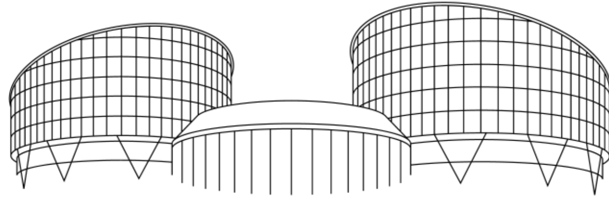

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF REYNOLDS v. THE UNITED KINGDOM

(Application no. 2694/08)

JUDGMENT

STRASBOURG

13 March 2012

FINAL

13/06/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Reynolds v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 21 February 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2694/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mrs Patricia Reynolds ("the applicant"), on 7 January 2008.

2. The applicant, who had been granted legal aid, was represented by Atherton Godfrey, a firm of solicitors practising in Doncaster. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Moynihan, of the Foreign and Commonwealth Office.

3. The applicant argued, under Articles 2 and 13 of the Convention, that civil proceedings were not available to her as regards the death of her son.

4. On 10 January 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

5. The present application was introduced by Mrs Patricia Reynolds, a British national born in 1935 who lived in Hebden Bridge. Following the introduction of the application, Mrs Reynolds died and Ms Catherine King (her daughter) continued the case on her behalf. The Court has referred below to Mrs Reynolds as the applicant.

6. The applicant's son, David Reynolds, was born in 1969 and he died on 16 March 2005. The present application relates to his death.

A. The circumstances of the case

7. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Mr Reynolds' illness and death

8. Mr Reynolds was diagnosed with schizophrenia in 1998. He was treated by a mental health team which was operated by the National Health Service Trust ("the NHS Trust") and which assigned Mr Stephens as Mr Reynold's Care Co-ordinator. On 16 March 2005 Mr Reynolds contacted the applicant and Mr Stephens: he was hearing voices ordering him to kill himself. The applicant and Mr Stephens went to Mr Reynolds's home.

9. Mr Stephens contacted the Crisis Resolution Home Treatment Team ("CRHTT") informing it that Mr Reynolds might need to be hospitalised. The CRHTT is a community-based team of mental health professionals operated by the NHS Trust from the psychiatric unit of Calderdale Royal Hospital ("the Hospital"). Mr Stephens was told that no beds were available but that Mr Reynolds could have a crisis bed at the Intensive Support Moving On Scheme Unit ("the ISMOS Unit"). The local Council is responsible for the Unit and it is located in a building of which the Council is the occupier for the purposes of the Occupiers Liability Act 1957 ("the 1957 Act"). It is staffed by social workers experienced in the care of mental health patients and it provides an alternative to in-patient care where the risk assessment renders this appropriate. ISMOS Unit patients are not subjected to formal monitoring but staff regularly check on them and have custody of their medication. While patients are voluntary, cameras monitor the outside of the building so that the ISMOS Unit is alerted if a patient leaves.

10. On the way to the ISMOS Unit Mr Reynolds told Mr Stephens that he found the 'voices' so distressing that he felt like killing himself. Mr Stephens therefore took Mr Reynolds to the Hospital (run by the Trust) for a clinical assessment. This was carried out by a psychiatrist of the CRHTT assisted by a psychiatric nurse and Mr Stephens. Mr Reynolds was assessed to be a low suicide risk. He had once again reduced his medication in order to drink and socialise at the weekend. His psychotic symptoms had therefore returned but he had stabilised rapidly as he had already re-taken his medication that morning. The voices had diminished and were not troubling him any more although he was terrified of their returning. During the assessment, he confirmed that he did not want to kill himself. He had no history of self-harm/attempted suicide, he had not acted on his earlier hallucinations and, even when having hallucinations, he had sought help.

11. Since it was agreed that Mr Reynolds needed a safe and supported environment, he was admitted to the ISMOS Unit as a voluntary in-patient. He was allocated one of the crisis rooms across from the staff room on the

sixth floor. During dinner he seemed withdrawn and unwell. Later that evening, he was found wandering outside the building but he returned with staff to his room. At 22.00 there was a change of shift, the new staff were briefed and Mr Reynolds appeared more relaxed and spoke with them.

12. Mr Reynolds was due his medication at 22.45. At around 22.30 he broke a window in his room and fell from the sixth floor to his death.

2. *The internal investigation*

13. On 26 May 2005 an internal investigation into Mr Reynolds' death was completed by the NHS. The resulting Report recommended, *inter alia*, that the bedroom windows in the crisis rooms at the ISMOS Unit be reinforced. On 20 May 2005 the applicant's daughter wrote a letter of complaint to the Trust. On 20 June 2005 the Trust responded stating that it had reviewed the information available on the relevant date but that there had been no indication that Mr Reynolds would harm himself.

3. *The Inquest*

14. The applicant could not afford legal representation for the Inquest. She considered applying to the Legal Services Commission for legal aid and, following receipt of the Coroner's views as regards the two criteria applied by the Commission in deciding on a grant of legal aid, the applicant decided not to pursue a claim.

