did pass the papers to Crown Office where Crown counsel decided that it was appropriate to obtain the views of an independent expert. That is a decision which appears to have been taken when the petitioner's application for legal aid to bring the present petition was intimated. Accordingly, the Deputy Crown Agent, Mr Brisbane, wrote to the petitioner's agents on 22 November 2006 advising that Crown counsel had instructed that an independent expert's report be obtained. He also wrote, the same day, to the Scottish Legal Aid Board to advise them that that was being done and that:

"Once that expert report has been received, a final decision will be taken in relation to whether a Fatal Accident Inquiry should be held."

[22] The Crown instructed Dr David Johnson, consultant gastroenterologist of Ninewells Hospital, Dundee, to provide a report.

[23] Notwithstanding the fact that Dr Johnson's report was awaited, the petitioner proceeded with the present petition.

[24] Dr Johnson responded by a report dated 18 May 2007. It is evident from that report that he was asked to focus on specific issues, namely:

- whether the care afforded to the deceased at St John's Hospital was appropriate

- the clinical decision making

- the professional actions of those involved in the treatment of the deceased whilst he was a patient at the hospital.

[25] Dr Johnson reached his conclusions having taken account of:

- the deceased's medical records

- Professor Busuttil's post mortem report

- statements from the staff at the hospital which were made available to him.

[26] It is plain from Dr Johnson's report that he has accurately noted the deceased's medical history and the details of the deceased's condition at the relevant times during his last illness. He details the PEG procedure used. He details the deceased's progress and treatment thereafter. He takes account of the findings at post mortem. In the light thereof, he expresses the following views:

"The decision to insert a PEG feeding tube in Mr Emms appears to have been carefully considered in this case. The case appears to have been discussed with the Speech and Language team, the Gastrointestinal Specialist Nurse, the Dietician, the attending Medical Team, and Mr Emms' family. In addition, there was a clear indication for the insertion of the PEG tube as he was regarded as unable to swallow safely. However in addition to this, he also had limited iv access and had been unable to tolerate naso-gastric feeding. He was

also an Insulin dependent diabetic and therefore required regular feeding which could not be achieved without the insertion of the PEG tube."

[27] Dr Johnson expresses the view that the insertion procedure was "carried out without any problems".

[28] In summary, he concludes:

"... in my opinion, the decision to insert a PEG in Mr Emms case was entirely justified on the basis of the information given. The PEG tube itself appears to have been inserted correctly with no obvious concern that the procedure was not carried out appropriately. In some cases, previous gastric surgery could be considered a relative contra-indication to PEG insertion, but in this case, previous surgery does not appear to have had any influence whatsoever. Unfortunately the patient developed a recognised complication (peritonitis) of a PEG tube insertion which can occur in up to 1% of cases. When it does occur it is a significant mortality which unfortunately has been the outcome in this case. It appears that death in this case was despite the fact that possible further prophylactic antibiotics were given. PEG misplacement was considered, feeding stopped and antibiotics given.

Overall, having reviewed the notes I can find no problems with the care given to Mr Emms, the clinical decision making or the professional action of PEG insertion."

[29] Following receipt of that report, the procurator fiscal advised, by letter dated 6 June 2007, that the respondent's depute took the view that in all the circumstances, including the expert report from Mr Johnson, it was not appropriate that an FAI be held.

[30] A first hearing was due to have taken place at the end of the summer term 2007 but it was discharged to enable a meeting to take place between the Crown and the petitioner's agents, in the light of Dr Johnson's report, which had been made available to the petitioner. At that meeting, the Crown confirmed its position and the petitioner's agents continued to question the use of the PEG. They did not raise any questions about lack of notes, failure to give insulin or antibiotic therapy at that meeting.

The Pleadings

[31] The petition sets out a number of questions which, it is said, arise from the death of the deceased. These questions remain in the form they were in prior to Dr Johnson's report. Although Mr Bovey submitted that some of them could be characterised as a list of "contra-indications to the insertion of the PEG", that does not seem right. Rather, they can, as a whole, be summarised as including a series of questions apparently directed to asking why the PEG was inserted, a series of questions regarding what explanations were given to the next of kin, a series of questions regarding the PEG insertion procedure and questions about post insertion care relating to the lack of care records at the weekend, the failure to administer insulin, the antibiotic therapy given and "why was the PEG allowed to leak"?

