Neutral Citation Number: [2022] EWHC 1608 (QB)

Case no: QA-2020-000209
Claim no: E01CL472

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 23/06/2022

Before :

MR JUSTICE SOOLE

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Between :

1. PATRICIA DEVALL (as joint administratrix of the Estate of Billy Rye deceased and on her own behalf) **2. JANINE CORCORAN** (as joint administratrix of the Estate of Billy Rye deceased)	**Claimants/ Respondents**
- and –	
MINISTRY OF JUSTICE	**Defendant/ Appellant**

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James Williams (instructed by **Government Legal Department**) for the Appellant
Patrick McMorrow and **Sophie Walker** (instructed by **Tuckers Solicitors**) for the Respondents

Hearing date: 10 May 2022

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Judgment Approved by the court for handing down

Mr Justice Soole :

1. This is an appeal from the decision of HH Judge Freeland QC dated 19 October 2020 whereby he refused to strike out/dismiss the Claimants' claim against the Defendant arising from the death of Billy Rye on 21 May 2017 at Approved Premises (Fleming House, Maidstone) run by the National Probation Service.

2. The claim is made pursuant to s.7 Human Rights Act 1998 and contends that the Defendant public authority was in breach of systemic and operational duties owed to Mr Rye pursuant to Article 2 ECHR and that these materially contributed to his death. On the same essential facts, it is also alleged that the Defendant breached his rights under Article 8 ECHR. The claims are brought by his mother (the first Claimant) and his former partner and mother of their children (the second Claimant) as administrators of Mr Rye's estate. The first Claimant also brings the Article 8 claim in her own right.

3. By application dated 17 June 2020 the Defendant applied to strike out the Particulars of Claim (POC) pursuant to CPR 3.4(2)(a) as disclosing no reasonable grounds for bringing the claims and/or for summary dismissal pursuant to CPR 24.2 on the ground that the claims had no real prospects of success. The applications were supported by a witness statement from Ms Jutta Kemppinen, a solicitor at the Government Legal Department. This largely consists of submissions to the effect that the pleaded claims must fail in law, but also exhibits documents which are said to provide further support for the summary dismissal of the claim. Mr Williams placed some reliance on these documents for the purpose of the Part 24 application; but accepted that there was not much difference between the applications under the two CPR rules.

4. Accordingly the essential assumed facts can be taken from the POC. These state that Mr Rye, aged 28, was released on licence from HMP Maidstone on 28 April 2017, having served one-half of an 8-year sentence for causing grievous bodily harm. As part of his licence conditions he had to reside at Fleming House between 11 pm and 7.30 am.

5. On the morning of his death (21 May 2017), the CCTV evidence shows that a staff member (Mr Gian Gurung) entered Mr Rye's room at 07.33. He opened the door and looked inside for a few seconds. Mr Rye was breathing at this point.

6. Shortly after the day shift began at 08.30, Mr Rye's partner (Ms Smith), and subsequently other members of the family, started contacting Fleming House, asking for Mr Rye to be awoken; as he was needed to help and participate in various family events that day.

7. At 09.04 another staff member (Paul Relf) went to Mr Rye's room, knocked on the door and called out to him. After about 2 minutes, he walked away. At 09.10 he returned with the key; and, after knocking, entered the room. He observed that Mr Rye was breathing. He shook his leg and shouted his name. There was minimal reaction.

8. At 09.13 Mr Relf returned with another staff member (Carole Sharp). They were in the room for 3 minutes, clapping their hands loudly, shouting his name, shaking him and flicking water on him. There was no reaction. At 09.48, they returned to his room and repeated their previous actions, again with no reaction.

9. Although family members continued to contact Fleming House, it was nearly 4 hours later before Mr Relf and Ms Sharp returned to Mr Rye's room and repeated what they had done before. On this occasion, Ms Sharp decided to seek medical advice by calling 111. At 13.52 the 111 operators called an ambulance. At 13.58 Mr Relf entered Mr Rye's room and noticed he was not breathing. He called 999 on his mobile. At 14.05 a responder entered the room. At 15.04 Mr Rye was pronounced dead. The medical cause of death was recorded as pneumonia.

10. An independent investigation into Mr Rye's death was carried out by the Prisons and Probation Ombudsman (PPO). The report dated December 2017 contained criticisms which included the 4-hour delay before return; the failure to call an ambulance at that later occasion; and the absence of emergency first-aid training for the staff on duty.

11. The inquest hearing was held at the Mid Kent and Medway Coroner's Court between 3 and 5 December 2018. The written findings of the Coroner include a variety of criticisms of the staff response and of the absence of first-aid training. There is dispute as to the admissibility of the findings and opinions of the PPO report and inquest. The Judge decided the applications without regard to that evidence, leaving the issues of admissibility for trial. I take the same course.

Pleadings

Existence of Article 2 duties

12. The POC contend that the Defendant owed systemic and operational duties under Article 2. The systemic obligation was to establish a framework of laws, precautions, procedures and means of enforcement which would, to the greatest extent practicable, have protected Mr Rye's life, including training competent staff and maintaining high professional standards. The operational obligation was to take action which, judged reasonably, might have been expected to prevent Mr Rye's death in circumstances where the Defendant knew or ought to have known of a real and immediate risk to his life.