15. On 22 March 2005 the Inquest was opened and adjourned by the Coroner. It resumed on 21 July 2005. The applicant attended with two daughters including Ms King. The Coroner sat without a jury. He explained that the Inquest was to find the answers to four limited factual questions: who was the deceased and how, where and when did the death come about. "How" was limited to "how the cause of death arose" since an Inquest was not an opportunity to examine the broad circumstances in which the death occurred so that all questions touching thereon would be excluded as would any question of civil or criminal liability.

16. Oral evidence was given by, *inter alia*, the psychiatrist and the psychiatric nurse who assessed Mr Reynolds; by the relevant four members of staff at the ISMOS Unit; by the eye witness who saw him step through the broken window; and by the team leader of the CRHTT. The applicant gave evidence: she considered that her son had not attempted to commit suicide but rather had wished to go home and had not realised he was on the sixth floor. The applicant submitted questions to the Coroner prior to the Inquest and she and her daughters put questions to witnesses during the Inquest.

17. The Inquisition Form recorded that Mr Reynolds had been placed in the crisis room for a few days for monitoring; that just a few hours later he broke a window, climbed through it and walked off the window sill; and

that he sustained fatal injuries as a result of the fall and was pronounced dead that day. The Coroner's conclusion as to death was an "Open verdict", he explaining that, while those with schizophrenia presented a high incidence of suicide, there was insufficient evidence that Mr Reynolds intended to kill himself.

18. Since the Coroner was concerned about a psychiatric facility on a sixth floor, in July 2005 he reported the incident to the NHS Trust under Rule 43 of the Coroners Rules 1984. By letter of 11 October 2005 the NHS Trust informed the Coroner that, since an ISMOS Unit was used when the risk was low, its location on the sixth floor was not unusual. However, the windows had been reinforced and, in the longer term, there were plans to re-locate the ISMOS Unit to a two storey dwelling.

4. The applicant's claim for compensation

19. The applicant obtained legal aid and issued an action for damages under section 7 of the Human Rights Act 1998 (HRA") against the NHS Trust and the Council, arguing that they had failed to adequately discharge their duties to Mr Reynolds in breach of Articles 2, 3 and 8 of the Convention in that they had failed to ensure his appropriate placement, failed to ensure that the ISMOS Unit was safe and failed adequately to assess the suicide risk or to admit him for in-patient care. An expert report obtained by the applicant from a consultant psychiatrist for the proceedings (although not served since the action was later struck out, see below) considered that the care of Mr Reynolds fell below the required standard.

20. On 21 December 2006, the High Court decided the case of *Savage v South Essex Partnership NHS Foundation Trust* ([2006] EWHC 3562, paragraphs 33-37 below).

21. The NHS Trust and the Council served defences in March 2007. The Trust accepted that it owed a common law duty to take reasonable steps to try to prevent Mr Reynolds from taking his own life. The Council accepted that it owed a common law duty of care not to expose Mr Reynolds to a reasonably foreseeable risk of injury or harm on the premises as well as a common duty of care under the 1957 Act. However, both defendants argued that the applicant had no cause of action and that the case should be struck out since the High Court judgment in the *Savage* case had provided that one had to establish gross negligence of a kind sufficient to sustain a charge of manslaughter in order to establish a breach of Article 2 of the Convention. The applicant requested that her action be adjourned pending the appeals in the *Savage* case.

22. On 13 July 2007 the County Court delivered its judgment striking out the applicant's case pursuant to Rule 3.4 of the Civil Procedure Rules holding that there were no reasonable grounds for bringing the claim. The County Court noted that the High Court in the *Savage* case had accepted that, where the allegations were of clinical negligence, the measure of the

duty owed to both voluntary and involuntary patients was as outlined in *Powell v. the United Kingdom* ((dec.), no. 45305/99, ECHR 2000-V) and in *R (Takoushis) v. Inner North London Coroner and Another* ([2006] 1WLR 46) namely, that there had to be at least gross negligence of a kind sufficient to sustain a charge of manslaughter. The applicant had not made any such allegations:

> "It is thus clear that there is strong authority which would make it highly unlikely that any decision on appeal in the case of *Savage* would render [the Trust and the Council] liable under the provisions of Article 2."

23. In refusing the applicant's request for an adjournment, the County Court did not accept that the law relating to the treatment of voluntary mental health patients was uncertain or in a state of development which was likely to lead to a change in the law which would enable the applicant's claim to succeed. It was not persuaded that the prospect of the appeal in the case of *Savage* raised a sufficient prospect of an outcome favourable to the applicant as to justify refusing the orders sought by the defendants.

24. Two barristers, experienced in clinical negligence, human rights cases and Inquest law, advised the applicant that an appeal had no realistic prospect of success. One of these opinions was submitted to the Legal Services Commission which withdrew legal aid in August 2007.

B. Relevant domestic law and practice

1. Human Rights Act 1998 ("HRA")

25. Section 6 of the HRA makes it unlawful for a public authority to act incompatibly with Convention rights, unless it is not possible to act differently by virtue of primary legislation. A successful claim under Article 6 renders the relevant public authority liable under section 7 of the HRA and a judge has the power to award damages under section 8 of the HRA.

