Human Rights and State Accountability for Fire Safety in Blocks of Flats

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Abstract

The second anniversary of the Grenfell Tower fire has come and gone, and yet it has been estimated that as many as 200,000 people in the UK are still living in buildings with major fire safety defects. Some of these blocks are wrapped in flammable cladding, as was Grenfell Tower, but many blocks have other fire safety risks, both known and unknown, for which there exists only limited data. With inadequate recourse through private law for most of those affected, this paper asks whether human rights law offers an effective avenue for redress. This paper illustrates the UK government's failure to implement an effective regulatory system for the building and refurbishment of high-rise buildings (especially in relation to combustible cladding systems) and considers whether this failure constitutes an ongoing violation of various rights under the European Convention on Human Rights: Articles 2, 3, 8 and Article 1 Protocol No. 1 ("A1P1). In doing so, it is submitted that current remediation measures and piecemeal reforms do not go far enough to discharge the state's positive obligation to preserve life.

Keywords

Human rights – fire safety – Grenfell – Systemic Failure – Positive Obligations.

1. Introduction

> "The Grenfell Tower fire represents the greatest loss of life in a residential fire in a century. It shattered the lives of many people and shook the trust of countless more in a system that was intended to ensure the most basic human need of having a decent and safe place to live."[1]

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[1] Minister of Housing, Communities & Local Government, *Building a Safer Future: Proposals for Reform of the Building Safety Regulatory System* (June 2019) 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806892/BSP_consultation.pdf> accessed 7 June 2019.

Building a Safer Future: Proposals for reform of the building safety regulatory system

> "Everyone has the right to life and the right to safe, adequate housing, but the residents of Grenfell Tower were tragically let down by public bodies that had a duty to protect them."[2]

David Isaac, Chair of the Equality and Human Rights Commission

The terrible events of 14th June 2017, when fire ripped up the sides of the 24-storey Grenfell Tower in the Royal Borough of Kensington and Chelsea, were shocking. As a result of the fire, 72 people died and many more residents were injured and displaced.[3] Attention quickly turned to the recent refurbishment of Grenfell Tower and the external cladding that had been installed there. It was this cladding that appeared to explain the fire's devastating spread. Soon, broader questions were being asked about fire safety: might other buildings be similarly at risk? In turn, this led to a programme of testing to identify other high-rise residential buildings at risk with the same type of aluminium composite material ("ACM") cladding. Two years on, ACM cladding is now thought to affect 433 high-rise residential buildings.[4] But it has also emerged that the scale of fire-safety risks goes far beyond ACM cladding.[5] There are risks of external fire spread with different types of flammable cladding,[6] as well as with some types of insulation that is used behind the cladding. Further, the risk to life caused by fire is amplified due to inadequate fire doors, cramped and singular exits, poor compartmentalisation and fire breaks, and the lack of effective sprinkler systems.[7] Very recent events show that the focus on "high-rise" is also too restrictive. There is specific government guidance about materials to be used above 18 metres, but in June 2019, shortly before the second anniversary of Grenfell, a fire tore across a shorter block of flats in Barking.[8] The questions that this article explores are whether, adapting the words of David Isaac, residents in unsafe housing have been let down by public bodies, and whether there is anything that residents can do about this by using human rights law.

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[2] EHRC, 'Watchdog Confirms Grenfell Breached Human Rights Laws' (Equality and Human Rights Commission, 13 March 2019) <https://www.equalityhumanrights.com/en/our-work/news/watchdog-confirms-grenfell-breached-human-rights-laws> accessed 11 June 2019; K Monaghan, J Pobjoy, I Buchanan, and M Etienne, 'Equality and Human Rights Commission Submissions Following Phase 1 of the Inquiry' (Equality and Human Rights Commission, 25 January 2019) <https://www.equalityhumanrights.com/sites/default/files/grenfell-inquiry-phase-1-submissions-january-2019.pdf> accessed 29 May 2019.

[3] A O'Hagan, 'The Tower' (London Review of Books, 7 June 2018) <https://www.lrb.co.uk/v40/n11/andrew-ohagan/the-tower> accessed 29 September 2019.

[4] Ministry of Housing, Communities & Local Government, *Building Safety Programme: Monthly Data Release* (31 March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793799/Building_Safety_Data_Release_March_2019.pdf> accessed 6 June 2019.

[5] M Smith, 'Grenfell Cladding Fears for 1,687 Building Facades in the UK' *The Mirror* (London, 29 January 2019).

[6] For example, see defects involved in *RG Securities (No 2) Ltd v Leaseholders of St Francis Tower* (First-Tier Tribunal Property Chamber, 20 December 2018) CAM/42UD/LDC/2018/0015; N Barker, 'Government awards HPL cladding test contract' (Inside Housing, 9 May 2019) <https://www.insidehousing.co.uk/news/news/government-awards-hpl-cladding-test-contract-61345.> accessed 9 June 2019.

[7] Secretary of State for Housing, Communities & Local Government, *Building a Safer Future Independent Review of Building Regulations and Fire Safety: Final Report* (Cm 9607, 2018) 5.

[8] P Apps, 'Twenty flats destroyed in huge Barking flat fire' (Inside Housing, 10 June 2019) <https://www.insidehousing.co.uk/news/twenty-flats-destroyed-in-huge-barking-flat-fire-61835> accessed 11 June 2019.