[32] At one point (6.2(i)(g)), the averments appear to suggest that there should have been a trial of nasogastric feeding prior to the insertion of a PEG. No attempt to review that averment has been made notwithstanding that Dr Johnson's report identifies that one of the factors on which the decision to insert the PEG was based was "repeated removal of naso gastric tubes" also referred to as the deceased being "unable to tolerate naso- gastric feeding" in circumstances where adequate nutrition was of particular concern on account of the deceased being a diabetic. It is not the only averment which calls to be reviewed in the light of that report, particularly since Mr Bovey made it plain on more than one occasion in the course of the hearing that the petitioner has not instructed her own report and is not, as he put it, in a position to disagree with the terms of Dr Johnson's.

[33] At paragraph 8.2, it is averred:

"The sheriff's determination following any Fatal Accident Inquiry into Mr Emms' death could usefully answer the matters of public concern apparently raised by the death of Mr Emms in determining *inter alia* 'the reasonable precautions, if any, whereby the death ... might have been avoided', 'the defects, if any, in the system of working which contributed to the death' and 'any other facts which are relevant to the circumstances of the death'."

At times during submissions, Mr Bovey sought to argue that there were criticisms inherent in the questions contained in the petition. That was at odds with the petitioner's position also being (as it was) that she could not take issue with what is said in Dr Johnson's report. She cannot have it both ways. What, in my view, is significant is that nowhere is it suggested in the averments that those responsible for the care of the deceased were in breach of any duty owed under the criminal or civil law and nowhere is it suggested that there was any breach of professional conduct calling for disciplinary action. Indeed, Mr Bovey candidly stated in the course of the hearing that the petitioner does not have evidence that would justify her bringing a civil action. The three year limitation period has now expired.

[34] Mr Bovey referred to two other matters by way, it seemed, of explanation for the fact that the petitioner (despite having intimated a claim at an earlier stage) has not sought to pursue a civil claim. One was that the family was not, as he put it, "in the blame game". They would, he said, be just as happy with an inquiry in which the outcome was that it was determined that all was done that could have been done. The other was that any claim would be small in value, given that there would have been no dependency element to it and it was questionable, therefore, whether it was appropriate to claim, particularly once account was taken of the possibility of damages being eroded by the legal aid "clawback" that would arise if damages were awarded. That approach was what appeared to lie behind the averments in paragraph 9.6 (substituted by way of amendment) in the following terms:

"The Respondent was or should have been aware that the triennium for the Petitioner making any claim for loss of society in respect of George Emms expired on 7 September 2007, but the Petitioner has not made any such claim as it was not practicable for the Petitioner to procure an effective investigation of the facts by pursuing civil proceedings as her claim would be for a comparatively small sum and it would not make practical or economic sense for civil proceedings to be begun, in respect of such a small sum, the late George Emms not being a person who provided support to any other person."

The Submissions of Parties

The Petitioner:

[35] The petitioner's case was that the death of the deceased gave rise to an obligation on the part of the state to hold, of its own motion, an inquiry which was prompt, comprehensive, that allowed for the participation of the next of kin, that was prepared on a proper evidential basis and that was effective in result. For the duty to hold an inquiry, he relied on the cases of *Calvelli & Ciglio* v *Italy**[1]**, Powell* v *UK **[2]**,* and *Silih* v *Slovenia**[3]**.* For the submission that the inquiry required to be by the state of its own motion, he relied on the case of *R (Amin)* v *Home Secretary**[4]**.* For the specific features of the requisite inquiry, he relied on *Tarariyevah* v *Russia**[5]**.* The key

was, he said, that the inquiry had to be effective. It had to allow for lessons to be learned: *Byrzykowski* v *Poland**[6]**.*

[36] Mr Bovey submitted that the investigations carried out in this case were not sufficient. Dr Johnson's opinion was not good enough, it was not public and it had not "involved the family". For the submission that the family required to be involved, he relied on *Tarariyevah* and on paragraph 18 of Lord Drummond-Young's judgment in the petition of *Mohamed Moneim Ali Fayed* unrepd 12 March 2004. An FAI would, he said, be a suitable but not the only vehicle. There was no need for an allegation of medical negligence for the

obligation to hold an inquiry to be triggered. It was more logical to require it wherever an issue of public interest arose from a death. In this case, there was a public interest in respect of the possible failure in record keeping, the failure to give insulin and failures in antibiotic therapy; Mr Bovey did not, however, suggest that any of these factors was causative in the death. There was also public interest in, he said, whether high professional standards were achieved and the nursing of adult patients with learning disabilities. Again, it was not suggested that any of these factors were causative of the death.