2. Coroners and Inquests

26. Section 8(1) of the Coroners Act 1988 ("the 1988 Act") requires a Coroner to hold an Inquest in circumstances where there are grounds to suspect that the person (a) has died a violent or an unnatural death or (b) has died a sudden death of which the cause is unknown.

27. As to the scope of an Inquest (including a resumed one), section 11(5)(b) of the 1988 Act outlines the content of the Inquisition Form (a document completed by the Inquest jury at the end of the evidence). It must set out, so far as such particulars have been proved (i) who the deceased was; and (ii) how, when and where the deceased came by his death. Rule 36 of the Coroners Rules 1984 ("the 1984 Rules") requires that proceedings be directed solely to ascertaining: (a) who the deceased was; (b) how when and

where he came by his death; and (c) the particulars required by the Registration Act to be registered concerning the death. Rule 36(2) specifically provides that neither the Coroner nor the jury shall express any opinions on any other matters. Rule 42 provides that no verdict shall appear to determine any question of criminal or civil liability on the part of a named person.

28. On 11 March 2004 the House of Lords decided (*R. (Middleton) v West Somerset Coroner* [2004] 2 A.C. 182; and *R. (Sacker) v. West Yorkshire Coroner* [2004] 1 W.L.R. 796) that the limited scope of Inquests to date was incompatible with the procedural requirements of Article 2. Using the interpretation mechanism of section 3 of the HRA, the House of Lords extended the Inquest regime so that "how" (section 11(5)(b)(ii) of the 1988 Act and Rule 36(l)(b) of the Coroners Rules 1984) was to be interpreted as meaning "by what means and in what circumstances" the deceased came by his death. Lord Bingham clarified that, however the jury's extended factual conclusions were to be conveyed, Rule 42 was not to be infringed so that there could be no finding of criminal or civil liability. While acts or omissions could be recorded, expressions suggestive of civil liability, in particular neglect, carelessness and related expressions were to be avoided.

3. Proceedings for injury and death caused by negligence

29. A person who suffers injury, physical or psychiatric, in consequence of the negligence of another may bring an action for damages for that injury. Upset and injury to feelings resulting from negligence in the absence of physical or psychiatric damage or exacerbation do not entitle a plaintiff to damages. Any personal-injury action maintainable by a living person survives for the benefit of his estate and may be pursued after his death.

30. Claims arising from a death caused by negligence are brought under the Fatal Accidents Act 1976 ("the 1976 Act") or the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"). The 1976 Act enables those who were financially dependent on the deceased to recover damages for the loss of support: the scheme is compensatory and, save for the sum of currently 10,000 pounds sterling for bereavement awarded to the spouse of a deceased or parent of a deceased child under 18 at the time of death, damages are awarded to reflect the loss of support. The 1934 Act enables damages to be recovered on behalf of the deceased's estate and may include any right of action vested in the deceased at the time of death together with funeral expenses.

4. *Relevant domestic case-law*

(a) *R (Takoushis) v. Inner North London Coroner and Another* [2006] 1WLR 46.

31. Mr Takoushis, diagnosed with schizophrenia, left a hospital where he was a voluntary patient and committed suicide. His wife challenged certain rulings of the Coroner. The Court of Appeal, following the approach of the High Court, examined, in the first place, whether those rulings were justified on the assumption that Article 2 was not engaged. The Court of Appeal did not uphold the Coroner's rulings and ordered a new Inquest.

32. The Court of Appeal went on to examine the applicability and scope of the protection of Article 2 in such cases partly because the point was evidently of some potential importance for the new Inquest which was now to be held. It accepted that simple negligence in the care of a patient resulting in his or her death was not sufficient to amount to a breach of the State's obligation under Article 2 to protect life, although the position might be different where gross negligence or manslaughter had been alleged (relying, *inter alia*, on *R (Goodson) v Bedfordshire and Luton Coroner* [2004] EWHC 2931 (Admin), itself based on *Powell v. the United Kingdom* ((dec.), no. 45305/99, ECHR 2000-V). The Court of Appeal concluded by rejecting the argument that the deceased should be considered an involuntary patient as he would have been detained had he been seen leaving the hospital: the court found that the deceased was clearly a voluntary patient and that there was an important difference between the principles applicable to those who were detained and those who were not.