The impact of these failings on those living in affected blocks is enormous. There is the obvious concern for personal safety – will they get out safely if there is a fire? – and for personal belongings. For flat "owners" there are also enormous financial worries. Flats in England and Wales are bought as (very) long leases, often 999 years,[9] and the wording of these leases will almost always make the leaseholders (the flat owners) liable to pay for any remediation work and interim fire safety measures.[10] These bills can be huge, running into many thousands of pounds, often five figure sums. Failure to pay can lead to forfeiture (loss of the lease and the home), and bankruptcy. Flats have effectively become non-sellable as lenders refuse to grant mortgages to buy flats in non-remediated buildings, flat values have therefore plummeted, and there are stories of leaseholders being unable to move, to take up new employment opportunities, or to start a family. In the majority of cases, leaseholders have also been unable to force the building owner (the freeholder) to fix the fire safety issues.[11] In terms of private law routes, perhaps surprisingly, it may not be possible for leaseholders to use the lease to compel the freeholder to fix the building, and pursuing potential claims against builders, developers, and so on will be extremely difficult. Further, in most cases it is too late to bring a claim due to the short (and unrealistic) limitation period of 6 years.[12] The government has repeatedly argued that building owners and developers should "do the right thing" and replace flammable cladding and insulation without cost to leaseholders. Some progress has been made, but the majority of buildings remain at risk. Following earlier announcements in May 2018 of £400 million funding being made available to facilitate ACM remediation in the social housing sector,[13] the government announced in May 2019 that a similar £200 million fund would be available for private blocks.[14] The hope is that this will speed up remediation,

[9] For this reason, "ownership" is a contested term in this context. A simple explanation of leasehold ownership of flats is available here: S Bright, 'Part 1: Building Owners and the Cladding Problem: Some Basic Land Law' (Housing After Grenfell Blog, 20 February 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/02/part-1-building-owners-and-cladding-problem.> accessed 29 May 2019.

[10] See, S Bright, 'The Green Quarter Decision: Leaseholders Have to Pay' (Housing After Grenfell Blog, 30 July 2018) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2018/07/green-quarter-decision.> accessed 29 May 2019. This is not due to special lease provisions for fire safety but because most leases are drafted on the basis that landlords can recover costs for building maintenance etc.

[11] S Bright, 'Getting the Cladding Replaced' (Housing After Grenfell Blog, 20 July 2018) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2018/07/getting-cladding-replaced> accessed 12 May 2019. See also, H Carr, D Cowan, E Kirton-Darling, and E Burtonshaw-Gunn, 'Closing the Gaps: Health and Safety at Home' (Shelter Report, November 2017), <https://england.shelter.org.uk/__data/assets/pdf_file/0010/1457551/2017_11_14_Closing_the_Gaps__Health_and_Safety_at_Home.pdf> accessed 9 May 2019.

[12] S Bright, C Bull, 'Limitation Periods: How Much Time is There to Bring a Claim?' (Housing After Grenfell Blog, 22 May 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/05/limitation-periods> accessed 8 August 2019.> accessed 23 May 2019.

[13] Minister for Housing, Communities & Local Government Press Release, 'Government releases funding to replace unsafe cladding' (17 October 2018) *Government* <https://www.gov.uk/government/news/government-releases-funding-to-replace-unsafe-cladding> accessed 8 June 2019.

[14] HC Deb 9 May 2019, vol 659, col 688 (James Brokenshire MP): "First and foremost, this fund is about public safety. It will allow remediation to happen quickly, restore peace of mind and allow residents living in these blocks to get on with their lives. It will also protect leaseholders from bearing the cost. Building owners or those responsible for fire safety should prioritise getting on with the work necessary to make their buildings permanently safe. The new fund, which is estimated at £200 million, will cover the full cost of remediating the unsafe ACM cladding systems in privately owned high-rise residential buildings. This funding is being provided entirely for the benefit of the leaseholders in the buildings." Details of the fund are available here:

but it is too limited (in amount *and* scope) to address the extent of the problems.[15] Leaseholders in buildings not covered by this fund are now claiming they are losers in the "cladding lottery"; and indeed, the toll on leaseholders is stark. A recent mental health survey has reported "a deeply worrying trend of depression, anxiety and suicidal thoughts, as flammable cladding remains attached to their buildings", with 65.8% of leaseholders' mental health being "hugely affected".[16] As this evidence highlights, fire safety fears are affecting leaseholders' autonomy, mental health, and financial stability.

An Independent Public Inquiry has been set up to examine the circumstances leading up to and surrounding the fire at Grenfell Tower but the full report from this is still some way off.[17] Even before the Inquiry publishes its report it is clear that the victims of the Grenfell Tower fire were, as David Isaac states, let down by public bodies who had a duty to protect them. As the Equality and Human Rights Commission ("EHRC") and others have claimed, this was a violation of their human rights and the blame ultimately "lies with the authorities".[18] The European Court of Human Rights ('ECtHR/Strasbourg Court') has on several occasions found there to be a violation of the European Convention on Human Rights ('ECHR') where the act or omissions of public bodies have resulted in the loss of life.[19] This paper asks whether there can be a violation of Convention rights when a loss of life has not yet occurred, but the available evidence - from past events, most notably Grenfell, and a defective health and safety system - points overwhelmingly towards a real and imminent risk of lives being lost.[20]

The question of a building's ownership can have considerable consequences for the application of Convention rights. It is unlawful for a public body, such as the Royal Borough of Kensington and Chelsea, to act in a way which is incompatible with a Convention right.[21] This is known as the doctrine of "direct effect". As hundreds of the blocks that continue to pose fire safety risks are not owned or managed by public bodies, residents in these blocks will face particular hurdles when seeking human rights remedies. Private freeholders and management companies are not public bodies, nor can they reasonably be said to be "performing functions of a public nature".[22] The application of Convention rights to disputes between private parties,

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<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818168/Private_sector_ACM_cladding_remediation_fund.pdf> accessed 7 August 2019.