[37] Mr Bovey responded to the respondent's submissions regarding alternative means of fulfilling the Article 2 obligation and I have already referred to the petitioner's position in that regard. Mr Bovey's submission was that to look at the availability of a civil action for damages in the present case was to confuse such an action with the extent of the state's duty to investigate. He sought to support his submission by drawing a comparison with systems where there was no fault liability. The court's duty was, Mr Bovey submitted, to keep the state in compliance with

Article 2 and that required the orders sought to be pronounced. This court required to remember that its function was not to review the decision of the respondent but to determine whether or not she was in breach of Article 2: *Huang* v *Home Secretary**[7]***.

Respondent:

[38] For the respondent, Mr Moynihan submitted that the petition was ill founded. It was proceeded with in circumstances where no attempt had been made by the petitioner to review her position after Dr Johnson's report became available. That report had, to all intents and purposes, been ignored by the petitioner. To adhere to the questions posed in the petition whilst accepting that she was not in a position to challenge Dr Johnson's report or to put forward an allegation of negligence was inexplicable.

[39] The position was that the state, via the respondent, had concluded that there was no need for an FAI. She had concluded that no wrongful conduct had occurred and there was no issue of public interest to look into under the FAI jurisdiction. Dr Johnson's report was clear and it was significant in its rationale. The cause of death was identified, namely that it was the result of a recognised complication of an appropriate and properly performed procedure. There was a significant statistical chance of such a death occurring again; that was the nature of it being a recognised complication. As regarded the suggestion that questions needed to be asked about the nursing notes, insulin administration and antibiotic therapy, these were all based on facts which had been known about since October 2004 and the CIR had looked at these matters. The deceased's family had not raised any of them as issues of concern. The concern that they had and raised with the procurator-fiscal was the use of the PEG. He discussed that further with Professor Busuttil who in turn had had further discussions with staff at the hospital in the light of which he was satisfied that there was no cause for concern about the use of the PEG. The procurator fiscal, on that basis, was satisfied that there was no need for him to have any concerns. Notwithstanding that, because of the family's anxieties in that regard, he was as a result of caution and out of respect for the family prepared to instruct an independent report if they would agree the identity of the appropriate expert[8]. That did not happen because no expert was agreed on but subsequently, when intimation of the petitioner's legal aid application for the present petition was received, Crown counsel decided that an independent report should be obtained. That was done. Dr Johnson's subsequent report was clear and unequivocal. The question was whether an FAI should be ordered. It should be borne in mind, in considering that question that the requirements of Article 2 were more restricted than the width of the 1976 Act.

[40] Regarding Article 2, Mr Moynihan submitted that its purpose was to protect life, to ensure that that protection is practical and effective protection and to promote life in addition to avoiding the deprivation of life. To that end, states required to have criminal, civil and disciplinary systems in place and they required to be backed up by sanctions. Such systems were in place in this jurisdiction: the criminal law protected life through the imposition of penalties, the civil law protected it through delicts and disciplinary systems also

played a part. For such systems to be effective, there required to be a proper investigation; disciplinary measures could suffice and would not need to be in public. Damages were a means of enforcement. The duty was not, though, a duty to investigate public interest issues at large. The proper focus of an Article 2 investigation would be the consideration of the non-implementation of systems put in place by the state for the protection of life. Article 2 did not require the investigation of every death, only those which gave rise to a need for the state to address its duty to promote life whether substantively, because the death was brought about by an agent of the state or procedurally because the state needed to review its protective systems and consider whether its civil law remedies were working effectively. If a death was due to natural causes then the case was not within Convention territory at all.