13. The Defence admits a general systemic duty to establish a framework of law, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. It admits that where a member state has assumed responsibility for an individual it may be obliged in certain situations (such as prisons and hospitals) to employ and train competent staff and to adopt appropriate systems of work that will protect the life of such individual, including by maintaining high professional standards. It is denied that any such obligation exists in Approved Premises in the circumstances of this case. In the alternative, if there were any such general obligation, it did not apply in Mr Rye's case. The Defendant had not assumed any general responsibility for Mr Rye when he was residing at Fleming House, nor specifically in relation to the illness from which he died and of which it had no knowledge. Where health care to residents is provided by local NHS services, the member state is not obliged to ensure that staff at Approved Premises have any medical expertise, alternatively medical expertise that would have equipped them to intervene or take action in Mr Rye's case: citing Offender Management Act 2007 (Approved Premises) Regulations SI 2014/1198 ('the 2004 Regulations') Regulation 11.

14. As to the operational duty, the Defendant admits that this is engaged where (but only where) the relevant public authority knows or ought to know of a real and immediate risk to the life of a particular individual in its care. It denies any such obligation in Mr Rye's case, in particular because he was not in its care for these purposes; and it neither knew nor ought to have known of a real and immediate risk to his life. Further it denies that any action taken might have been expected to prevent his death.

Breach of duty

15. As to breach of the alleged systemic duty, the Particulars allege that the Defendant failed to employ and train competent staff or to adopt appropriate systems of work that would protect the right to life and diminish opportunities for self-harm. There was no adequate system in place to care for Mr Rye and other residents who were dependent on the Approved Premises for care, nor adequate monitoring for that purpose, and having particular regard to the vulnerabilities of residents through the prevalence of drugs and the mental health issues experienced by those who have served substantial prison sentences. Neither member of staff on duty that day had received up-to-date medical training. Further there was a failure to have in place policies to ensure that all residents were awake by a specific time; and that, if a resident is found unconscious and unresponsive, to ensure that emergency medical treatment is sought. These breaches materially contributed to his death.

16. As to breach of the alleged operational duty, the Particulars at [33] allege that the staff knew or ought to have known that there was a real and immediate risk to Mr Rye's life for the following reasons:

'a. Mr Rye's dependency on the Approved Premises for medical treatment (as 'a man who was in a locked room in an unresponsive state');

[I was told by agreement that residents can unlock their doors at all times including during the curfew period].

b. Mr Rye's family repeatedly contacted the Approved Premises asking them to wake him up as he was needed that day to look after the children as his partner had to go [to] *the hospital. Approved Premises staff attended Mr Rye's room on three occasions between 9-10 am where staff shouted his name, flicked water on his face and shook him, during which he remained unconscious*;

c. The Approved Premises' knowledge of Mr Rye's vulnerabilities as a person recently released from prison with a past history of drug use;

d. Mr Rye's licence conditions requiring that he reside at the Approved Premises overnight (11 pm to 7 am).'

The Defendant failed to take reasonable operational measures which would have had a significant chance of preventing Mr Rye's death. These included seeking emergency medical treatment when staff were unable to rouse him. These breaches materially contributed to his death.

17. As to breach of the alleged systemic duty, the Defence admits that the two members of staff had not received up-to-date first aid training; but denies that this was required.

Medical care was provided by local NHS services as it would be for anyone not in State detention. In any event first aid training would not have included recognition or response to symptoms of pneumonia in a man who appeared fit and well the night before. Further, whilst former prisoners may in general be more prone to drug use and/or mental health problems, it is denied that this is relevant in the present case. In particular staff at Fleming House were not aware (and could not have been expected to be aware) of any mental health issues experienced by Mr Rye nor whether he had or may have taken drugs in the period immediately before his death.

18. As to breach of the alleged operational duty, it is denied that there was a real and immediate risk to Mr Rye's life of which the staff knew or ought to have known. Mr Rye was not dependent on the Approved Premises for medical treatment, either generally or in particular. His room was not locked unless by his choice. He had not been diagnosed with a life-threatening illness or condition and was not known to have taken drugs recently or otherwise to be in a life-threatening condition or at risk. He was not materially more vulnerable than any other resident at Fleming House.

19. In each respect, the Defendant accepts that the issue of causation/material contribution is a matter of evidence; and focusses its challenge on both the existence and the breach of such duties in the circumstances.

Article 8

20. The Particulars of Claim allege that the Defendant was under a negative obligation not to interfere with Mr Rye's physical or moral integrity; alternatively under a positive obligation to preserve this. The allegations of breach rely on the matters alleged; together with the close and loving family relationship between Mr Rye, his mother and his children: *'As a result the Defendant violated the rights of the deceased and the human rights of the Claimant as protected by Article 8 ECHR'.* The Defence contends that the Article 8 claim is fundamentally misconceived.

21. Under each Article the Claimants seek declaratory relief and damages in just satisfaction of the breaches alleged.

Witness statement

22. The witness statement of Ms Kemppinen summarises the legal challenge as that: (a) the alleged breach of the systemic obligation is based on a misunderstanding of the purpose, nature and duties of Approved Premises. Staff have limited responsibilities towards residents who, unlike inmates in prison, are provided with healthcare services through the community, as for most people not in state custody; (b) the alleged breach of the operational obligation cannot satisfy the high threshold for such claims as set out by the European Court of Human Rights, e.g. Watts v. UK (2010) 51 EHRR SE 66; (c) the alleged breach of Article 8 is misconceived.