[15] S Bright, 'The Government's Rescue Plan and the Unanswered Questions' (Housing After Grenfell Blog, 15 May 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/05/government-rescue-plan-unanswered-questions> accessed 6 June 2019.

[16] P Apps, 'Revealed: the mental health trauma of residents in private blocks with dangerous cladding' (Inside Housing, 26 April 2019) <https://www.insidehousing.co.uk/insight/insight/revealed-the-mental-health-trauma-of-residents-in-private-blocks-with-dangerous-claddingi-61169> accessed 6 June 2019; P Apps, 'The cladding scandal is everybody's fight' (Inside Housing, 10 May 2019) <https://www.insidehousing.co.uk/comment/the-cladding-scandal-is-everybodys-fight-61326> accessed 10 May 2019.

[17] The Inquiry has been separated into two phases. Phase 1 focuses on the factual narrative of the events on the night of 14 June 2017. Hearings for Phase 1 began on 21 May 2018, and concluded on 12 December 2018. The Chairman is now in the process of drafting his Phase 1 Report, publication of which will be in October 2019. Phase 2 of the Inquiry is focusing on the remainder of the list of issues and hearings are expected to begin in early 2020, following which the final report will be written and subsequently published.

[18] EHRC (n 2); G Van Bueren, 'The Grenfell Disaster and the Right to Life' *The Times* (London, 22 June 2017); EHRC, 'Following Grenfell: The Right to Life" (August 2018) <https://www.equalityhumanrights.com/sites/default/files/following-grenfell-the-right-to-life_0.pdf> accessed 7 June 2019.

[19] *Öneryildiz v Turkey* (2005) 41 EHRR 20; *Fadeyeva v Russia* (2007) 45 EHRR 10.

[20] Minister of Housing, Communities & Local Government (n 1).

[21] HRA 1998, s 6.

[22] See, *YL v Birmingham City Council* [2007] UKHL 27.

known as "horizontal effect", has been subject to considerable disagreement.[23] The courts are not yet willing to accept the application of Convention rights to wholly private disputes.[24] As such, residents in private blocks will struggle to demonstrate that there has been a *direct* interference with their Convention rights either by the state or by freeholders. Any private leaseholder's complaint will instead fall to be analysed in terms of the *positive* duty on the UK government to take reasonable and appropriate measures as a regulator to secure the enjoyment of their human rights.[25] We cannot allow the shattering consequences of Grenfell to be repeated. Our purpose is to show that human rights law provides a legal tool for residents to compel government action in both socially and privately owned blocks.

Part 2 explains the regulatory landscape for construction and building safety in England and Wales. It demonstrates systematic inadequacies in relation to the current regulatory model for building safety. Part 3 sets out the application and effect of the ECHR, before turning to consider the Convention rights that are engaged by fire safety risks in high-rise blocks.[26] Early understandings of Convention rights tended to focus "not with what a state must do, but with what it must not do; that is, with its obligation to refrain from interfering with the individual's rights".[27] Over time, however, the ECtHR and domestic courts have come to recognise that human rights often entail positive duties on the state. This means that the state may be answerable if there is a regulatory failure or if it has failed to protect against a known and specific risk. The UK government has positive obligations under Articles 2 (the right to life), 3 (the right to not be subjected to inhuman or degrading treatment), 8 (the right to respect for private and family life, and the home) and A1P1 (the right to peaceful enjoyment of possessions). It has been suggested by the Equality and Human Rights Commission and several other commentators[28] that the loss of life at Grenfell violates Article 2. Given what is now known about the fire safety regulatory framework and that the positive obligation "indisputably" applies when there is a risk that life may be lost,[29] it is also arguable that there is on-going violation in relation to residents still living in unsafe blocks. The impact on the health and wellbeing of those living in blocks at risk also means that for many individuals their Article 8 (and possibly Article 3) rights have also been breached. In Part 4 we discuss how individuals living in unsafe blocks may come to realise their Convention rights through the domestic and Strasbourg courts. Although it will not be easy for occupiers to bring claims, the government has a duty to address the clear market and system failure, particularly when it has contributed to that failure.

First, we explain how the state is involved with building safety in England and Wales, and what was known about risks prior to the Grenfell Fire.

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[23] See, A Williams, 'Strasbourg's Public-private Divide and the British Bill of Rights' (2015) 6 European Human Rights Law Review 617.
[24] *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587 [12], [68], and [101].
[25] See, *Fadeyeva* (n 19) [89].
[26] *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1050, ETS 5 ('ECHR').
[27] JG Merrill, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 103.
[28] EHRC (n 2), states *inter alia* that: "Local authorities and public services failed their human rights obligations to protect life and provide safe housing"; Monaghan, Pobjoy, Buchanan and Etienne (n 2) para 50: 'The [Equality and Human Rights] Commission considers that the evidence demonstrates that the State knew, or ought to have known, of the risk to life posed by the cladding at Grenfell Tower. There have been a significant number of warnings raised in the past that have not been acted upon.'
[29] *Öneryildiz* (n 19) [90].