[41] In support of his analysis, Mr Moynihan referred to and relied on *Banks* v *United Kingdom* ***[9]***, as showing that the purpose of the procedural obligations was to render the Article 2 right practical and effective and as illustrative of the procedural obligations not being identical in every case. He also relied on *R (Takoushis)* v *Inner North London Coroner* [2006] 1 W.L.R. 461 and *Calvelli* as indicating that what mattered was that the state provided the requisite mechanism. In some circumstances, the state required to hold a full public inquiry, as in *Tarareyivah* but in others, it was enough for the state to hand over matters to the relatives, as in *Calvelli.* It may not be necessary to proceed to a full public investigation, even in the case of a death in custody: *R (JL)* v *Secretary of State for the Home Department****[10]***. Further, it was not for this court to extend the operation of Article 2 beyond that which had been determined by the European Court thus far.

[42] Mr Moynihan submitted that in the present case the relevant question was whether there were grounds for thinking that the death of the deceased may have resulted from a wrongful act on the part of the state's agents; he accepted that the hospital and its staff could be regarded as agents of the state. There were though no

such grounds. Whilst he accepted that not every specific question posed in the petition had been answered by the respondent, that was not the point. The procurator fiscal had investigated at his own hand. Dr Johnson had seen all the relevant documents and he had no concerns. His report provided a proper basis for the respondent to decide not to hold an FAI. If there were any relevant residual questions, the remaining available procedures were sufficient for Article 2 and a public inquiry was not required.

[43] Finally, Mr Moynihan referred to the need for a person who claims violation of a Convention right to be a victim[11]. Such a claim is not available for the purpose of advancing an abstract challenge. That was what the petitioner was seeking to do. Yet the civil system of this jurisdiction had been available to her. The fact that it was not being used by her was not due to any defect in the system itself. Article 2 was not, accordingly, engaged. This being a petition for judicial review, matters required to be considered in the light of present facts not on the basis that something more might emerge at a future date. Those facts were that the petitioner had no basis on which to criticise the deceased's treatment in hospital. Nothing advanced by the petitioner afforded good grounds for questioning the correctness of the respondent's decision.

Discussion and Decision

[44] The petitioner asserts that the respondent is in breach of her obligations under Article 2 of the European Convention on Human Rights, paragraph 1 of which provides:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law."

[45] As has often been remarked, this article of the convention is both negative and positive in aspect. Life is not to be taken away except in very restricted circumstances but states must take positive action to protect

life. The latter is liable to raise questions as to the nature and extent of the action that a state is required to take for compliance with the obligation. That is the issue in the present petition.

[46] Article 2 has been the subject of discussion in a number of the Strasbourg cases and also in the appellate courts in England. Much of that discussion focuses on the positive actions required of the state where it is evident that, unlike the death of this deceased, the death in question has been caused by force, at the hand of an agent of the state, or in custody.

[47] The decisions reached in these cases demonstrate a flexibility of approach. The precise details of the positive action called for can, it seems, be adapted according to the particular circumstances of each case. That is only to be expected of a convention that has often been described as a living instrument. Insofar as principles of general application can be deduced, they appear to be as follows.

[48] States have a positive obligation to protect by law the right to life of every natural person within their jurisdiction. To that end, they are required to provide for a sufficient degree of protection of life in their legal systems in respect of the acts of individuals and of state agents. How that is to be done is left primarily for each state to determine in accordance with a margin of appreciation. The obligation to protect life will usually be reflected in criminal offences where one person kills another, in the civil wrongs provided by states where death occurs as a result of an act or omission and in disciplinary provisions applying to the control and regulation of relevant persons including the medical profession. By the imposition of these sanctions society conveys to its members the message that the right to life is a value which it is determined to and will protect. It is through them that it seeks to deter those who would devalue or disregard that right.

[49] In Scotland, the killing of one person by another may amount to the crime of murder or culpable homicide and there is a system in place whereby the perpetrator of such an offence is held to account and punished under the criminal law. Under the civil law, it may be determined that a death has been caused by an act or omission which is delictual in nature and in that event, the defender will be found accountable and held to account. There are systems in place throughout the United Kingdom for registration, control and discipline of health care professionals. For instance, under the Medical Act 1983, there is a system provided for whereby doctors require to have full registration to carry out any unsupervised medical practice and whereby the General Medical Council was set up and charged with responsibilities in connection with the setting of standards for and disciplining of the medical profession. Its work, particularly in the disciplinary field, regularly receives widespread publicity.