23. Nor was there any other compelling reason for the claim to be disposed of at trial (cf. CPR 24.2(b)) in circumstances where there had been a full investigation of the death by both the Coroner and the PPO.

24. The statement also provides statutory and other information about Approved Premises. These are premises which have been approved by the Secretary of State under s.13

Offender Management Act 2007. Their operation is governed by the 2014 Regulations. As summarised in the Foreword to the July 2017 Report by HM Inspectorate of Probation: *'They act as a half-way house between prison and home, and have two main roles: to help rehabilitate and resettle some of our most serious offenders, and to make sure that the public are protected in the offenders' early months in the community.'*

25. The statement exhibits Mr Rye's licence conditions and certain other documents from his time at Fleming House. He was on a curfew between 9 pm (later changed to 11pm) to 7.30 am and was registered with the local GP practice. He was initially obliged to sign in at noon and 5 pm but these requirements were subsequently lifted by his probation officer. Subject to requirements to keep in touch with his supervising officer, he was otherwise free to leave the premises outside his curfew hours. Staff at the Approved Premises would have had no power to prevent him from leaving or to force him to return during the day. Any such step would have required them to request an amendment to the terms of his licence. She concludes *'A resident at an approved premises, at least outside the period of his curfew, is thus in a very different position from an inmate in a prison or a patient in a psychiatric hospital. Although Mr Rye was required to sleep there, he was not otherwise being detained and staff had no control over his movements. Indeed, Approved Premises are intended to help prisoners back into normal civilian life.'*

The hearing below

26. Before the Judge, the Defendant's arguments focused on the distinction between a prison and Approved Premises. As the Judge summarised the argument of Counsel who then appeared: *'This…is not Her Majesty's prison. It is close…to a hall of residence, and so the way the claim is put on violation of Article 2 does not withstand scrutiny because it misunderstands the nature of approved premises.'*

27. The Judge recorded Mr McMorrow's response as that *'…it is not to the moment that Mr Rye was not detained in Her Majesty's prison. I must look at what happened at the approved premises and apply the correct principles and jurisprudence to the arguable facts which disclose an arguable claim based upon breach of the operational duty and systemic duty under Article 2 and at least an arguable claim under Article 8.'*

28. The Judge's reasoning for rejection of the application was relatively terse; reflecting the narrow focus of the argument then advanced by the Defendant. As to the distinction between a prison and Approved Premises: *'I have had full regard to the core submission on Article 2 advanced by Miss Wilsdon that approved premises are not Her Majesty's prison premises, that Mr Rye was not in the custody of the state, and for that reason…there is a misunderstanding of approved premises and therefore, in all the circumstances, this case falls to be struck out. I disagree'*: [57]. In concluding that the tests under both CPR Part 3 and 24 were not met by the Defendant he had *'fully taken into account the nature of approved premises'* [58]. As to Article 8, *'It may ultimately be the case that Article 8 does not add a great deal to Article 2, but, having reached the clear conclusion that I should allow the claim in relation to the Article 2 breach to continue, I am not of the view that I should yield to Miss Wilsdon's argument on Article 8'* [61].

29. On this appeal Mr Williams has relied on a much wider range of authorities and the argument on Article 2 has broadened beyond the strict confines of the grounds of

appeal. In circumstances of a challenge on point of law, I allowed some indulgence in this respect. In these circumstances I will consider Mr Williams' contentions on the relevant law before turning to the grounds of appeal.

The Appellant's submissions

30. Before turning to the case-law, Mr Williams pointed to the description of Approved Premises as a halfway house between prison and home; and emphasised that during the curfew period the residents were not physically restrained from leaving; and that outside the curfew hours they were under no legal restraint beyond the general law.

31. As to the 2014 Regulations, he pointed in particular to the residence conditions (Regulation 5); the general duties (Regulation 6); the provisions on absconding (Regulation 9); and Regulation 11 on medical care and advice: *'(1) Each provider must ensure that facilities are available for the provision to residents of any necessary medical and dental treatment. (2) A provider may appoint a healthcare professional to assist in discharging the functions under paragraph (1).'* That medical care was provided through the NHS.

Article 2

32. This provides as material: *'(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally…'*

33. Mr Williams started with the Supreme Court decision in Rabone v. Pennine Care NHS Trust [2012] UKSC 2; 2 AC 72. In that case the Court identified the three distinct duties under the Article: *'(i) a negative duty to refrain from taking life save in the exceptional circumstances described in article 2.2; (ii) a positive duty to conduct a proper and open investigation into deaths for which the state might be responsible; and (iii) a positive duty to protect life in certain circumstances'*: per Lord Dyson JSC at [12].

34. That latter positive duty contained two distinct elements, i.e. the systemic duty and the operational duty: *'The first is a general duty on the state "to put in place a legislative and administrative framework designed to provide effective deterrents against threats to the right to life"…The second is what has been called the "operational duty"'*: ibid.

35. The operational duty had been articulated by the ECtHR in Osman v UK (1998) 29 EHRR 245 as arising where the real and immediate risk to life came from the criminal acts of a third party: Osman at [116]. However, as Rabone explained, the potential ambit of the obligation was no longer so confined. In Watts v. UK (2010) 51 EHRR SE 66, a case concerning the applicant's transfer from a care home, the ECtHR observed that the Court had *'…since made it clear the positive obligations under art. 2 are engaged in the context of any activity, whether public or not, in which the right to life may be at stake:* [82]. Further, for a court to find a violation of the positive obligation to protect life, *'…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 and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, including in respect of the operational choices which must be made in terms of priorities and resources.*

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.': [83].