2. State Responsibility for Building Safety

The regulatory landscape for construction and building safety in England and Wales is complex,[30] but the two key mechanisms are the Building Regulations and building control inspection.

A. Building Regulations and Cladding Systems

Since the Building Act 1984, a "principle-based" regulatory approach has been adopted to building construction. This replaced a system which involved following much more detailed, prescriptive rules.[31] Under the "principle-based" method the focus is on outcomes and it is for developers and other professionals to ensure that the outcomes are compliant with these principles. The key provision is now contained in the Building Regulations 2010 where the simple principle in Schedule 1, part B4 provides that "the external walls of a building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building."[32] Building Regulations are supplemented by government guidance in the form of Approved Document B ("ADB"); this explains how to meet the requirements of the Building Regulations but is non-prescriptive and acknowledges that there are alternative ways of achieving compliance.[33]

Since Grenfell there has been controversy over whether the various cladding systems in use, including ACM, comply with the Building Regulations, particularly in relation to how a crucial paragraph of ADB (para 12.7) is interpreted.[34] In response to the Inquest into the Lakanal House fire the Assistant Deputy Coroner wrote to the then Secretary of State for Communities & Local Government (Eric Pickles MP), setting out that "AB D is a most difficult document to use" and that there remained "uncertainty about the scope of inspections for fire risk assessment purposes which should be undertaken in high rise residential buildings".[35] The response letter from Eric Pickles demonstrates an unwillingness to accept the severity of the ongoing risks combined with a disregard for the opaque nature of the existing regulatory system. To Pickles, "the design of fire protection in buildings is a complex subject and should

[30] The regulatory framework differs in Scotland.
[31] What had been 306 pages of Building Regulations was then reduced to 24; P Apps, 'Was the cladding legal' *Inside Housing* (London, 23 March 2018); S Hodkinson, *Safe as Houses* (Manchester University Press 2019).
[32] The Building Regulations 2010, Approved Document B: Fire Safety, B4(1).
[33] The Building Regulations 2010, Approved Document B.
[34] The Building Regulations 2010, Approved Document B, Vol 2:2006 para 12.7 'In a building with a storey 18m or more above ground level any insulation product, filler material (not including gasket, sealants and similar) etc. used in the external wall construction should be of limited combustibility […].'; P Apps, "Who's been signing off Grenfell-style cladding? (Inside Housing, 8 March 2019) <https://www.insidehousing.co.uk/insight/insight/whos-been-signing-off-grenfell-style-cladding-read-our-full-investigation-60498> accessed 29 May 2019; A Chapman, "A battle over words: is there 'filler' in ACM cladding" (Housing After Grenfell Blog, 6 March 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/03/battle-over-words-there-filler-acm-cladding> accessed 29 May 2019 and J Bessey, "Cladding: combustibility, terminology and Building Regulations" (Housing After Grenfell Blog, 8 September 2018) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2018/09/cladding-combustibility-terminology-and-building-regulations> accessed 29 May 2019.
[35] Letter from Frances Kirkham (Assistant Deputy Coroner) to Eric Pickles MP (28 March 2013) 2-3 <https://www.lambeth.gov.uk/sites/default/files/ec-letter-to-DCLG-pursuant-to-rule43-28March2013.pdf accessed> accessed 9 June 2019.

remain, to some extent, in the realm of professionals."[36] What this response ignores is that, within the profession, there are differing interpretations as to whether or not the wording in para 12.7 - which requires "insulation product, filler material (not including gaskets, sealants and similar) etc." to be of limited combustibility - covers the "core", which is the filling between the two aluminium panels in ACM. The term "limited combustibility" has a precise and technical meaning but for non-experts can be thought of as material that has been shown through various tests to have a greater resistance to fire spread. It is the core in some cladding systems which can be highly combustible; as Peter Apps wrote in *Inside Housing*, "[…] the plastic in the middle will burn like solid petrol in the event of a fire".[37] The government, post-Grenfell, has stated that para 12.7 "applies to any element of the cladding system, including, therefore, the core of the ACM";[38] and therefore to comply with ADB this should only have been used if of "limited combustibility". Many experts disagree with this reading and, therefore, do not accept that the government's guidance in para 12.7 required ACM to be of limited combustibility.[39] Which interpretation is correct, and the answer to that question, will be critical when it comes to some issues of liability and responsibility, and feeds into the more specific question of whether the ACM used on Grenfell Tower itself complied with ADB. For Grenfell, this will not be formally answered until the second stage of the Grenfell Tower Inquiry is complete and this is still some time off. *Inside Housing*, a specialist housing journal that has carried out detailed investigations into high-rise fires, claims that it is the ADB guidance that is "a major – if not *the* major – part of the reason why ACM is so widely used".[40]

A decision on Grenfell will not, however, be determinative of many of the other systems, combining differing types of cladding, insulation, and fixing. Industry experts argue that ADB has failed to keep pace with cladding technology; what may have worked for solid products does not work for composites with extremely flammable interiors.[41] In particular, the requisite test requires only the "surface" of the panel to be fire resistant. There has been less confusion over insulation, which ADB makes clear must be of "limited combustibility".[42] Nonetheless, many buildings have used non-compliant insulation, including Grenfell itself,[43]

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[36] Letter from Eric Pickles MP to Frances Kirkham (Assistant Deputy Coroner) (undated) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/205567/Annex_B_-_SoS_DCLG_Rule_43_response.pdf> accessed 12 June 2019.