[50] Secondary to the obligation to provide for sanctions is the obligation to inquire[12]. The obligation to inquire is not a "stand alone" obligation but arises in respect that states should be astute to identify when the laws and rules it has put in place in implement of its Article 2 obligations have not been complied with and when its sanctions should be imposed. If it does not do so, those laws and rules are liable to become like St Paul's sounding brass or tinkling cymbals. As was observed by Lord

Bingham of Cornhill in *R (Amin)*, at paragraph 18:

"The European Court has made plain that its approach to the interpretation of article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective."

[51] Against that background of generalities I turn to look at what guidance can be gleaned from the authorities as to what is required of states by way of investigation and inquiry. The cases considered in the various authorities to which I was referred were evidently fact sensitive and much is liable to turn on the particular facts of each case[13]. That is only to be expected in the context of a system of jurisprudence which emphasises the need for flexibility. There is though a clear impression that where the death in question

was the result of the use of force or could have been brought about by the act of an agent of the state those factors are regarded as being of particular relevance and in such circumstances, the court has been more demanding of the steps that the state must take by way of investigation and inquiry[14]. The need for public investigation and scrutiny is liable to be regarded as much more compelling in, for instance, the case of a death in custody[15]. In *R (Amin)*, Lord Hope of Craighead put such deaths in the same category as those where a lethal act has been perpetrated by an agent of the state and he agreed, at paragraph 62, that wide exposure and rigorous investigation was called for. Waller LJ, in *R (JL)* refers to the need for an "enhanced investigation"[16] in such circumstances. Similar sentiments were expressed by the European Court in its admissibility decision in the case of *Banks & Others* where, at p.10, it states:

"In the context of Article 2 of the Convention, the obligation to conduct an effective investigation into allegations of the unlawful use of force attracts particular stringency in situations where the victim is deceased and the only persons with knowledge of the circumstances are officers of the State."

[52] Plainly however, the death of a patient in hospital does not fall into the same category.

[53] I am satisfied from the terms of the article itself and a reading of the authorities that the obligation to hold a public inquiry does not arise in every case where a person dies whilst under medical care. Nor will fulfilment of the obligation necessarily require there to be a judicial inquiry. Although at an early point in his submissions, Mr Bovey suggested that every time there was a death of a patient whilst in the care of the medical profession, there required to be a judicial inquiry into its cause, he later qualified that proposition so as to submit that it is only if such a death raises any question of public interest that that would have to occur. Even thus qualified his proposition is, however, a far reaching one and would involve an obligation to hold a judicial inquiry even in cases where there is no reasonable possibility of the death having been caused by breach of the criminal or civil law or of relevant disciplinary rules. I do not agree that an obligation of such magnitude can be deduced from either a plain reading of Article 2 or of the relevant authorities. So to hold would be to impose an enormous burden on the state and to impose it in the absence of any concern that the domestic laws which are designed to protect life have not been observed. The Strasbourg court has recognised the need not to make unreasonable demands of states in relation to their Article 2 obligations. In the case of *Keenan* v *UK**[17]*, which involved a death in custody, the court confirmed that states have a duty to secure the right to life by putting in place an effective criminal law with provisions which seek to deter the commission of offences backed up by law enforcement machinery and in appropriate cases to take preventive operational measures to protect a person whose life is at risk from the criminal acts of another but added:

"Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive 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."

[54] Whilst made in the context of a death in custody and a state's fulfilment of its Article 2 obligations by the imposition and implementation of criminal sanctions, these comments would appear to apply generally whenever the question of whether a state has met its Article 2 obligations arises. They seem particularly apt where what is under consideration is not a death caused by force or at the hand of an agent of the state but the unforced death of a patient whilst in medical care.

[55] Moving then to those cases where the court has had to consider deaths whilst in medical care, I consider firstly what it is that has thus far been regarded by the European Court as the appropriate trigger for the need for a public inquiry to arise. The following narrative appears in a number of the Strasbourg cases to which I was referred:

"... the first sentence of Article 2, ... ranks as one of the most fundamental provisions in the Convention and also enshrines one of the most basic values of the democratic societies making up the Council of Europe (see,

among other authorities, *McCann and Others* v *the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998 - III, p.1403, 36).