(b) Savage v South Essex Partnership NHS Foundation Trust, [2006] EWHC 3562, [2007] EWCA Civ 1375 and [2008] UKHL 74

33. The deceased was an involuntary mental health patient who left an open acute psychiatric ward and committed suicide.

34. The Trust contended before the High Court that the extent of the obligations of health authorities to protect a patient's life was to be found in *Powell v. the United Kingdom* ((dec.), no. 45305/99, ECHR 2000-V) namely, that the treatment alleged amounted either to gross negligence or to manslaughter. The claimant argued, citing *Osman v. the United Kingdom* (28 October 1998, *Reports of Judgments and Decisions* 1998-VIII), that a duty to take steps to prevent a particular patient from committing suicide arose if the authorities knew or ought to have known that there was a real and immediate risk of her doing so. The claimant sought to distinguish her son's position (an involuntary patient) from that of a voluntary patient arguing that the test for Article 2 liability in *Powell* did not apply to her son and equating the duty of care owed by the State to an involuntary patient with that owed to a prisoner in the criminal justice system. The High Court expressly rejected that distinction, finding that the proper test applicable to a

breach of the substantive obligation under Article 2, in respect of both voluntary and involuntary patients where the relevant allegations were of clinical negligence, was the *Powell* test namely, that of gross negligence of a kind sufficient to sustain a charge of manslaughter (the High Court relied on the above-cited *Takoushis* judgment). The High Court struck out Ms Savage's action. In December 2007 the Court of Appeal allowed Ms Savage's appeal.

35. The appeal to the House of Lords was rejected by judgment dated 10 December 2008. Lord Rodger, giving the main judgment of the House of Lords, noted that the fundamental error in the approach of the Trust was to conceive of the *Powell* decision and the *Osman* judgment as laying down two mutually exclusive approaches whereas the Court's case-law did not contain a hint of such an approach. The principles represented by those cases related to different aspects of the Article 2 obligations of health authorities and Lord Rodger summarised the relevant obligations of the health authorities under Article 2 as follows:

> "In terms of article 2, health authorities are under an over-arching obligation to protect the lives of patients in their hospitals. In order to fulfil that obligation, and depending on the circumstances, they may require to fulfil a number of complementary obligations.
>
> In the first place, the duty to protect the lives of patients requires health authorities to ensure that the hospitals for which they are responsible employ competent staff and that they are trained to a high professional standard. In addition, the authorities must ensure that the hospitals adopt systems of work which will protect the lives of patients. Failure to perform these general obligations may result in a violation of article 2. If, for example, a health authority fails to ensure that a hospital puts in place a proper system for supervising mentally ill patients and, as a result, a patient is able to commit suicide, the health authority will have violated the patient's right to life under article 2.
>
> Even though a health authority employed competent staff and ensured that they were trained to a high professional standard, a doctor, for example, might still treat a patient negligently and the patient might die as a result. In that situation, there would be no violation of article 2 since the health authority would have done all that the article required of it to protect the patient's life. Nevertheless, the doctor would be personally liable in damages for the death and the health authority would be vicariously liable for her negligence. This is the situation envisaged by Powell.
>
> The same approach would apply if a mental hospital had established an appropriate system for supervising patients and all that happened was that, on a particular occasion, a nurse negligently left his post and a patient took the opportunity to commit suicide. There would be no violation of any obligation under article 2, since the health authority would have done all that the article required of it. But, again, the nurse would be personally liable in damages for the death and the health authority would be vicariously liable too. Again, this is just an application of *Powell*.
>
> Finally, article 2 imposes a further "operational" obligation on health authorities and their hospital staff. This obligation is distinct from, and additional to, the authorities'

> more general obligations. The operational obligation arises only if members of staff know or ought to know that a particular patient presents a "real and immediate" risk of suicide. In these circumstances article 2 requires them to do all that can reasonably be expected to prevent the patient from committing suicide. If they fail to do this, not only will they and the health authorities be liable in negligence, but there will also be a violation of the operational obligation under article 2 to protect the patient's life. This is comparable to the position in *Osman* and *Keenan*. As the present case shows, if no other remedy is available, proceedings for an alleged breach of the obligation can be taken under the Human Rights Act 1998."

36. Lord Rodger noted that it was relevant to the authorities' obligations under Article 2 that the deceased was a detained patient and he continued:

> "Any auction in the comparative vulnerability of prisoners, voluntary patients, and detained patients would be as unedifying as it is unnecessary. Plainly, patients, who have been detained because their health or safety demands that they should receive treatment in the hospital, are vulnerable ... not only by reason of their illness which may affect their ability to look after themselves, but also because they are under the control of the hospital authorities. Like anyone else in detention, they are vulnerable to exploitation, abuse, bullying and all the other potential dangers of a closed institution. *Mutatis mutandis*, the principles in the case law which the European court has developed for prisoners and administrative detainees must apply to patients who are detained. ...... The hospital authorities are accordingly responsible for the health and well being of their detained patients. Their obligations under Article 2 include an obligation to protect those patients from self-harm and suicide."

37. Baroness Hale noted the special position of detained patients and that it was not necessary to address in that case the extent of the State's operational duty to protect non-detained patients. Lord Walker and Lord Neuberger agreed with both Lord Rodger and Baroness Hale.

(c) *Rabone v. Pennine Care NHS Trust*

38. The deceased was a voluntary patient who committed suicide once released on home leave. Her parents brought a claim under the HRA and the 1934 Act, in their own right and on behalf of their child's estate. The claim under the 1934 Act on behalf of the estate for negligent care was settled by the Trust: 5,000 pounds sterling (GBP) in general damages and GBP 2,500 in funeral expenses, plus legal costs.