36. Thus the existence of a real and immediate risk to the life of an identified individual did not itself give rise to a general duty on the State under Article 2. That was a necessary but not a sufficient condition: Rabone at [21].

37. Rabone cited examples where the ECtHR had held the operational duty to exist: to take reasonable steps to protect prisoners from being harmed by others including fellow prisoners, and from suicide; to protect others who are detained by the State, including those in administrative detention and psychiatric patients detained in a public hospital; and in respect of military conscripts: [15]. The ECtHR had expanded the circumstances in which the duty is owed *'so as to include what may generally be described as dangers for which in some way the state is responsible'* [16], e.g. where the applicant had lived with his family in a slum bordering on a municipal refuse tip where a methane explosion caused a landslide which engulfed the applicant's house and killed his close relatives[1]; and Watts where it was held that the duty was capable of being owed where a badly managed transfer of elderly residents of a care home could have a negative impact on their life expectancy. For various reasons that claim had failed on the facts.

38. Rabone then distinguished cases where hospital deaths resulted from *'casual acts of negligence'*: Savage v. South Essex Partnership NHS Foundation Trust [2009] AC 681 per Lord Rodger at [45]. This followed Powell v UK (2000) 30 EHRR CD 362 where the ECtHR, holding a claim of negligent hospital treatment causing death to be inadmissible, stated: *'The court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of healthcare policy may in certain circumstances engage their responsibility under the positive limb of article 2. However, where a contracting state had made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a contracting state to account from the standpoint of its positive obligations under article 2 of the Convention to protect life'*: p.364.

39. Mr Williams submits that Article 2 thus raised a very high bar to overcome in a medical care case. As Rabone observed: *'…a patient undergoing major surgery may be facing a real and immediate risk of death and yet the* Powell *case shows that there is no article 2 operational duty to take reasonable steps to avoid the death of such a patient'*: [21].

40. Rabone continued that there was no decision of the ECtHR which clearly articulated the criteria by which it decides whether an article 2 operational duty exists in any particular circumstances. However *'There are certain indicia which point the way…the operational duty will be held to exist where there has been an assumption of responsibility by the state for the individual's welfare and safety* (*including by the exercise of control). The paradigm example of assumption of responsibility is where the state has detained an individual, whether in prison, in a psychiatric hospital, in an immigration detention centre or otherwise. The operational obligations apply to all*

[1] Oneryildiz v. Turkey 41 EHRR 325

detainees, but are particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition.': [22].

41. Given the language of 'paradigm example', Mr Williams accepted that it was not necessary to find that a claimant had been in detention or in a position which was akin to a state of detention. However it was necessary to find an assumption of responsibility by the State for the type of risk which had materialised: see further below.

42. Rabone continued that the ECtHR had repeatedly emphasised the vulnerability of the victim as a relevant consideration: *'In circumstances of sufficient vulnerability, the ECtHR has been prepared to find a breach of the operational duty even where there has been no assumption of control by the state, such as where a local authority fails to exercise its powers to protect a child who to its knowledge is at risk of abuse*: [23]. Mr Williams accepted that this could include constructive knowledge of vulnerability as well as actual knowledge; but again the bar was high.

43. Another relevant factor was the nature of the risk: *'Is it an "ordinary" risk of the kind that individuals in the relevant category should reasonably be expected to take or is it an exceptional risk?'*: Rabone at [24].

44. Mr Williams duly acknowledged that in Rabone the Supreme Court had observed that the boundaries of Article 2 were still being explored. Thus:*'All of these factors may be relevant in determining whether the operational duty exists in any given circumstances. But they do not necessarily provide a sure guide as to whether an operational duty will be found by the ECtHR to exist in circumstances which have not yet been considered by the court. Perhaps that should not be altogether surprising. After all, the common law of negligence develops incrementally and it is not always possible to predict whether the court will hold that a duty of care is owed in a situation which has not been previously considered. Strasbourg proceeds on a case-by-case basis. The jurisprudence of the operational duty is young. Its boundaries are still being explored by the ECtHR as new circumstances are presented to it for consideration. But it seems to me that the court has been tending to expand the categories of circumstances in which the operational duty will be found to exist'*.

45. However this position had been changed by the ECtHR decision in Lopes de Sousa Fernandes v. Portugal (2018) 66 EHRR 28, a claim of clinical negligence at a state hospital. The Court expressly clarified the law as to the appropriate approach in healthcare cases: [185]; and identified the State's obligations (systemic and operational) in the following way: *'The Court reaffirms that where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under art. 2 of the Convention to protect life'*: [187].

46. Further, *'On the basis of this broader understanding of the states' obligation to provide a regulatory framework, the Court has accepted that, in the very exceptional circumstances described below, the responsibility of the state under the substantive limb of art.2 may be engaged in respect of the acts and omissions of healthcare providers'*: [190; emphasis supplied].

47. Those *'very exceptional circumstances'* fell into two categories. The first type: *'...concerns a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment. It does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment*: [191].