49. Those principles apply in the public - health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or private sector can be determined and those responsible made accountable (see, among authorities, *Erikson* v *Italy* (dec.), no. 37900/97, 26 October 1999; and *Powell* v *United Kingdom* (dec.) no. 45305/99, ECHR 2000-V; see also *Isiltan* v *Turkey*, no. 20948/92, Commission decision of 22 May 1995, DR 81-B, p.35)."[18]

and envisages the state taking a number of administrative measures as regards putting systems in place which have as their objective the provision of medical care that has the protection of patients' lives as their objective. There are a number of such systems in Scotland and, indeed, in the United Kingdom as a whole and it was not suggested by the petitioner that there was any failure in that regard in this case[19]. It goes on and refers to the need for there to be an independent effective judicial system. Again, it is not suggested that such a system is not available in this case. Mr Bovey accepted that an FAI under the 1976 Act would constitute such an inquiry. It is important to note, however, that the above narrative then indicates *when* it is that the system requires to be accessed and brought into play. That is in circumstances where there is a need for those responsible for the death to be made accountable. That can arise only in circumstances where there is a reasonable possibility that the death has been caused by an act or omission for which some person or persons ought, by means of such an inquiry, to be held to account.

[57] I find further support for the above conclusion from the approach that has in fact been adopted in a number of the cases to which I was referred. For instance, in *Sieminska*, where a patient had died whilst under medical care, the European Court approached the case on the basis that an Article 2 duty to hold an effective public investigation arose where "agents of the State potentially bear responsibility for loss of life" [20] and do not seem to have envisaged it arising, in the case of a non violent death in hospital or in any other circumstances in a medical case. In *Calvelli,* also a medical case, the Court noted that the Italian legal system afforded injured parties mandatory criminal proceedings, the possibility of bringing an action in the relevant civil court and that there was a possibility of disciplinary proceedings and commented:

"Consequently, the Italian legal system offers litigants remedies which in theory meet the requirements of Article 2."[21]

[58] There was an allegation of medical negligence in *Calvelli* and I recognise that the comments were made in that context but there is no indication from the Grand Chamber that they would have regarded a case where there had been a non violent death in hospital in which no allegation of negligence was made as demanding of a higher standard, an approach which is inherent in the petitioner's case.

[59] In *Silih*, another case involving the death of a patient in medical care, there is reference to the requisite procedure being one:

"whereby the criminal and civil responsibility of persons who may be held answerable could be established." [22]

Again, I take it from that that it means that the requirement to hold an effective public judicial inquiry into the death of a patient in medical care does not arise in the absence of at least some reasonable possibility of a person or persons responsible for the care of that patient being found in breach of duty.

[60] Then, more recently, in the case of *Tarariyeva*, on which much reliance was placed by the petitioner, where the court was considering a death in custody, the indications given of what would be required of an effective judicial system in the investigation of such a death were made on the basis that it was for:

"... enabling liability for loss of life to be established and any appropriate redress to be obtained."[23]

[61] I would also refer to a passage at p.13 in *Banks* in which the court responds to a submission that there required to be a public inquiry where the deceased had died following what was referred to as "a putative suicide in prison". His family were

apparently suspicious that his death was not the result of suicide but was an unlawful killing. It is clearly relevant:

"It is not however apparent that such an inquiry would be a means of identifying and bringing to account the perpetrator(s) of any unlawful violence where the police investigations and inquest have been unable to do so. There is, in the Court's opinion, no general requirement under Article 2 of the Convention to provide a public inquiry into the general background to a suspicious death, where, as was the case in the current application, the ordinary mechanisms have provided for an adequate scrutiny of the incident itself."

[62] If there is no such general requirement in respect of a suspicious death, it seems illogical to suggest that there is such a requirement in the case of a non-suspicious death. That, however, is of the essence of the petitioner's case.