39. The High Court ([2009] EWHC 1827 (QB)) and the Court of Appeal (2010] EWCA Civ 698) held that there was no operational duty under Article 2 on the hospital authorities to take reasonable steps to protect the deceased against the risk of suicide because she was a voluntary patient and the remedy for allegations of clinical negligence as regards voluntary patients was an action in negligence. In any event, the parents were no longer victims for the purposes of the HRA given their settlement of the 1934 Act proceedings. The parents appealed.

40. On 8 February 2012 the Supreme Court ([2012] UKSC 2) allowed the appeal, Lord Dyson giving the main judgment. He found that the difference between voluntary and involuntary psychiatric patients was more

apparent than real, noting that a voluntary patient who was a suicide risk was taking medication which would compromise his/her ability to make an informed decision, was likely to be detained if he/she attempted to leave and, indeed, may have consented to be a patient to avoid detention. An informal psychiatric patient's position was therefore more analogous to that of the child at risk of abuse (*Z and Others v. the United Kingdom* [GC], no. 29392/95, ECHR 2001-V). Accordingly, he was in no doubt that the NHS Trust owed to the deceased patient an operational duty to take reasonable steps to protect her from a real and immediate risk of suicide. On the facts, that obligation had not been fulfilled since the decision to allow her home on leave was one that no reasonable practitioner would have made.

41. Moreover, by settling the 1934 negligence claim on behalf of the estate, the parents could not be said to have renounced their own Article 2 claim for non-pecuniary damages for bereavement to which damages they were entitled. However, negligence proceedings had not been open to them (section 1A of the Fatal Accidents Act 1976, the deceased not being a minor on death). Lord Dyson awarded each parent GBP 5,000 under Article 2 of the Convention. Lady Hale, Lord Brown, and Lord Mance delivered concurring judgments and Lord Walker agreed with the main judgment and with the added comments of the remaining judges.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 ALONE AND IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION

42. The applicant complained that she had no effective domestic mechanism whereby issues of civil liability could be determined in respect of the alleged negligent care of her deceased son and through which she could have obtained compensation for the non-pecuniary loss sustained by her including grief, loss and distress. She invoked Article 2 alone and in conjunction with Article 13 of the Convention. The parties' observations, summarised below, were filed prior to the delivery of the Supreme Court judgment in *Rabone* (paragraphs 40-41 above).

43. Article 2, in so far as relevant, reads as follows:

> "2(1) 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 of a court following his conviction of a crime for which this penalty is provided by law."

Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

44. The applicant died after introducing the present application and her daughter, Ms King, wished to pursue the application on her behalf. The Government did not make any comment. The Court considers that the conditions for striking the case out of its list of pending cases, as defined in Article 37 § 1 of the Convention, are not met and that it must accordingly continue to examine the application at Ms King's request (*Arsenić v. Slovenia* (nos. 22174/02 and 23666/02, §§ 17-19, 29 June 2006).

45. The Government maintained that the applicant had at her disposal an effective remedy pursuant to section 7 of the HRA, under the 1976 Act and/or under the 1934 Act. The applicant argued that those remedies were not available to her. The Court considers that the question of the availability of effective domestic remedies prior to the above-described Supreme Court judgment in the *Rabone* case of February 2012 is closely linked with, and should be joined to, the merits of the related complaints under Articles 2 and 13 of the Convention.

Even assuming that the *Rabone* judgment means that the applicant would now have available to her an effective remedy (an action for damages under the HRA within the time-limit for which section 7(5) of the HRA provides), the Court notes any such remedy was not clarified by the Supreme Court until over 4½ years after her original HRA action was struck out and, most importantly, until 4 years after she introduced her application to this Court. The Court does not consider that there exist exceptional circumstances which could compel the applicant to exhaust any such remedy at this point (*Baumann v. France*, no. 33592/96, § 47, 22 May 2001; *Brusco v. Italy*, no. 69789/01 (dec.), 6 September 2001; and, more recently, *Nagovitsyn and Nalgiyev v. Russia* (dec.), nos. 27451/09 and 60650/09, 23 September 2010).

46. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicants' observations

47. The applicant argued that, while a mechanism for establishing any liability and compensation was crucial to the fulfilment of the obligations under Articles 2 and/or 13, such a mechanism was not available to her.

48. In the first place, her action under the HRA was struck out on a point of law without any consideration of the evidence or the facts, the County Court finding that there was no legal basis for it given settled case-law. As pleaded by the State defendants and as found by the County Court, there was clear case-law at the time which distinguished between the positive obligation owed to detained and non-detained patients. Two legal opinions confirmed that an appeal against the County Court's decision had no prospects of success and, on receipt of one opinion, the Legal Services Commission withdrew legal aid. Nor was there any reason to appeal from the County Court following the Court of Appeal decision in *Savage*. That decision re-affirmed the distinction between the State's positive obligation to detained and non-detained patients, a distinction maintained by each relevant domestic decision thereafter. The Court of Appeal judgment in the above-cited *Rabone* case definitively precluded any argument that there was any prospect of a successful appeal from the decision of the County Court.

