

POSITIVE OBLIGATION OF THE STATE TO PROPERLY VET A POLICE OFFICER BEFORE ISSUING HIM OR HER A FIREARM

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ABSTRACT

Purpose: The paper argues that Article 2 of the European Convention on Human Rights (ECHR) imposes a positive obligation on states to properly vet a police officer before issuing him or her a firearm.

Design/Methods/Approach: To explain the content of the state's obligation to properly vet a police officer before issuing him or her a firearm, the paper applies qualitative content analysis of judgments of the European Court of Human Rights selected as illustrations in the Guide on Article 2 of the ECHR (as updated on 31 August 2024) published by the Strasbourg Court.

Findings: The analysis of the judgments provided in the paper shows that the state is obliged to put in place and apply a system of adequate and effective safeguards designed to prevent police officers from making improper use of firearms. Article 2 of the ECHR also requires the state to subject the selection of agents allowed to carry a firearm to particular scrutiny. The national authorities are expected to set high professional standards within the police. As the paper explains, even a harmful action taken by a state agent outside his or her duties in certain circumstances may be imputable to the state.

Originality/Value: The findings of the paper, as summarized in the conclusion, contribute to an ongoing academic debate about the scope and content of the state's obligation to protect life under Article 2 of the ECHR. By identifying the content of the State's obligation to properly vet a police officer before issuing him or her a firearm the paper also contributes to the existing literature on police vetting process.

Keywords: right to life, positive obligation, Article 2 of the ECHR, firearm, vetting, police

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INTRODUCTION

The existence of the positive obligation to protect life under Article 2 of the European Convention on Human Rights (ECHR) is no longer an issue in the human rights literature. However, its scope and content, as well as the circumstances under which it can be triggered are still the subject of vigorous debate among the scholars. The paper contributes to this debate by providing arguments that under certain circumstances the State's failure to properly vet a police officer allowed to carry a firearm may give rise to a violation of Article 2 of the ECHR.

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It argues that Article 2 of the ECHR requires states to properly vet a police officer before issuing him or her a firearm. To support the position the paper applies a content analysis of judgments of the European Court of Human Rights (ECtHR; the Strasbourg Court) selected as illustrations in the Guide on Article 2 of the ECHR (as updated on 31 August 2024) published by the Strasbourg Court. The Guide sums up the case-law on Article 2 (right to life) and explains “the key principles in this area and the relevant precedents” (Guide, 2024), so one may consider it as a useful starting point for researching the state’s positive obligation to protect life. It informs the readers about the fundamental judgments delivered by the ECtHR. The paper identifies two judgments² (cited in the Guide) as particularly relevant for the subject under discussion (obligation to vet): the judgment in the case *Sašo Georgiev v FYR Macedonia* and that in the case *Gorovenky and Bugara v Ukraine*.³ The analysis of the judgments (underlining the fact that the state may be held responsible for actions of its police officers (agents) taken even outside their official duties) confirms the main thesis of the paper (that the state is obliged to properly vet a police officer before issuing him or her a firearm under Article 2 of the ECHR). In addition, it suggests that states may fulfill this obligation by developing an appropriate legislative and administrative framework compatible with the requirements of Article 2 in this area and implementing the legislation effectively in practice.

To explain these findings, as summarized in the conclusion, Part I of the paper describes the concept of positive obligations (key characteristics, legal basis and purpose). Part II of the paper discusses the content and scope of the state’s positive obligation under Article 2 of the ECHR to protect life, emphasizing that it should not be interpreted in such a way as to impose an excessive, unrealistic, burden on states. Finally, Part III of the paper analyses in detail the state’s obligation to properly vet a police officer before issuing him or her a firearm by referring to the case law of the European Court of Human Rights.

POSITIVE OBLIGATIONS UNDER THE ECHR: GENERAL REMARKS

The existence of positive obligations under the European Convention on Human Rights (expressed in the text and implied by the Court) in addition to negative obligations is no longer an issue in the human rights literature. The case law of the European Court of Human Rights discourages any effort to argue the opposite. It clearly reveals that since the late 1960s (the Belgian linguistic case) positive obligations have been developed by the Court under virtually all articles of the Convention (see: Rainey, McCormick & Ovey, 2021; Mowbray, 2004; Mowbray, 2012; Greer, 2006; Akandji-Kombe, 2007;), including such which require the State to take positive measures “even in the sphere of relations between individuals, if need be” (ECtHR, 1988, para. 32).