48. The second type *'...arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger'*: [192].

49. As to the distinction with cases of 'mere' medical negligence: *'The court is aware that on the facts it may sometimes not be easy to distinguish between cases involving mere medical negligence and those where there is a denial of access to life-saving emergency treatment, particularly since there may be a combination of factors which contribute to a patient's death'*: [193]. *However, for a case to fall into the latter category the following factors, taken cumulatively must be met.* First, *'...the acts and omissions of the healthcare providers must go beyond a mere error or medical negligence, insofar as those healthcare providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given'*: [194]. Secondly, *'...the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the state authorities, and must not merely comprise individual instances where that something may have been dysfunctional in the sense of going wrong or functioning badly'*: [195]. Thirdly, *'...there must be a link between the dysfunction complained of and the harm which the patient sustained. Finally, the dysfunction at issue must have resulted from the failure of the state to meet its obligation to provide a regulatory framework in the broader sense indicated above'*: [196].

50. Further, *'...an alleged error in diagnosis leading to a delay in the administration of proper treatment, or an alleged delay in performing a particular medical intervention, cannot in themselves constitute a basis for considering the facts of this case on a par with those concerning denial of healthcare'*: [200].

51. Mr Williams submits that the two identified categories are the only 'very exceptional circumstances' which fall outside the category of 'mere' or 'casual' negligence; and so form part of the test of whether there is an arguable claim in the present case. Neither was applicable on the pleaded facts of this case.

52. He acknowledged the caveat in Lopes that *'...different considerations arise in certain other contexts, in particular with regard to medical treatment of persons deprived of their liberty or of particularly vulnerable persons under the care of the state, where the state has direct responsibility for the welfare of these individuals'*: [163]. However Mr Rye's case did not arguably fall into such a category.

53. That Lopes de Sousa had further raised the bar in cases of medical care had been acknowledged by the Court of Appeal in R (Maguire) v Blackpool and Fylde Senior Coroner [2020] EWCA Civ 738; [2021] QB 409. In that case, the claimant's daughter had Down's syndrome and lived in a residential care home. The local authority had

granted a standard authorisation under the Mental Capacity Act 2005, depriving her of her liberty while she was there. While at the home she became seriously ill and died in hospital two days later. The Coroner rejected the argument that the circumstances of her death dictated that there should be an inquest which satisfied the State's procedural duty under Article 2. The claim for judicial review of that decision was successively dismissed by the Divisional Court and Court of Appeal.

54. The Court of Appeal gave particular consideration to the decision in Lopes de Sousa. It stated that *'The approach of the Grand Chamber in* Lopes de Sousa *now governs cases of this sort'* [27], but noted the *'important caveat'* [28] which it had entered at [163].

55. Further it was important to focus on the scope of any such duty under Article 2 and why it might be owed: [71]. Thus ECtHR authority showed that *'…the substantive article 2 duty owed to the people concerned was to protect from a type of harm entirely within the control of those who cared for them*. Thus the Article 2 procedural obligation *'does not apply to cases of deaths in custody arising from natural causes'*: [72].

56. The Court continued that *'Both the prison cases and those concerning conditions within an institution where vulnerable people are cared for demonstrate that the article 2 substantive obligation is tailored to harms from which the authorities have a responsibility to protect those under its care. It cannot be supposed that if a child in a care home or an adult in a position such as Mr Campeanu*[2]had *suffered an isolated medical emergency that the substantive obligation would have applied to the manner in which that was dealt with. The reasoning of the Strasbourg court which supported the imposition of the operational duty would not apply'*: [73].

57. On the particular facts in Maguire, the circumstances of the deceased *'…were not analogous with a psychiatric patient who is in hospital to guard against the risk of suicide. She was accommodated by United Response to provide a home in which she could be looked after by carers, because she was unable to look after herself and it was not possible for her to live with her family. She was not there for medical treatment. If she needed medical treatment it was sought, in the usual way, from the NHS'*: [101]. Nor was it a case which fell within the 'very exceptional circumstances' identified in Lopes de Sousa: *'We are unable to accept that the criticisms of the paramedics or out of hours GP come close to satisfying the first exception identified by the Strasbourg court, namely that the patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment. On the contrary…the collective judgement of the professionals was that Jackie was not in danger on the evening* [in question]*…'*: [105].

58. The subsequent decision in R (Morahan) v West London Assistant Coroner [2021] EWHC 1603 (Admin); [2021] 3 WLR 919 had further emphasised the importance of identifying the scope of any alleged Article 2 duty and the type of harm for which the public authority had assumed responsibility. This concerned the death at home, shortly after her discharge, of a former in-patient at a community-based open rehabilitation unit operated by an NHS trust.

[2] Centre for Legal Resources on behalf of Campeanu v. Romania 37 BHRC 423: where the domestic authorities knew that the facility in which he was kept lacked proper heating and food, had a shortage of medical staff and resources and inadequate supplies of medication: see Maguire at [72].

59. The Divisional Court[3] said that the question of whether an operational duty was owed *'was not an abstract one which delivers a "yes" or "no" answer in all circumstances. It was necessary to consider the scope of any operational duty'* [64]. This led to *'three important and related points'*: [65].

60. First, that the existence or otherwise of the operational duty was not to be analysed solely by reference to the relationship between the state and individual, but also by reference to the type of harm of which the individual is foreseeably a real and immediate risk – *'There may be an operational duty to protect against some hazards but not others'* [65].

61. Secondly, that the foreseeable real and immediate risk of the type of harm in question is a necessary condition of the existence of the duty, not merely relevant to breach. Without identifying such foreseeable risk of the type of harm involved, it is impossible to answer the question whether there is an operational duty to take steps to prevent it: [66].