49. Secondly, while the Trust and the Council accepted duties of care to Mr Reynolds, they were unenforceable since the applicant, either as a claimant in her own right or on behalf of the estate, had no viable cause of action where there was no dependency claim and where the death had been instantaneous. Whether or not she was an executor of Mr Reynolds' estate (and she was not), any claim on behalf of the estate for funeral expenses would not have been viable as it would not have satisfied any cost/benefit analysis required to enable the grant of legal aid. Any damages for pre-death pain and suffering would have been minor given the instantaneous nature of the death. In short, in the absence of any pecuniary claim (a dependency claim) and where the non-pecuniary loss was limited to bereavement under the 1976 Act, the value of any such claim would be insufficient to enable the applicant to enforce the substance of a complaint regarding death.

50. Thirdly, no other mechanism (Inquest or complaints/disciplinary mechanisms) could have established civil liability and awarded damages for non-pecuniary loss for bereavement. The internal inquiry was not independent and it did not identify liability, its conclusions were limited to reinforcing glass and it did not satisfactorily address Mr Reynolds' placement in the ISMOS Unit. The Inquest could not establish any civil liability and it did not even address whether Mr Reynolds should have been placed at the ISMOS Unit. It established the immediate cause of death and not the wider causal factors (such as negligent care) which might be

contributory. The enhanced *Middleton* investigation was not considered necessary where the potential failure related only to clinical care of a non-detained patient and was not of such a character as to reach the bar for a potential finding of gross negligence.

2. The Government's observations

51. The Government argued that the applicant did not have an arguable claim of a violation of Article 2 of the Convention. She was not suggesting that the medical personnel knew or ought to have known of a risk of suicide but rather, as alleged before the County Court, that they had been negligent in their assessment and care of her son. However, even if there had been medical negligence, the *Powell* decision made it clear that this would be insufficient to establish a violation of Article 2 of the Convention.

52. Even if there were such an arguable claim, the Government pointed to a number of mechanisms which together satisfied the Article 2 obligation to implement a legislative and administrative framework to protect life.

53. In the first place, the Inquest was prompt, public and independent and the family was entitled to be legally represented. Numerous relevant witnesses were heard and were questioned by the next-of-kin. The latter could have requested the Coroner to hear further witnesses or to put additional questions. The Inquest identified and exposed to the public the circumstances surrounding his death and the persons involved.

54. Secondly, the internal inquiry further elucidated the circumstances of the death and the steps to be taken to avoid any future similar deaths.

55. Thirdly, and as to the accountability objective of the Article 2, the Government accepted that neither the Inquest nor the Inquiry determined any individual responsibility. Criminal responsibility was not alleged and there was no complaint about a failure to bring disciplinary proceedings. Moreover, the Government argued that the applicant had access to a mechanism to establish any civil liability.

56. In this respect, the applicant had access to proceedings under the HRA whereby her allegation of the State's liability under Article 2 was examined. The County Court did not strike out the case on the basis of the High Court judgment in *Savage* as the applicant claimed. The issue in *Savage* was whether the *Osman* "operational duty" applied to a mental health detainee, whereas the applicant's case amounted to a claim that ordinary clinical negligence was sufficient to establish a breach of Article 2 by the State. The County Court concluded that it was unlikely that any appeal in *Savage* would render the Trust and Council liable under Article 2 because an allegation of ordinary negligent medical care was insufficient of itself to establish a breach of Article 2 of the Convention (*Powell v. the United Kingdom*, no. 45305/99, (dec.) 4 May 2000). Accordingly, any future finding in Mrs Savage's favour by the Court of Appeal would not have changed anything for the applicant who alleged ordinary clinical

negligence. The applicant therefore had a remedy which she used and it was found that she did not have a good case under Article 2. Her HRA action demonstrated not a breach of Article 2 but compliance with it.

57. If the applicant considered that the County Court had erred, she could have appealed immediately or sought leave to appeal out-of-time following the judgments on appeal in the *Savage* case. Counsel's advice on chances of success could only exempt an applicant from exhausting a remedy when the subject was settled law but, when the applicant's case was struck out, the scope of the positive duty under Article 2 to protect voluntary mental health patients from suicide was not settled law. At the time of the County Court decision, there was no Court of Appeal or House of Lords' judgment on the issue as the Court of Appeal judgment in *Takoushis* concerned only investigative obligations. The matter was not even clear after the House of Lords' judgment in *Savage* and it was resolved by the Court of Appeal in the *Rabone* case.

58. Moreover, the applicant could have taken civil negligence proceedings. She could have applied to be an executor of the deceased's estate and brought proceedings, on behalf of the estate, as regards any claim vested in the estate at the time of death and which could have been brought by the deceased. Such a claim could have included claims of medical negligence and of a breach of an occupier's common law duty to protect (the Occupiers Liability Act 1957) and both defendants had accepted in the HRA action that they owed such duties to Mr Reynolds. Any breaches of those duties would render compensation for pecuniary and non-pecuniary loss payable, the amount of damages depending on the level of pecuniary and non-pecuniary damage sustained by Mr Reynolds as a result of the alleged breach of duty of care in accordance with the established principles of law concerning damages in tort: limited damages would be simply a reflection of limited pecuniary and non-pecuniary loss. Even if damages would not be substantial, this would not amount to a bar on obtaining a judicial determination on liability in principle or in practice, the Government referring to the above-described settlement in the *Rabone* case.