The European Court of Human Rights did not “develop a general theory of the positive obligations which may flow from the Convention” (ECtHR, 1988, para. 31), nor has it provided a formal definition of the concept of positive obligation (Mowbray, 2004; Akandji-Kombe, 2007). However, its case law helps us understand that the key characteristic of positive obligations (whether substantive or procedural) is that in practice they require states to take measures, to take action (such as to investigate a killing, to adopt legislation or to train the law-enforcement agents). It also reveals that the Europe-

2 As the European Court of Human Rights clearly established “the Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties” (ECtHR, 1978, para. 154).

3 The paper focuses on these two judgments due their particular relevance to the main subject under discussion. However, in order to explain the state’s positive obligation to protect life, and in this context to explain the content of the state’s obligation to properly vet a police officer before issuing him or her a firearm, it also refers to other ECtHR’s judgments, including landmark ones (*L.C.B. v. the United Kingdom*, *Osman v United Kingdom*, *Öneryıldız v. Turkey*, *Makaratzis v. Greece*, etc.) cited in the Guide as well.



an Court of Human Rights based the positive obligations on a particular substantive article (standard-setting provision of the ECHR) or on a combination of that article with Article 1 of the ECHR (which imposes an obligation on states “to secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention) or with general principles of European law (Akandji-Kombe, 2007; Mowbray, 2004). In any case, all of them “pursue the same goal, which is the effective application of the European Convention and the effectiveness of the rights it secures” (Akandji-Kombe, 2007, 9). As the European Court of Human Rights has reiterated many times in the context of the positive obligations “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective” (ECtHR, 1979, para. 24). One may agree with Stoyanova that the principle of effectiveness, “has a crucial role for justifying positive obligations and determining their scope” (Stoyanova, 2023, p. 11). By resorting to the concept of positive obligation, that is, by developing different types of positive obligations (substantive and procedural) the Strasbourg Court aims to guarantee effective enjoyment of rights protected by the ECHR. It uses them also to interpret the Convention (as a living instrument) in the light of the present-day conditions. Although the European Court of Human Rights has not developed a general theory of the positive obligations yet, its case law provides a useful basis for one to analyse the content (measures that states are obliged to take) and scope of each positive obligation developed by the Court, including of the state’s positive obligation under Article 2 of the ECHR to protect life.

POSITIVE OBLIGATION TO PROTECT LIFE: CONTENT AND SCOPE

It is well established in the case law of the European Court of Human Rights that Article 2 of the European Convention on Human Rights (right to life) “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction” (ECtHR, 1998, para. 36). In other words, it imposes a positive obligation on state to protect life in addition to its negative obligation to refrain from the intentional and unlawful taking of life. Such a positive obligation to protect has been found to arise in a number of different contexts (road safety, health care sector, environmental disasters, rescue operations and many others). The European Court of Human Rights has not provided an exhaustive list of sectors, but observed that it “must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake”. (ECtHR, 2013, para. 65). Consequently, the positive obligation to protect life “is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”. (ECtHR, 2013, para. 65). “In particular, the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State’s margin of appreciation” (ECtHR, 2012a, para. 33). As the European Court of Human Rights explicitly stated “there are a number of avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfill its positive duty by other means” (ECtHR, 2004a, para.107).

Following much of the human rights literature one may argue that the positive obligation of the State to protect life under Article 2 of the ECHR encompasses two aspects: a substantive aspect and a procedural aspect, namely some form of effective investigation of deaths, life-threatening injuries or disappearances. (Stoyanova, 2023; Wallace, 2019; Milenkovska, 2014; Korff, 2006). It entails “above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective prevention” (ECtHR, 2012b, para, 42). Article 2 of the ECHR requires the State to regulate all activities and situations that may pose a threat to life (with regard to level of potential risk)



and to back up the regulation by law-enforcement machinery, “which consists centrally of an effective judicial system to enforce criminal and other laws required by Article 2” (Harris et al. 2014, 206). In addition to the duty to provide a regulatory framework, states are also under obligation to take preventive operational measures to protect life.