62. Thirdly, in cases where vulnerable people are cared for by an institution which exercises some control over them, the question whether an operational duty is owed to protect them from a foreseeable risk of a particular type of harm is informed by whether the nature of the control is linked to the nature of the harm: *'Where…there is no link between the control and the type of harm, to impose an operational duty to protect against the risk would be to divorce the duty from its underlying justification as one linked to State responsibility. It would also undermine the requirement identified in* [Osman] *that the positive obligations inherent in article 2 shall not be interpreted so as to impose a disproportionate burden on a state's authorities'*:[67]. Thus *'A psychiatric hospital owes no duty to protect the patient, whether voluntary or detained, from the risk of accidental death from a road traffic accident whilst on unescorted leave'* [ibid.]

63. On the facts of that case, the court held that none of the Rabone factors were satisfied. First, there was no real and immediate risk of death from such cause of which the authority was or ought to have been aware; there was no history to suggest suicide risk or accidental overdose [124]. Secondly, there was no relevant assumption of responsibility: *'The Trust had not assumed responsibility for treatment of Tanya for drug addiction of a life-threatening nature'* [128]. Nor was she especially vulnerable, in the sense relevant to the existence of the duty. In her case *'…the vulnerability is unconnected to the harm against which it is said the Trust owed a duty to protect her, namely a foreseeable risk of accidental overdose'*[129].

64. Nor was the risk in question an exceptional risk rather than an ordinary risk: *'It was a risk to which Tanya was exposed in the same way as any other recreational drug user irrespective of her status as a patient at CGR'*.

65. Nor was her position to be equated to that of a detained patient, at least on the day in question. Whereas *'Rabone's status was that of an involuntary patient in all but form', 'Tanya's position…was quite different. She was in the phase of her treatment which involved rehabilitation into the community. As a voluntary patient it was necessary to respect her article 5 and article 8 rights to autonomy and private life.'* [131].

[3] Popplewell LJ, Garnham J, Judge Teague QC (Chief Coroner of England and Wales).

66. Mr Williams submits that the same conclusion applies in the present case. There is no arguable claim that Mr Rye was at real and immediate risk of death from some cause of which the authority was or ought to be aware; nor that there was any relevant assumption of responsibility for the type of harm in question (whether death from natural causes or in connection with drug use); nor that Mr Rye was vulnerable in the sense relevant to the existence of the duty; nor was there exceptionality of risk.

67. Nor was it arguable that Mr Rye's claim fell into either of the two exhaustive categories of 'very exceptional circumstances' identified exhaustively in Lope de Sousa; nor that the State had direct responsibility for his welfare. Mr Rye was in the Approved Premises in order to prepare him for release back to civil society; not for medical treatment.

68. Pressed as to what the position would be if the pleaded events had occurred during the hours of curfew, Mr Williams accepted that the necessary ingredient of assumption of responsibility would at least arguably have been present; because Mr Rye's position would at least arguably have been akin to custody. However the other necessary ingredients for breach of the Article 2 duty would have remained absent.

69. He acknowledged that, as in Rabone, the Court in Morahan had observed that the boundaries of the operational duty were still being explored; and that *'they might expand to include new categories of circumstances as giving rise to the operational duty as new factual circumstances were considered.'*[40]. However the factual circumstances of Mr Rye's case were not capable of establishing an Article 2 duty or breach.

70. In the recent case of R (Gardner) v. Secretary of State for Health and Social Care [2022] EWHC 967 (Admin) the Divisional Court (Bean LJ, Garnham J) summarised the ingredients of the Article 2 operational duty as follows:

> *'i. a real and immediate risk to life is a necessary but not sufficient factor for the existence of an Article 2 operational duty;*
>
> *ii. generally, the other necessary factor is the assumption by the State of responsibility for the welfare and safety of particular individuals, of whom prisoners, detainees under mental health legislation, immigration detainees and conscripts are paradigm examples since they are under State control;*
>
> *iii. however, the duty may exist even in the absence of an assumption by the State of responsibility, where State or municipal authorities have become aware of dangerous situations involving a specific threat to life which arise exceptionally from risks posed by the violent and unlawful acts of others* (Osman), *or man-made hazards* (Oneryildiz, Kolyadenko) *or natural hazards* (Budayeva), *or from appalling conditions in residential care facilities of which the authorities had become aware* (Nencheva, Campeanu)*;*
>
> *iv.* Watts *suggests that, in appropriate circumstances (which remain so far undefined), the operational duty may also arise where State or municipal authorities engage in activities which they know or should know pose a real and immediate risk (according to* Maguire, *an exceptional risk) to the life of a vulnerable individual or group of individuals.'*

71. Mr Williams submits that none of those matters were capable of being established on the assumed facts of the present case.

Systemic duty

72. Mr Williams acknowledged that the distinction between the operational and systemic duty was not always clearly drawn in the ECtHR jurisprudence. As observed in Morahan *'…there is often no clear dividing line between this operational duty, and the systems duty below the national level'*: [30]; citing R (L (A Patient)) v Secretary of State for Justice [2009] AC 588 per Lord Walker of Gestingthorpe at [89]. Thus he accepted that the applications in respect of operational and systemic duty stood or fell together.