59. Finally, and as regards Article 13, the Government reiterated that the applicant had a remedy under the HRA and a breach of Article 13 of the Convention was not established just because she had been unsuccessful on the merits of that action.

3. The Court's assessment

60. The Court has examined the applicant's complaint under Article 13 in conjunction with Article 2 of the Convention. In particular, it has considered whether there is an arguable claim of a breach of Article 2 of the Convention and whether civil proceedings for establishing any liability and, if so, awarding non-pecuniary damages were available to the applicant in that respect (*Z and Others v. the United Kingdom* [GC], no. 29392/95,

§ 109, ECHR 2001-V; *Keenan v. the United Kingdom*, no. 27229/95, §§ 123-133, ECHR 2001-III; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 96-102, ECHR 2002-II; and *Bubbins v. the United Kingdom*, no. 50196/99, §§ 173/176, ECHR 2005-II).

61. As to the existence of an "arguable claim" for the purposes of Article 2, the Court notes as follows.

The applicant's son had a history of schizophrenia and was known to the health services. Having suffered a relapse of his psychotic symptoms, including voices telling him to kill himself, he was assessed as a low suicide risk and transferred as a voluntary patient by the NHS Trust to an ISMOS Unit for which the Council was responsible. At one point during the evening before he died, he was found wandering outside the ISMOS Unit and encouraged by staff to return, which he did. Moreover, the applicant's son later broke a window in the Unit and fell to his death from the sixth floor of the building occupied by the Unit. The Coroner, concerned as he was about a psychiatric facility on a sixth floor, reported the incident to the NHS Trust under Rule 43 of the Coroner's Rules 1984. The windows have since been reinforced and the long term plan is to transfer the ISMOS Unit to a two-storey building. In such circumstances, the Court considers that there is an arguable claim that the position of the applicant's son was such that an operational duty arose to take reasonable steps to protect him from a real and immediate risk of suicide and that that duty was not fulfilled.

62. As to the compensatory remedies available, it is common ground that the Inquest, while constituting a detailed examination of the circumstances of the death, could not examine individual civil liability (paragraphs 15 and 27-28 above). It was not suggested that there was any question of criminal or disciplinary responsibility in the present case. The internal inquiry held was not independent, the NHS being responsible for the Trust.

63. As to an action under the HRA on which the Government first relied, the Court recalls that the applicant's HRA action, alleging negligence and a violation of Article 2 of the Convention, was struck out under Rule 3.4 of the Civil Procedure Rules on the basis that she had no reasonable grounds for bringing the claim. The Government argued that this amounted to a rejection of the merits of her negligence case. The applicant maintained that the HRA action was a limited remedy which did not apply to her case.

The Court recalls that the Court of Appeal had found in 2005, in the above-cited *Takoushis* case which concerned allegations of negligence as regards a voluntary mental health patient, that the *Powell* decision meant that the relevant Article 2 substantive responsibility was limited to cases where gross negligence or manslaughter was alleged. The Government suggested that *Takoushis* was not clear precedent because the core dispute therein concerned the investigatory duties under Article 2. However, the Court of Appeal in *Takoushis* explained why its view on the applicability

and scope of Article 2 protection was important in that case and subsequent domestic courts did not treat as *obiter* the *Takoushis* ruling on the *Powell* substantive obligation under Article 2. On the contrary, the High Court in *Savage* later accepted that obligation as outlined in *Takoushis* and went on to apply it to a case concerning the death of an involuntary patient due to alleged negligence. The County Court therefore applied this case-law from two superior courts to the present applicant's case (death of a voluntary patient due to alleged clinical negligence) and found it clear from that case-law that the parameters of the applicant's case fell outside the scope of an action under the HRA alleging a violation of Article 2 of the Convention. Indeed the County Court considered the case-law to be so certain in these respects that an appeal in the *Savage* case did not raise sufficient prospects of success for the applicant's case as to require it to be adjourned pending the *Savage* appeal. The applicant's case was not therefore rejected as failing to disclose negligence but rather as not disclosing a cause of action under the HRA and, in particular, the County Court applied contemporary domestic case-law to the effect that she had no cause of action under the HRA about the allegedly negligent care and death of her son as he was a voluntary psychiatric in-patient.

Moreover, the Court does not accept that any purpose would have been served by the applicant lodging an appeal immediately after the County Court decision if she considered it to be erroneous or by lodging an appeal thereafter on an out-of-time basis following the appeals in the *Savage* case. While the House of Lords in the *Savage* case (2008) later confirmed the existence of an Article 2 "operational duty" to suicide-risk patients, the Court of Appeal in *Rabone* found in 2010 that any such duty did not concern voluntary psychiatric patients. It was not until February 2012 that the Supreme Court in *Rabone* definitively confirmed that an operational duty to protect could arise as regards voluntary psychiatric patients such as the applicant's son and, further, that parents would be entitled to damages for non-pecuniary loss following the death of a child in such a situation. Accordingly, while the underlying reasoning may have changed over the years, prior to February 2012 the applicant did not have an action for damages under the HRA for her non-pecuniary loss following the death of her son.