However, “not every risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising” (ECtHR, 2013, para. 65). As the European Court of Human Rights explained “for a positive obligation to arise, 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 [or individuals] and that, if so, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (ECtHR, 2013, para. 65). The positive obligation to take preventive operational measures “has been extended beyond the protection of identified individuals at risk to the protection of the public at large in life-threatening situation” (Harris et al, 2023, 218). In any case some nexus (causation) between the harm (or the risk of harm) and the State’s failure to take preventive measures must be established. When the perpetrator (source of harm) is within the control of the State, as some authors observe, “then it is more likely that the omission to prevent the harm (or the risk of harm) that he or she has ultimately inflicted, irrespective of the identifiability of any possible victims, is considered causative” (Stoyanova, 2023, 59).

It is indisputable that police officers are within the control of the State, and the state may be held responsible for their acts or omissions. Therefore, to comply with positive obligation to protect life under Article 2 of the ECHR, and thus to avoid responsibility, states are obliged to take a number of measures to protect persons from lethal use of force by the police officers. They should put in place a legal and administrative framework defining “the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect”. (ECtHR, 2004b, para.59) and providing “a system of adequate and effective safeguards against arbitrariness and abuse of force... and even against avoidable accidents (ECtHR, 2004b, para.58). Additionally, they are required to set high professional standards within the police and ensure that police officers meet the requisite criteria, in particular by training them to assess whether or not there is an absolute necessity to use firearms and properly vet them before issuing him or her a firearm (ECtHR, 2025).

The analysis provided below explains the State’s obligations under Article 2 of the European Convention on Human Rights to properly vet a police officer before issuing him or her a firearm.

OBLIGATION TO PROPERLY VET A POLICE OFFICER BEFORE ISSUING HIM OR HER A FIREARM

As noted in the introduction, the paper uses two cases determined by the ECtHR to explain the state’s obligation to properly vet a police officer before issuing him or her a firearm. The first case, *Gorovenky and Bugara v Ukraine*, concerns a police officer D. (deputy head of the criminal investigation department Pyatykhatky District Police Office) who, while off duty, deliberately killed two persons with the police gun which he carried on him at all times (ECtHR, 2012, para.7). The second case, *Sašo Georgiev v FYR Macedonia*, concerns a police reservist⁴, R.D., who left the place of duty (the police

4 The incident took place in 2002 when the country was facing the immediate consequences of the 2001 armed conflict (see Milenkovska & Taševska Remenski, 2016), so one may understand why police reservists were engaged in the police. According to the Internal Affairs Act, as in force at that time, they were regarded as State officials during their period of service (ECtHR, 2012b).



station) without informing his superiors (without authorization) and went to a bar where, while intoxicated, unintentionally pulled the trigger of his service gun and injured one person (put his life at risk; life-threatening injury). The incident described in the second case took place in 2002 when the country was facing the consequences of 2001 armed conflict (see Milenkovska & Taševska Remenski, 2016)

The ECtHR found a violation of Article 2 of the ECHR (positive aspect) in both cases, and thus supported the position that under certain circumstances – such as breach of the existing domestic regulations concerning issuing a gun to a police officer by the competent authorities or state's failure to establish a system of adequate and effective safeguards (including during recruitment) designed to prevent police officers from making improper use of service gun – a state may be held responsible for actions of its police officers (agents) taken even outside their official duties (see, for example, ECtHR, 2012b, para. 48). The decision whether the responsibility can be imputed to the state or not depends, in each case, on the totality of the circumstances and the nature and circumstances of the conduct in question (see, ECtHR, 2012b, para. 48).

In the case *Gorovenky and Bugara v Ukraine* the applicants complained that “by failing to supervise the keeping and use of firearms by police officer D. the State had not complied with its positive obligations as provided in Article 2 of the Convention. However, these conclusions had been ignored by the national courts in the civil proceedings for compensation,” (ECtHR, 2012a para, 25, 37). The national court in the proceedings “held that no causal link existed between the failure of the police officers to comply with the law in force and correctly assess the case when allowing their subordinates to carry a weapon, and the lethal incident involving this subordinate” (ECtHR, 2012a, para. 37).