The pleadings

73. The pleaded allegations provided no support for the contention that there was a real and immediate risk to Mr Rye's life of which the Defendant knew or ought to have known: cf. POC para.33. Neither factors (a) (*'dependency on the Approved Premises for medical treatment'*) nor (d) (*'licence conditions requiring that he reside at the Approved Premises overnight (11 pm to 7 am)'*) provided any support. Factor (b) amounted to no more than that the staff had difficulty waking him up that morning. At its highest, (b) combined with (c) (*'The Approved Premises' knowledge of Mr Rye's vulnerabilities as a person recently released from prison with a past history of use'*) 'might just have raised alarm bells'. However there was no allegation that he was a current user of drugs.

74. All this was equally relevant to the issue of assumption of responsibility for the type of harm in question. On this the pleaded case was that the Defendant's role included the *'the proper assessment of risks of harm, including self-harm and drug use, to all those persons dependent on the Defendant's care, as well as emergency response provisions'* (POC para. 22). However there was no allegation that Mr Rye's risk of harm from drugs was not properly assessed; nor that there was an assumption of responsibility for his drug use. Rather, the pleaded allegation was framed in the context of the general prevalence of drugs and mental health issues experienced by those who had served substantial prison sentences and the *'failure to ensure that staff had received up-to-date training'* (POC para. 28).

75. Further the exhibited Probation Service reports on Mr Rye provided no support for the Claimants' case on any of these issues. Whilst they referred to his past misuse in prison of NPS (new psychoactive substances) – e.g. referral form to Approved Premises 24.3.17: *'Early this year he started to go down hill and misusing new psychoactive drugs (NPS)'* – they did not identify the drugs as one of the areas of risk nor suggest that he should be treated. Furthermore the PPO report stated that *'…we are satisfied that there were no indications that he was using illicit substances or that he was at risk of an overdose, while living at Fleming House'* (para.44).

76. Mr Rye's death was from natural causes (pneumonia); it arose without prior warning; and the relevant staff were not medical professionals. As Lopes de Sousa observed in the context of the requisite 'very exceptional circumstances', Article 2 *'…does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment'* [191].

77. As to the systemic duty, the allegations (POC paras. 24-29) were insufficient to raise any arguable case. Further, as the Divisional Court had observed in R (Parkinson) v. Kent Senior Coroner [2018] EWHC 1501 (Admin), *'…care should be taken to ensure that allegations of what are in truth allegations of "individual negligence" are not "dressed up as systemic failures"*: [91].

Article 8

78. Mr Williams submits in various ways that the Article 8 claim is misconceived on its face. In particular, if the unqualified right under Article 2 cannot be established, the claimant can do no better on the same facts through the qualified right under Article 8.

79. As the ECtHR observed in Van Colle, its conclusion that it could not be said that the policeman knew or ought to have known of a real and immediate risk to the life of the victim *'…equally supports a finding that there has been no breach of any positive obligation implied by art.8 of the convention to safeguard* [his] *physical integrity*': [108]. It distinguished cases where it had been held that a claim under another Article (3) could succeed despite failure under Article 2. That was because the separate complaint *'concerned facts about treatment of the deceased which were substantively distinct from the facts to which the art.2 complaint related.'*: ibid.

80. The claim under Article 8 relied on the same facts as the claim under Article 2. The pleaded references to the close loving relationship between Mr Rye, his mother and his children; and to their bereavement, grief and distress took it no further. Rabone made clear that the purpose of damages for non-pecuniary loss in the context of Article 2 was to acknowledge the bereavement of family members: see Baroness Hale at [92]: *'We are here because the ordinary law of tort does not recognise or compensate the anguish suffered by parents who are deprived of the life of their adult child'*; also Lord Dyson at [58-59].

81. HH Judge Freeland had observed that *'It may ultimately be the case that Article 8 does not add a great deal to Article 2'* and that *'…there may be ultimate difficulties in the way of the Claimants in succeeding on the Article 8 case…'*; but wrongly declined to strike it out.

The grounds of appeal

82. The grounds were drafted without benefit of the transcript of judgment. It is convenient to take them out of order

83. Ground 1 contends that the Judge *'was wrong to find or assume that Mr Rye was in the custody of the state at the time of his death at the Approved Premises (or that this was arguable)'.* In the light of the transcript, Mr Williams contended that it is not entirely clear whether the Judge made such a finding or assumption; but in any event he did not appreciate the significance of the issue of whether Mr Rye was in custody when residing at the Approved Premises, nor therefore give due weight to that aspect. If he had done so he would have appreciated that the Claimants had no real prospect of reaching the high threshold for a claim under Article 2. The Judge failed to conclude that there was no arguable case that the Defendant had assumed responsibility for the type of risk that materialised.

84. Ground 3 is that, having reminded himself of the *'relatively high threshold for Article 2 claims'* (Judgment para.48), the Judge failed to apply it. Set against the ingredients that the authorities knew or ought to have known at the time of the existence of a real and immediate risk the life of an identified individual, the Judge had wrongly proceeded on the basis that the risk to Mr Rye 'should have been obvious'. In light of the transcript Mr Williams accepted that the Judge did not say that. However, for the fuller reasons advanced, there was no basis to contend that the Defendant knew or ought to have known of a real and immediate risk to his life.

85. Ground 2 is that the judge failed to give clear reasons why he considered that the claim should not be struck out/dismissed.

86. Ground 4 is that the claim under Article 8 was misconceived, for the reasons noted above.

Conclusions

87. For the reasons largely advanced by Mr McMorrow, I am not persuaded that the claims under Article 2 or 8 should be struck out or dismissed; nor therefore that the Judge's refusal to do so was wrong.