[37] Apps (n 16).

[38] Letter from Melanie Dawes to Local Authority Chief Executives and Housing Association Chief Executives (22 June 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621449/170622_letter_to_LAs_and_HAs.pdf> accessed 9 June 2019; P Apps, S Barnes and L Barratt, 'The Paper Trail: the Failure of Building Regulations' (Inside Housing, 23 March 2018) <https://social.shorthand.com/insidehousing/3CWytp9tQj/the-paper-trail-the-failure-of-building-regulations > accessed 11 June 2018, cites: 'The government is playing Humpty Dumpty with words' says Mr Tarling. 'They are trying to cover up the fact that the rules weren't tight enough in the first place'. See also, J Bessey, 'Cladding: combustibility, terminology and Building Regulations' (Housing After Grenfell Blog, 8 September 2018) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2018/09/cladding-combustibility-terminology-and-building-regulations> accessed 29 May 2019.

[39] Chapman (n 34) contrast with Bessey (n 34)

[40] Apps (n 34).

[41] ibid.

[42] The Building Regulations 2010, Approved Document B, para 12.7.

[43] Dr Barbara Lane's evidence to the Grenfell Inquiry states that she had not seen tests to demonstrate the Celotex insulation used 'has the necessary fire performance of limited combustibility' to satisfy ADB 12.7 (11.11.16 and see Table 11.7): <https://www.grenfelltowerinquiry.org.uk/evidence/dr-barbara-lanes-expert-report> accessed 8 August 2019.

and this is a clear breach of ADB. Further dangers continue to emerge. There is specific government guidance about materials to be used above 18 metres, but in June 2019, shortly before the second anniversary of Grenfell, a fire tore across a shorter block of flats in Barking.[44] Eerily reminiscent of Grenfell, it has been reported that worried residents had written to the developer raising concerns over the building as an "accident waiting to happen".[45]

B. Building Control Inspection

The second stage of building safety is provided by the building control inspection system. This too was changed by the Building Act 1984. Prior to this change, building control approval was carried out by local authority inspectors whose job it was to inspect at various intervals during construction and issue a completion certificate when satisfied that the finished building was compliant. Since 1984 it has been possible for this task to be carried out by "approved inspectors" from the private sector.[46] There has been much criticism of this system, including from the Independent Review of Building Regulations and Fire Safety (the "Hackitt Review"): as inspectors compete for business they may not want a reputation for critical inspection;[47] there is a risk of conflict of interest as private inspectors, such as NHBC (which has a dominant market share), may also be providing the structural warranty for the development; and the process of inspection, whether by approved inspectors or the local authority, is often claimed not to be rigorous.[48] Concerns have also been raised about the "self-certification" scheme that was introduced by the government in 2002, which allows individuals and businesses to self-certify that certain types of work comply with building regulations.[49]

C. The Regulatory System as a Whole

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[44] P Apps, 'Twenty flats destroyed in huge Barking flat fire' (Inside Housing, 10 June 2019) <https://www.insidehousing.co.uk/news/twenty-flats-destroyed-in-huge-barking-flat-fire-61835> accessed 11 June 2019.

[45] B Moore-Bridge, J Dunne, and L Coleman, 'Barking fire: residents say there were no alarms or sprinklers after 20 wood-clad flats destroyed' (Evening Standard, 11 June 2019) <https://www.standard.co.uk/news/london/barking-fire-residents-say-there-were-no-alarms-or-sprinklers-after-20-woodclad-flats-destroyed-a4163741.html> accessed 12 June 2019. Compare to Grenfell Action Group, 'KCTMO – Playing with fire!' (Grenfell Action Group, 20 November 2016) <https://grenfellactiongroup.wordpress.com/2016/11/20/kctmo-playing-with-fire/> accessed 12 May 2019.

[46] See, V Ramsey and S Furst QC (eds) *Keating on Construction Contract 10th ed* (Sweet & Maxwell, 2016) para. 16-049.

[47] *Hackitt Review: Final Report* (n 7) para. 2.41 and 2.48. The Hackitt Review was announced by government in July 2017 and led by Dame Judith Hackitt. Its purpose was to make recommendations that will ensure: (i) a sufficiently robust regulatory system for the future; (ii) residents feel that the buildings they live in are safe and remain so. It examined building and fire safety regulations and related compliance and enforcement with the focus on multi-occupancy high-rise residential buildings. An interim report was published on 18 December 2017 and the final report was published on 17 May 2018.

[48] In practice, site checks are unlikely to be able to track each step of construction and inspection is often based heavily on plans and process.

[49] Local Government Association "Building regulations and building control" (June 2017) <https://www.local.gov.uk/sites/default/files/documents/LGA%20-%20%20Building%20control%20briefing.pdf> accessed 11 June 2019.