In contrast, the European Court of Human Rights identified a causal link between the failure and the incident. When assessing the circumstances of the case the Court made several important observations (based on police internal investigation launched after the incident, special ruling of the Regional Court “informing the head of the Regional Police Office of serious deficiencies in the activities of the Pyatykhatky District Police Office” (ECtHR, 2012a, para. 14) and relevant domestic law). First, it observed that the superiors of the police officer “had failed to appropriately assess his personality and, despite previous troubling incidents involving D. [dismissed from the position of section commander for alcohol abuse when studying at police college; disciplinary offences; alcohol abuse], had allowed him to carry a weapon, which had led to the incident in question” (ECtHR, 2012a, para. 35). Although he was known to abuse alcohol, they “had not withdrawn his police gun in due time” (ECtHR, 2012a, para. 10). Second, it noted that “the national law expressly forbids issuing guns to police officers who do not have appropriate equipment for their safe storage”, and that it was acknowledged by the internal investigation that it had never been checked where D. had stored his gun at home” (ECtHR, 2012a, para. 36). Finally the Court observed that “in particular the absence of a safe storing place could be the reason for D.'s carrying the gun with him at all times while on and off duty, which factored into the lethal outcome of D.'s quarrel with his victims (ECtHR, 2012a, para. 36).

These observations of the Court clearly reveal that authorities within the District and Regional Police Offices failed to take appropriate measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk to human lives. So, the European Court of Human Rights applied the general principles established in its case law on positive obligation to protect life under Article 2 of the ECHR to the circumstances of the case. And, it found a violation of the right to life by Ukraine – summarizing in its concluding remarks that “the police officer, who deliberately shot two persons with his police gun, was issued with the gun in breach of the existing domestic regulations, since it was not checked where he would be keeping it when off duty, and his personality was not correctly assessed in the light of his previous history of disciplinary offences” (ECtHR, 2012a, para. 39). The following two elements played a significant role in its reasoning: a) “the State's duty to safeguard



the right to life must be considered to involve the taking of reasonable measures to ensure the safety of individuals and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim” (ECtHR, 2012a, para. 34); b) “states are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria. In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny” (ECtHR, 2012a, para. 38).

The European Court of Human Rights reiterated the same position in the second case under discussion in this paper, the case of Sašo Georgiev v. FYR Macedonia. In this case, “the applicant complained under Article 2 of the Convention that he had been the victim of a life-threatening action taken by R.D., a State official” (ECtHR, 2012b, para. 28), a police reservist, and argued that the state should be held responsible for his action. The domestic courts did not establish State responsibility for the damage suffered “on the ground that the State did not have the necessary capacity to be sued because R.D. had not been acting in an official capacity but rather as a private person, and the damage had not been caused in the course of or in connection with the performance of his duties” (ECtHR, 2012b, para. 46). In contrast, the European Court of Human Rights, after assessing the totality of the circumstances and considering the nature and circumstances of the conduct in question, held the State responsible despite the fact that the harmful action was taken by a police reservist outside his duties. The Court accepted that “the authorities could not objectively have foreseen the applicant’s insubordinate behavior and his subsequent action in the bar” (ECtHR, 2012b, para. 50). However, the Court took into consideration the State’s obligation “to put in place and rigorously apply a system of adequate and effective safeguards designed to prevent its agents, in particular temporary mobilised reservists, from making improper use of service weapons provided to them in the context of their official duties” (ECtHR, 2012b, para. 50). And, in the context of this obligation it noted the fact that the Government had not informed the Court of any regulations in force in this respect (ECtHR, 2012b, para. 50). In addition, the European Court of Human Rights criticized the provision of the national Internal Affairs Act, “which required that State agents – as R.D. was – perform their duties “at all times, whether on or off duty” (ECtHR, 2012b, para. 50). According to the Court “the application of this provision had obvious benefits for society, but it also involved some potential risks. The permanent engagement of State agents as police officers required that they always carry their service weapon in order to exercise their duties” (ECtHR, 2012b, para. 50).

It follows from the foregoing that the European Court of Human Rights identified certain deficiencies in the national legal framework relevant for the circumstances of the case. It took them into consideration when assessing the state’s compliance with Article 2 of the ECHR. Additionally, it took into consideration the fact that “the Government had not informed the Court whether any assessment was made by the national authorities as to whether R.D. was fit to be recruited and equipped with a weapon” (ECtHR, 2012b, para. 52). And, “in these circumstances it considered that his harmful action must be imputable to the state” (ECtHR, 2012b, para. 52). The Court did not find evidence that the national authorities subjected the selection of agents allowed to carry such firearms to particular scrutiny as Article 2 of the ECHR requires.

One may conclude, based on the Court’s judgment, that in the case of Sašo Georgiev v. FYR Macedonia like in the case of Gorovenky and Bugara v Ukraine, the state failed to properly vet a police officer/reservist before issuing him a firearm, and thus was held responsible for violation of the right to life as protected by Article 2 of the Convention. The analysis of the judgments supports the position that



positive aspect of the article requires state to protect life by properly vetting a police officer before issuing him or her a firearm.