[63] Further assistance is afforded by some of the comments made by the Court of Appeal in the case of *R (Takoushis)* where, in the judgment of the court handed down by the Master of the Rolls, it is stated:

"Before going any further we think it may be helpful to clarify what is meant in this context by saying that article 2 is or is not engaged. For reasons which will become apparent later in this judgment we are satisfied that article 2 is engaged in the sense that it gives rise to certain obligations on the part of the state whenever a person dies in circumstances which give reasonable grounds for thinking that a death may have been caused by negligence on the part of a member of staff in an NHS hospital."[24] and

"It seems to us that, however it is analysed, the position is that, where a person dies as a result of what is arguably medical negligence in an NHS Hospital, the state must have a system which provides for the practical and effective investigation of the facts and for the determination of civil liability. Unlike in the cases of death in custody, the system does not have to provide for an investigation initiated by the state but may include such an investigation. Thus the question in each case is whether the system as a whole including both any investigation initiated by the state and the possibility of civil and criminal proceedings and of a disciplinary process, satisfies the requirements of article 2 as identified by the European court in the cases to which we have referred, namely (as just stated) the practical and effective investigation of the facts and the determination of civil liability."[25]

[64] The absence of any indication that Article 2 would be engaged in the case of a death in hospital in which there were no reasonable grounds for thinking that it may have resulted from a wrongful act is striking. I do not agree, as was submitted by Mr Bovey, that a case of alleged negligence was simply being put forward as an example of a relevant trigger. Even if it was, it remains the case that the petitioner was not able to refer to any specific authority as support for the proposition that Article 2 is engaged in circumstances such as those of the present case where there are no reasonable grounds for thinking that the death of the deceased was due to anyone having committed a wrongful act. Mr Bovey said that he suggested that his position was based on "the Strasbourg case law" but he was unable to refer to any authority that was directly in point.

[65] I turn, secondly, to the ways in which the duty to inquire may be discharged where a patient has died in hospital. It seems clear that performance of the Article 2 obligation need not involve a public judicial inquiry. The adoption of other forms of procedure may suffice. The mere availability of other forms of procedure may suffice. In particular, the availability of civil litigation may be enough. The latter is evident from what was said in the cases of *Powell, Calvelli, Vo, Banks, Byrzykowski*, *Silih* and *Tarariyevah.* In *Powell*, where the

parents of a deceased child had withdrawn their appeal to the Welsh Office and settled a civil claim the court said:

"... by withdrawing their appeal, the applicants closed one of the options which may have uncovered the extent of the lack of co-ordination among the doctors concerned at the relevant time.

Of greater significance for the Court is the fact that the applicants settled their civil action in negligence against the doctors. In the Court's opinion, the applicants by their decision closed another and crucially important avenue for shedding light on the extent of the doctors' responsibility for their son's death. Had the civil action proceeded the applicants would have been entitled to have a full adversarial hearing on their allegations of negligence, to subject the doctors concerned to cross examination under oath and obtain discovery of all documents relevant to their claim...

Having regard to the above considerations the Court finds that it is not open to the applicants to complain under Article 2 of the Convention that there was no effective investigation into their son's death."[26]

[66] Comments to similar effect appear in *Calvelli* at paragraph 51, where it is said:

"In the specific sphere of medical negligence the obligation may also be satisfied if the legal system affords victims a remedy in the civil courts, either

alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.",

in *Vo* at p.296 - 297, in *Banks* at p.11 - 12, in *Byrzykowski* at paragraph 105, in March of this year, in *Tarariyevah*, at paragraph 75 and, in June of this year, in *Silih* at paragraph 118.

[67] Thus, it seems to me that the clear current view is that it is liable to be fatal to a claim of breach of Article 2 in circumstances such as those of the present case that the claimant has either not made use of a civil litigation avenue that is available to him or has used it but settled his claim out of court. The petitioner here has chosen not to go down the civil litigation route.

[68] The petitioner's argument is, in effect, that she should not be regarded as in the same category as a person who has failed to make use of civil litigation that is available. She cannot, it is said, properly do so as she has no basis upon which to allege negligence on the part of any person responsible for the deceased's care. In these circumstances, she calls on the state not only to investigate but to afford her what Waller LJ termed an "enhanced investigation". The problem with that approach is that it seeks to place a greater burden on the state in a case where it is frankly accepted that there is no arguable case of negligence (and thus no good reason to apprehend that there has been a breach of the civil law) than where there is such a case. I do not see that such a result would be consistent with the approach of the European court at least thus far and it is not, I agree with the respondent, for this court to seek to go further than Strasbourg in this respect; whilst its duty is to do no less than that which to date has been required by the Strasbourg court, it has no duty to do more[27] and I can see no good reason for it choosing to do so.