The scale of the fire safety problems that have emerged post Grenfell illustrate that the system as a whole is not working. Even on the government's (limited) data, there are 433 buildings with flammable external walls. The problem is not confined to ACM. One illustration is provided by the recent Tribunal case, *Re St Francis Tower*.[50] A fire strategy report available to the Tribunal concluded that the "risk to life is intolerable", with serious breaches in fire compartmentation, non-compliant fire doors, the cladding used (a type of High Pressure Laminate – "HPL") if ignited "has the ability to produce two-thirds more heat than petrol", and there were problems with the fire detection and AOV (automatic opening vent) systems.[51] Further, it seems that "the building has no Building Regulation sign off". This catalogue of failures is "staggering" in the words of the Tribunal.[52] Another illustration is the case of *Zagora Management Ltd v Zurich Insurance Plc*: this involved two blocks of flats found to be seriously defective.[53] The Building regulations final certificates were issued when the development was "far from being fully completed" and included flats yet to be built. When the Fire Service inspected, they found the site was not compliant with ADB, and had multiple and important fire safety failings.[54]

The testing programme established immediately after Grenfell was too narrow to identify all risks to life. A wide range of metal composite materials ("MCM") faced with material such as zinc, copper, and stainless steel have been found (like ACM) to have combustible materials in their filler or core.[55] Industry sources told *Inside Housing* that up to 80% of HPL cladding systems on high-rises use a highly combustible plastic foam insulation, and the majority of panels are a much lower fire standard.[56] The same expert has said that, beyond ACM, there should be four different tests carried out.[57]

The sheer number and complexity of the fire safety problems emerging means that it is evident that fire safety issues cannot be fixed overnight.[58] A number of measures have therefore been taken to ensure residents are (supposedly) "safe tonight". These "mitigating" or "interim" measures include making sure signage is correct, fire equipment is functioning, and sometimes alarm systems have been installed or upgraded.[59] The main measure,

[50] *RG Securities* (n 6)
[51] ibid para. 7.
[52] ibid para. 25.
[53] *Zagora Management Limited v Zurich Insurance Plc* [2019] EWHC 140 (TCC).
[54] ibid paras. 3. 23-4, 3.31, and 3.38.
[55] W Mann, 'New fire safety warning for non-ACM cladding' (Construction Manager Magazine, 14 December 2017) <http://www.constructionmanagermagazine.com/news/government-issues-new-fire-safety-warning-non-acm-/> accessed 4 June 2019.
[56] P Apps, 'Ministers accused of 'desperation to contain cladding scandal' as details of non-ACM tests emerge' (Inside Housing, 23 May 2019) <https://www.insidehousing.co.uk/news/news/ministers-accused-of-desperation-to-contain-cladding-scandal-as-details-of-non-acm-tests-emerge-61546> accessed 4 June 2019; J. Evans, 'St. Francis Tower: 'Staggering failures' – Part 2: The Building Construction and the Status of High Pressure Laminate Cladding (HPL)' (Housing After Grenfell Blog, 29 May 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/05/st-francis-tower-staggering-failures-part-2-building> accessed 4 June 2019.
[57] Apps (n 56)
[58] D Roberts and L Cohen, 'Legal liabilities post Grenfell' (2018) 34 Construction Law Journal 524, 529.
[59] UK Government 'Government to fund and speed up vital cladding replacement' (Press Release, 9 May 2019) <https://www.gov.uk/government/news/government-to-fund-and-speed-up-vital-cladding-replacement> accessed 9 May 2019; Nearly Legal, 'Cladding and the private sector: a good first step' (Nearly Legal, 9 May 2019) <https://nearlylegal.co.uk/2019/05/cladding-and-the-private-sector-a-good-first-step/ accessed 9 May 2019.

however, is to require fire marshals to patrol buildings 24/7, the so-called waking watch.[60] This is because buildings intended to be operated on a "stay put" policy – you stay in your flat if there is a fire – have had to move to a "get out" (evacuate) policy post-Grenfell because the flammable cladding creates a risk of unrestricted fire spread. Many have expressed reservations about how effective these measures are.[61] The National Fire Chiefs Council Guidance makes clear that mitigating measures are "second-best" and that the change to a simultaneous evacuation strategy should be "temporary … until the failings have been rectified" and "must not be permanent".[62] Several prohibition orders have already been issued which require occupiers to move out of buildings that are considered unsafe to live in. For example, Liverpool City Council issued a prohibition order on the private Fox Street development in the city due to several "serious construction issues" and fire risks.[63] This means hundreds of students and young professionals being evicted.[64] As there are doubts about how effective interim measures are, and it is thought that this effectiveness will diminish over time, it may be that more prohibition notes will be issued for other buildings if there is no remediation.[65]

Even before the Grenfell disaster, the government knew, or ought to have known, of the risks posed by the use of combustible cladding as there had been multiple warnings.[66] *Inside Housing* has uncovered minutes that show the government received warning about the inappropriateness of the standards being used and that this was resulting in the use of ACM.[67] It also refers to several fires overseas that gave clear indication that ACM was unsafe (Dubai

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[60] *E & J Ground Rent No. 11 LLP v Various Leaseholders of Fresh Apartments, Salford* (24 January 2018) MAN/00BR/LSC/2017/0068 para. 8 "A 'waking watch' is implemented to support the early identification of fire and the quick evacuation of the building […]. This involves having trained people physically patrolling the building to detect a fire quickly. Their role is to notify and liaise with the emergency services and most importantly, to alter all the residents and to facilitate a speedy and orderly evacuation of the building. Residents are often alerted by the use of fire horns or by simply banging on their doors".

