

# Legal Update

## COMMISSIONER OF THE POLICE FOR THE METROPOLIS V DSD AND NBV and ALIOU KORAOU V CHIEF CONSTABLE OF MANCHESTER

Court of Appeal (Master of the Rolls, Laws LJ, Kitchin LJ)  
30 June 2015

### Executive summary

The police owe a duty under Article 3 of the European Convention on Human Rights (ECHR) to investigate acts of alleged ill-treatment by private individuals. There is a sliding scale with deliberate torture by state officials at the top. At the bottom, the state enjoys a wider margin of appreciation, but serious, violent crime by non-state agents requires a proper criminal investigation.

### Background

In DSD and NBV, the Commissioner appealed the decision of Green J who had found the police liable under Article 3 at first instance. Readers are referred to Weightmans' updates on liability in March 2014 ([click here](#) to read more) and quantum in August 2014 ([click here to read more](#)). The claimants had been rape victims of a serial offender, the taxi driver John Worboys.

The claimant Koraou had been the victim of an assault in a bar. He appealed a finding against him by HHJ Platts.

### Decision

In each case the claimants alleged that failures to conduct effective investigations amounted to a breach of the duty arising under Article 3, the prohibition on torture and inhuman and degrading treatment and punishment. Rejecting the Commissioner's submissions, the court found that there was a positive duty under Article 3 to investigate crimes committed by non-state persons. Article 3 requires a proper investigation to ensure that individuals are protected against ill-treatment of the gravity contemplated by Article 3.

There is, however, a sliding scale ranging from deliberate torture by state officials at the top to negligence by non-state officials at the bottom. There is a wider margin of appreciation at the bottom but serious, violent crime by non-state agents (the case in DSD and NBV) comes higher up the scale and generally requires a proper criminal investigation by the state.

Not every allegation of ill-treatment which meets the Article 3 threshold calls for a full criminal investigation. There will be cases where the full facts are known, where the victim does not want the police involved or where the harm is caused by negligence and there is no criminal act.

The court also made observations about the nature of the duty and liability under Article 3. This explains the current divergence in the law by which, on the same set of facts, a police force may be liable for failure to investigate under the ECHR but not in common law negligence. The protection of the ECHR right is the purpose of claims brought under the Human Rights Act. The court has to ascertain the scope of rights and freedoms which the state has to secure and then determine if there has been a violation. The emphasis is on whether the state had carried out its duty, not on any entitlement to compensation: that is secondary and at the court's discretion.

The case of *Koraou* bears out the court's assertion that not every failure to investigate will lead to liability under Article 3. The judge at first instance noted shortcomings in the investigation and that this was not the most serious of cases. There were question marks about the claimant's credibility and this was not a case where the police ought to have left no stone unturned. Police resources had to be taken into account and it was not as if the police had done nothing. The judge asked himself if in all the circumstances the investigation was reasonable. Although the Court of Appeal observed that that approach was perhaps 'loose', the judge's overall treatment of the case had been in line with the proper scope and nature of the Article 3 duty. The decision would stand.

#### Comment

These decisions reinforce the existence of a positive obligation to investigate crimes meeting the severity required to engage Article 3. This echoes the positive duty long established in *Osman v UK* under Article 2, the right to life, to investigate crimes leading to death or serious personal injury.

The decision of Green J at first instance gave clear guidance on factors that may establish liability (see Weightmans' liability update in March 2014). That guidance remains the appropriate point of reference.

The Court of Appeal did not discuss liability under Article 8, the right to privacy. Liability here would broaden the burden of the police by requiring investigation of low level crime. Green J stated his opposition to this at first instance, as did the court in *Allen v Chief Constable of Hampshire* [2013] EWCA Civ 967. The bar remains high to engage Article 3.

Although Human Rights Act cases are concentrated on establishing and assessing the state's duty rather than compensating the victim, monetary awards are often made by way of 'just satisfaction'. Awards are typically lower than damages for common law negligence, and the helpful analysis of Green J in his quantum judgment is commended. Quantum was not in dispute in the appeal court.

The potential ramifications of the Court of Appeal decision are very significant. Although the case of *Koraou* provides some encouragement that investigative shortcomings further down the sliding scale may not result in liability under the Human Rights Act, further up the scale avoiding liability for investigative failures will be much more difficult to achieve. This is a challenging and developing area of the law, in which further appeal to the Supreme Court must be in prospect.

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**Weightmans LLP**  
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