Article 2 : operational duty

88. First, in my judgment this continues to be an evolving area of law whose boundaries are not fixed: see Rabone at [22] and Morahan at [40]. I am not persuaded that Lopes de Sousa has closed off further development in medical cases, at least in a case which arguably falls within the Grand Chamber's caveat at [163]. Accordingly the Court should continue to exercise considerable caution before striking out/dismissing claims on a summary basis.

89. Secondly, in the context of applications whose focus has been the pleadings and a small number of exhibited documents, I am not satisfied that the Court necessarily has all the available and potentially relevant evidence at this stage. In addition to my conclusion that there is a properly arguable claim in law on the available material, I consider that the case falls within the Easyair[4] Part 24 principle that: *'…the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a full investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case'* : [15].

90. Thirdly, I am satisfied that there is a real prospect of success for the contentions that the Defendant assumed responsibility for the welfare of Mr Rye and that its scope extended to protection from self-harm and drug (ab)use: POC para.22. To that end I consider it properly arguable that the requirement for those on licence to reside in Approved Premises involves a sufficient form of State control outside the 'paradigm examples' identified by the Court (Rabone; Gardner); and that potential support for the scope of the responsibility/duty may be provided e.g. by the passages in the Approved Premises Manual to which Mr McMorrow pointed, i.e. *'The APs policies and procedures in respect of drugs and alcohol'* (section D22) and *'The AP…written*

[4] Easyair Ltd v. Opal Telecom Ltd [2009] EWHC 339 (Ch)

strategy on preventing deaths of residents…' (section D23); by the general knowledge of the problem of drug abuse in prisons and arguably by extension in Approved Premises; and by the particular information in the Probation Service documents about Mr Rye's historic abuse of NPS.

91. Fourthly, as to 'real and immediate risk of which the Defendant knew or ought to have been aware', I am equally persuaded there is sufficient in the pleaded allegations (POC para.33) to meet the test for trial. These overlap with some of the factors which potentially support an assumption of relevant responsibility; and include knowledge of Mr Rye's vulnerabilities as a person recently released from prison with a past history of drug use and the successive unsuccessful attempts to rouse him.

92. I am thus not persuaded that the claim must necessarily be defeated on the basis of (i) the nature of Approved Premises; or (ii) the timing of the pleaded events, i.e. starting outside the curfew hours; or (iii) Regulation 11 and/or the arrangements for residents to receive medical treatment through the NHS; or (iv) necessary classification as 'mere' or 'casual acts of' negligence or as outside the Lopes de Sousa two types of 'very exceptional circumstances'; or (v) as arising from an 'ordinary' rather than 'exceptional' risk. In my judgment, these and all the matters advanced on each side require full argument and evidence at trial, not summary disposal.

93. The danger of striking out/dismissing claims in this difficult area was highlighted by Mr Williams' acceptance in the course of argument that it could not have been said that there was no arguable assumption of responsibility if the relevant events, i.e. including what the staff allegedly observed, had taken place during the hours of curfew and notwithstanding that residents were not under physical (as opposed to legal) restraint during those hours. Whether or not arguably fine distinctions of that type can be maintained is again a matter for full consideration at trial.

94. As to causation, the POC do not aver a causal link between drug abuse and Mr Rye's death. However the Defendant has throughout accepted that causation is a matter for evidence and trial; and has focussed its challenge on the ingredients of assumption of responsibility and of real and immediate risk.

The systemic duty

95. In circumstances where there is an arguable case on operational duty, I conclude that the case on the fact and breach of systemic duty must also proceed to trial. As the domestic authorities acknowledge (e.g. Morahan at [30]), the ECtHR decisions do not always demonstrate a clear dividing line between the systemic and operational duties. Thus Mr Williams, in my view rightly, acknowledged that applications to strike out/dismiss the claims of operational and systemic duty/breach stand or fall together.

Article 8

96. I accept the broad proposition that it is difficult to conceive of a case where a claim under Article 8 might succeed on the same facts as an unsuccessful claim under Article 2. However that is no sufficient reason to strike out the Article 8 claim in circumstances where the Article 2 claim is adjudged to have real prospects of success. In agreement with the Judge, it should be allowed to proceed.

97. I turn to the grounds of appeal. As to Ground 1, on a fair and correct reading of his judgment, the Judge did not find or assume that Mr Rye was in the custody of the State at the time of his death. In stating 'I disagree' at [57], the Judge was simply rejecting the argument of Counsel for the Defendant that the claim misunderstood the nature of Approved Premises and must necessarily fail for that reason. The Judge was right to reject that bald submission. Further, for the reasons already given, I am persuaded that there is a real prospect of establishing the requisite assumption of responsibility.

98. As to Ground 3, the Judge did not say that the risk 'should have been obvious' (as Mr Williams accepts). For the reasons given above, the Judge was right to conclude that the pleaded case that there was a real and immediate risk to the life of Mr Rye of which the Defendant knew or ought to have known had real prospects of success.

99. As to Ground 2, the Judge's reasoning was brief, but this reflected the limited terms of the argument then advanced on behalf of the Defendant. In essence the Judge accepted the rival submissions of the Claimant, which were duly recorded in the judgment. With the benefit of much fuller argument, including much greater citation of authority, I am satisfied that his conclusions were correct.

100. As to Ground 4, the Judge was right to conclude that the Article 8 claim should also proceed to trial.

101. For all these reasons, the appeal must be dismissed.