[61] R Curry, 'Residents warn waking watch was insufficient after fire in block with Grenfell-style cladding' (Inside Housing, 9 May 2019) <https://www.insidehousing.co.uk/news/news/residents-warn-waking-watch-was-insufficient-after-fire-in-block-with-grenfell-style-cladding-61322> accessed 11 June 2019.

[62] National Fire Chiefs Council, 'Guidance to support a temporary simultaneous evacuation strategy in a purpose-built block of flats' paras. 1.2 and 4.4 <https://www.ifsm.org.uk/wp-content/uploads/2014/08/NFCC_Guidance__Waking_watch_and_Common_Fire_Alarm..pdf> accessed 29 May 2019.

[63] T Clark, 'Liverpool City Council hits developers with prohibition order over fire safety failings' (Inside Housing, 12 April 2019) <https://www.insidehousing.co.uk/news/news/liverpool-city-council-hits-developer-with-prohibition-order-over-fire-safety-failings-61011> accessed 9 June 2019.

[64] Roofing Today, 'Dangerous Development Condemned for Flammable Cladding and Fire Risks' (Roofing Today, 25 April 2019) <https://www.roofingtoday.co.uk/development-condemned-for-faulty-cladding-and-serious-safety-breaches/> accessed 15 August 2019.

[65] Curry (n 61) reported that in response to a fire at Vallea Court in Manchester : 'While fire alarms sounded on the floor where the fire was, they did not sound elsewhere, and most residents were woken by members of a waking watch who banged on their doors and sounded an air horn. But some residents said they did not think the measures were sufficient and some reported sleeping through the incident entirely. One resident said they only realised that there had been a fire when a colleague mentioned it to her at work, despite having been asleep in the block when the fire took place'; Clark (n 63); M Rose, 'Manchester: 367 tower blocks failed to meet fire standards after Grenfell' (The Guardian, 19 March 2018) <https://www.theguardian.com/uk-news/2018/mar/19/manchester-367-tower-blocks-failed-fire-tests-grenfell-tower-disaster> accessed 12 June 2019.

[66] Grenfell Action Group (n 45).

[67] Apps (n 34).

at the end of 2015, Melbourne in 2014, and France in 2012), as well are fires in the UK (Garnock Court in 1999, Lakanal House in 2009, Shirley Towers in 2010, Shepherds Courts in 2016, and Coolmoyne House, Belfast in 2017).[68] The 1999 Inquiry into the Garnock Court fire concluded that cladding systems should be "entirely non-combustible" or proven as safe through full-scale testing.[69] Regulations were changed in Scotland in 2005 to require external wall cladding to be non-combustible,[70] but there was no change in England, even after repeated requests for a review of building regulations after the Lakanal House fire.[71] To argue that Grenfell was a one off event is to ignore over twenty years of cladding fires, both in the UK and around the world. This long history of fires and warnings shows that something should have been done sooner, and it should not have taken the shock of the Grenfell Tower fire to realise that there was a widespread problem with fire safety in high-rise buildings, posing a real and imminent threat to life.[72]

It is clear from this section that the government's building safety system was not functioning to ensure fire safety in high-rise residential buildings. The recent Barking fire shows that even low-rise buildings can be at serious risk.[73] The Regulations and guidance are not clear, and there is too much room for doubt that can be exploited or misunderstood by building professionals. Buildings are being signed off on the basis of surprisingly little oversight and, it would seem, are sometimes occupied having not been signed off at all. As Dame Judith Hackitt scathingly concluded in May 2018:

> "The current system of building regulations and fire safety is not fit for purpose and … a culture change is required to support the delivery of buildings that are safe, both now and in the future. The system failure identified in the interim report has allowed a culture of indifference to perpetuate."[74]

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[68] Apps, Barnes and Barratt (n 38).

[69] Environment, Transport and Regional Affairs Committee, *Potential Risk of Fire Spread in Buildings via External Cladding System* (5 January 2000) para 19 <https://publications.parliament.uk/pa/cm199900/cmselect/cmenvtra/109/10907.htm> accessed 12 May 2019; Monaghan, Pobjoy, Buchanan, and Etienne (n 2).

[70] Environment, Transport and Regional Affairs Committee (n 69); Building (Scotland) Regulations 2004 Reg 2.7.

[71] Shropshire and Wrekin Fire and Rescue Authority, *Coroner's Rule 43 Letter Shirley Towers, Hampshire* (24 April 2013) <https://www.shropshirefire.gov.uk/sites/default/files/11-coroners-rule-43-letter.pdf> accessed 12 May 2019; P Walker, 'Lakanal House tower block fire: deaths 'could have been prevented' (The Guardian, 28 March 2018).

[72] In an open letter to James Brokenshire MP, Rebecca Hilsenrath from the Equality and Human Rights Commission wrote 'that prior to the fire at Grenfell Tower, there was a long-standing and systemic breach of the right to life': Letter from Rebecca Hilsenrath to James Brokenshire MP, (14 May 2018) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiWmczM6-HiAhVyRRUIHaUZCagQFjAAegQIAhAC&url=https%3A%2F%2Fwww.equalityhumanrights.com%2Fsites%2Fdefault%2Ffiles%2Ffollowing-grenfell-our-letter-to-secretary-of-state-for-housing-communities-and-local-government-14-may-2018.docx&usg=AOvVaw3gt60JSB0MWxeYyqgPmZzv> accessed 11 May 2019.