64. As to a civil action in negligence pursuant to the 1934 and 1976 Acts on which on which the Government further relied, it is noted that, in their written pleadings in the applicant's HRA action, the Trust and Council accepted that they owed common law duties of care to the applicant's son (paragraph 21 above).

65. However, it is also noted that, as the mother of an adult child and a non-dependant, the applicant would have been unable to claim damages under the 1976 Act on her own behalf. Moreover, the Court does not consider that a negligence action on behalf of the estate of her son was

available to the applicant even assuming she could have applied to be an executor of that estate and that any such award to his estate could constitute compensation for the applicant's bereavement. The survival of any such action on behalf of the deceased and in favour of his estate is governed by the 1934 Act. Given the circumstances of the applicant's son's death (which was instantaneous), there is no evidence that he inflicted physical injury on himself before the moment of his death. While it is likely that he suffered significant anguish and fear, there is no evidence that this would be regarded as psychiatric "injury" in the sense recognised by domestic law. The most therefore that could be recovered under the 1934 Act on behalf of the deceased's estate would have been the funeral expenses (as regards the 1976 and 1934 Acts, see the above-cited *Keenan* judgment, § 129 and *Bubbins v. the United Kingdom*, no. 50196/99, § 172, ECHR 2005-II). It must be concluded therefore that the applicant had no prospect of obtaining adequate compensation for the non-pecuniary damage suffered by her as a result of the death of her child (either directly or as a beneficiary of her son's estate).

66. Moreover, and contrary to the Government's argument, this lack of compensation would itself reduce access to the civil remedy. The lack of compensation for non-pecuniary damage would almost certainly have had a negative bearing on any application by the applicant for legal aid to take civil proceedings and the Government did not dispute that she could not afford legal representation or that she would have required legal aid to effectively pursue any such negligence action (the above-cited *Bubbins* judgment, § 172).

67. The Court has therefore concluded that the present applicant did not have available to her, prior to the introduction of her application to this Court, civil proceedings to establish any liability and compensation due as regards the non-pecuniary damage suffered by her on her son's death.

68. The Court therefore concludes that there has been a violation of Article 13 in conjunction with Article 2 of the Convention and, consequently, it dismisses the Government's objection as to the applicant's failure to exhaust domestic remedies.

69. It is consequently not necessary also to examine the same complaint under Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

71. The applicant claimed that she suffered bereavement and distress following her son's death which was compounded by her distress and frustration at the failure of the State to provide an adequate civil remedy. She claimed 25,000 euros (EUR) in respect of non-pecuniary damages, plus any tax or interest payable on that amount.

72. The Government argued that a finding of a violation would constitute sufficient just satisfaction. Alternatively, since her complaint concerned a procedural aspect of Article 2 only, the applicant could not, as a matter of principle, seek to recover damages for her bereavement arising from the death itself. In the alternative, the sum claimed was excessive and the Government left to the Court the assessment of any sum which it considered appropriate to award under this head.

73. The Court has found a violation of Article 13 in conjunction with Article 2 (paragraph 67 above) in that domestic law did not afford a civil remedy to the present applicant enabling any liability to be established and any appropriate redress to be obtained as regards the non-pecuniary loss sustained by the applicant on the death of her son. The Court notes that the applicant did have the benefit of a detailed Inquest which elucidated the central facts of the present case but it accepts that the lack of civil remedy likely caused her some frustration and distress so that the Court awards the applicant the sum of EUR 7,000, plus any tax that may be chargeable on this sum.

B. Costs and expenses

74. She claimed the sum of GBP 29,826.09 for the costs and expenses incurred before the Court comprising GBP 4387.34 in solicitors' fees, GBP 13,453.75 in barrister's fees and GBP 11,985.00 in Queen's Counsel's ("QC") expenses. Vouchers were submitted. The Government considered the claim excessive. They argued that it was unnecessary to brief both a barrister and a QC, that the barrister's claim for more than 35 hours of work to reply to the Government's observations was excessive, that there was no breakdown of the solicitor's and the QC's costs and that the latter's claims were excessive when viewed against the claim for the barrister's work.

75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,000 for the proceedings before the Court, plus any tax that may be chargeable on this sum.

C. Default interest

76. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits of the complaints under Articles 2 and 13 the Government's objection as to the exhaustion of domestic remedies and *declares* the application admissible;

2. *Holds* that there has been a violation of Article 13 in conjunction with Article 2 of the Convention and, consequently, *dismisses* the Government's above-mentioned objection;

3. *Holds* that it is not necessary to examine the same complaint under Article 2 of the Convention alone;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
      (i) EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage plus any tax that may be chargeable; and
      (ii) EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Lech Garlicki
Registrar	President