The European Court of Human Rights did not explain the vetting process, nor did it provide exhaustive list of measures that the state is obliged to take to properly vet a police officer. However, notwithstanding the fact that “the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State’s margin of appreciation (ECtHR, 2012b, para. 33), one may identify certain steps that the State is expected to take to avoid being held responsible for violation of the right to life based on the analysis of the Court’s judgments. Above all the State has to put in place a legislative and administrative framework designed to provide high professional standards within its law-enforcement systems and ensure that the persons serving in these systems meet them (see ECtHR, 2012b). This framework must ensure that selection of agents (including police reservists) allowed to carry firearms will be subjected to particular scrutiny (the Court endorsed this standard but it did not provide further elaboration). In particular, it must provide effective protection of lives, by requiring the national authorities to make an assessment during the selection that each agent is fit to be recruited (selected) and equipped with a firearm (correctly assess the personality of each agent; establish that he or she satisfies the criteria of the necessary technical firearm training; conduct a background check, *inter alia* check his or her previous history of disciplinary offences). Superiors within the police are expected to follow (monitor, control) the work of subordinates, as well as supervise their behavior when they are off duty, and respond to any incident or disciplinary offence, including by withdrawing the police gun in due time if necessary (for example in a case of alcohol abuse).

Besides putting in place a legal framework which guarantees that a police officer will be properly vetted before issuing him or her a firearm, the state is obliged to implement rigorously the legislation in practice, “in a manner which is effective to protect lives” (Harris *et al*, 2023, 210). Any failure to properly vet a police officer must be established and those at fault held accountable, which implies that the state must have in place an effective independent judicial system. The European Court of Human Rights has reiterated many times so far in different circumstances that the legal framework concerning protection of right to life must “be backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions” (ECtHR, 1998, para. 115).

It follows that the European Court of Human Rights suggests that State’s failure to properly vet a police officer before issuing him or her a firearm exposes the lives of those within its jurisdiction at risk of police misconduct. Much research on police accountability conducted so far support the same position that police vetting during the police recruitment process (pre-hiring screening) and thereafter (after the employment; after issuing the service weapon) is an important tool that the State can use to prevent police misconduct (Cubitt, 2023; Huff, White, & Decker, 2018; Kane & White, 2009; Simpson & Kirk, 2023). In this context, some scholars attempt to understand and explain factors that could improve this process. For instance, Cubitt (2023) argues that police intelligence, and criminal records data should be integrated into vetting processes. The European Court of Human Rights has not explained the vetting process (has not introduced standardized vetting procedure). However, it has established that police vetting should be a continuous process and identified certain steps that authorities are expected to take in order to properly vet a police officer before issuing him or her a firearm (including background check), and thus meet the requirements of Article 2 of the ECHR. The states parties to the ECHR are obliged to comply with the Convention’s requirements, so national authorities, experts and scholars in these countries should take them into account when dealing with the question of police vetting.



CONCLUSION

The analysis of the case law of the European Court of Human Rights provided in this paper confirmed the thesis that Article 2 of the European Convention on Human Rights (positive limb) requires states to properly vet a police officer before issuing him or her a firearm. Above all states are expected to put in place a legislative and administrative framework compatible with the requirements of Article 2 in this area, but also to rigorously implement the legislation in practice. They must set high professional standards within the police and ensure that all police officers meet them. The selection of agents (including police reservists) allowed to carry firearms must be subjected to particular scrutiny. National authorities must make an assessment during the selection that each agent is fit to be recruited (selected) and equipped with a firearm. To avoid being held responsible for the violation of Article 2 of the ECHR states are expected to incorporate the following elements in the vetting process: (i) a standardized vetting procedure (assessment of personality, psychological assessment, disciplinary record, technical firearm training; background check); (ii) record-keeping and audit trails; (iii) supervision of the police officers' behavior even when they are off duty and periodic reassessment of suitability (iv) mandatory temporary withdrawal of firearms in risk situations, such as in a case of alcohol abuse; and (v) clear rules for off-duty carrying and storage of the service weapon.

Of course, the European Court of Human Rights did not provide exhaustive (closed) list of measures that states have to take to comply with their obligation to properly vet a police officer before issuing him or her a firearm. It is well established that states enjoy a margin of appreciation in determining the steps to be taken to ensure fulfillment of positive obligations under the ECHR.

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