[69] I note further that the petitioner seeks to elide the difficulties inherent in this petition by advancing a general public interest case. The purpose of Article 2 is not, however, to oblige states to investigate and inquire into all matters relating to a death in which the public may have an interest. That may in fact happen in the course of an FAI but that is because the scope of such an inquiry can, under the 1976 Act, go beyond that which is required for Article 2 compliance. The secondary obligation of investigation under Article 2 is limited, as I have already discussed. Further, no claim for violation can get off the ground if the claimant is not a victim. That is a problem for the petitioner because it became apparent that the petitioner's approach

was that the public interest she looked to as justification for the order sought was really as yet unidentified. Despite references to notes, insulin and antibiotics, Mr Bovey spoke in generalities of looking to the possibility of the need for improvements in practice being identified. Thus, the public interest which the petitioner had in mind was, as Mr Moynihan suggested, an abstract one. The plain impression was that she sought to have an inquiry so as to see if something emerged that none of those who had examined this case so far had noticed. She is not, in these circumstances, able to bring herself within the category of "victim" for the purposes of Article 2.

[70] I have also given consideration to what, on the information before me, would happen at an FAI or other public judicial inquiry, as sought by the petitioner. The focus of any such inquiry would be the cause of death. The petitioner is not in a position to challenge Dr Johnson's views in that regard. It follows that it would be established that the cause of death was as he states it to have been and also that there is no reason to have any concerns about the care and treatment of the deceased. That is, the position would remain the same as at present. Nobody would be said to be at fault. Nobody would be said to have breached those laws which serve to meet the state's Article 2 obligations. In respect that it was indicated that there was a desire on the part of the family to know more because there may be matters of concern, as I have indicated, what seemed to be being suggested was that something might emerge that would show how practices and procedures might be improved. But it is not apparent how the petitioner would be in a position to pursue any such line when she is unable to challenge Dr Johnson's views and the suggestion was not made in the context of seeking to link any deficiencies in practice or procedure with the death. Whatever the purpose of such an inquiry, I do not see that it would be an inquiry to fulfil the Article 2 obligation at all.

[71] As will be evident from the above, I agree with the respondent that this petition is not well founded and will pronounce an interlocutor dismissing it.

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[1] Application no. 32967/96 17 January 2002

[2] Application 45305/99 4 May 2000

[3] Application no. 71463/01 28 June 2007

[4] [2004] 1 AC 653

[5] Application 4353/03 14 March 2007

[6] Application no. 11562/05 27 June 2006

[7] [2007] 2 AC 167

[8] see: 6/21 of process.

[9] Application no. 21387/05 6 February 2007.

[10] [2007] EWCA Civ 767, at paragraph 30.

[11] Scotland Act 1998 s.11(1)(b) ; Human Rights Act 1998 s.7(1).

[12] In *R (Amin) v Home Secretary*, at paragraph 31, Lord Bingham of Cornhill said: "The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life .....It can fairly be described as procedural."

[13] Observations to that effect were made by Waller LJ in *R (JL)* at paragraph 30, where he said: "...I have the same difficulty as the judge as to whether it is possible to answer the question as to threshold in isolation

from the question as to precisely what type of investigation might be necessary having regard to the facts of individual cases."

[14] See, for example, *Jordan v United Kingdom* (2001) 37 EHRR 52, referred to in *R (Amin)* and *R (Takoushis)*.

[15] In Scotland, there would always be an FAI in the event of such a death: 1976 Act *s.1(1) (a) (ii).*

[16] at paragraph 3.

[17] Application no. 27229195, 3 April 2001.

[18] This is a quotation from the Grand Chamber decision in *Calvelli and Ciglio v Italy* (Application no. 32967/96, 17 January 2002). Passages in the same or similar terms appear in *Sieminska v Poland* (Application no.37602/97, 29 March 2001) and *Tarariyeva*.

[19] Where a state has made adequate provision for securing high professional standards amongst health professionals and the protection of patients' lives, it is liable to be very difficult to call it to account from the standpoint of the positive aspect of its Article 2 obligations where a patient dies even if due to matters which could be characterised as negligence: *Powell v United Kingdom*; *Byrzykowski v Poland.*

[20] p.6.

[21] p.10.

[22] paragraph 120.

[23] paragraph 90.

[24] paragraph 38.

[25] paragraph 105.

[26] p.365.

[27] *R (Ullah) v Special Adjudicator [2004] 2 AC 323* at paragraph 20.