[73] P Southworth, 'Barking fire: Investigation launched after blaze destroys 20 flats in East London' (The Telegraph, 10 June 2019) <https://www.telegraph.co.uk/news/2019/06/09/barking-fire-fifteen-fire-engines-100-firefighters-rush-blaze/> accessed 11 June 2019.

[74] Secretary of State for Housing, Communities & Local Government (n 7) 11; Secretary of State for Communities & Local Government, *Building a Safer Future Independent Review of Building Regulations and Fire Safety: Interim Report* (Cm 9551, 2017) 9.

A system, of course, that has been created by the UK government. The Government has since built upon the recommendations from the Hackitt Review and, on 6 June 2019, published proposals for "radical" reform of the building safety regulatory system.[75] Proposed reforms include: the establishment of a new 'building safety regulator'; the use of "duty holders" who have clear responsibilities throughout a building's design, construction and occupation; and strengthened sanctions to deter non-compliance with the new regime. While these proposals should be welcomed, they were only consulted over for eight weeks and have already been criticised for their limited scope. Indeed, the House of Commons Housing, Communities and Local Government Committee remarked that the "Independent Review did not fully meet the requirement in its terms of reference to reassure residents that their homes are, or will be made, safe".[76] With recent events in mind, it is difficult to see when parliament will find the time to enact meaningful reforms, or indeed what form these reforms will (if ever enacted) take.

In the next section, we look at how state responsibility is played out in human rights law.

3. Convention Rights

A. Scope and Jurisdiction

The Human Rights Act 1998 ("HRA") requires public authorities to act in a manner that is compatible with the "Convention rights" set out in section 1 with reference to rights contained in the ECHR.[77] It also requires domestic courts to interpret legislation, so far as possible, in a manner that is compliant with the ECHR,[78] and empowers courts to award damages where Convention rights have been violated.[79] The ECHR must be interpreted "in the light of its object and purpose".[80] Central to this is the doctrine of "effectiveness", also known as "innovative interpretation", which requires courts to give the fullest weight and effect to the underlying purpose of protecting human rights.[81] The underlying justification for the doctrine of effectiveness is that member states cannot protect Convention rights simply by inactivity but that, rather, they are required under certain circumstances to undertake *positive actions* to protect rights, even if this requires expenditure.[82] In determining whether positive obligations exist or not, the Court has to have regard to the fair balance that must be struck between the competing interests of the individual and the broader community.[83]

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[75] Minister of Housing, Communities & Local Government (n 1).
[76] House of Commons Housing, Communities & Local Government Committee, *Independent review of building regulations and fire safety: next steps* (18 July 2018), HC 555, para. 27. <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/555/55502.htm> accessed 29 September 2019
[77] HRA 1998, s 6.
[78] HRA 1998, s 3(1).
[79] HRA 1998, s 8.
[80] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Vol. 1155 p.331 Article 31(1).
[81] Merrill (n 27) 208.
[82] *Marckx v Belgium* (1979-80) 2 EHRR 330 [31]; *Öneryildiz* (n 19) [143]-[146].
[83] *McGinley v United Kingdom* (1998) 27 EHRR 1 [98]; *Powell v United Kingdom* (1990) 12 EHRR 355 [41]; D Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012).

Various Convention rights are in play in the context of dangerously defective high-rise buildings whose faults are attributable to the systemic failures of the regulatory framework: Articles 2 (the right to life), 3 (the prohibition of "inhumane and degrading treatment"), 8 (the right to a "private and family life" and the "home") and A1P1 (the right to the "peaceful enjoyment of possession:"). All of these rights have been interpreted by domestic courts and the Strasbourg Court to impose both positive and negative obligations upon member states. In the next few sections we will consider the application and effect of these Convention rights when applied in the context of buildings with fire safety issues.

B. Article 2: The Right to Life

> "I feel as though I could burn alive at any minute. I live in constant fear, my physical and mental health has taken a huge impact. My financial situation is unbearable, I cannot sell my property or re-mortgage. I am stuck in a nightmare".[84]

Anonymous Leaseholder cited in the House of Commons

For the thousands of people who are trapped living in unsafe high-rise buildings, one avenue for redress may be found in Article 2 of the ECHR. This provides that "everyone's right to life shall be protected by law".[85] The right to life is one of the most fundamental provisions of the ECHR, enshrining a basic value of democratic societies,[86] and it has a special position in the hierarchy of values.[87] Article 2 does not solely concern deaths resulting from the use of force by agents of the state, but also includes a substantive positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction.[88] This applies to any activity, public or private, in which the right to life may be at stake.[89] This duty to protect life has two angles: a "big picture" general duty with a focus on the state's obligation as overseer under which the state must institute and maintain an effective system of deterrence against the threat to life,[90] as well as an "operational" duty which can require public bodies to take preventive measures where there is a known and specific risk. [91] Where a violation of the substantive positive obligation in Article 2 is established, compensation for monetary loss (pecuniary) and non-monetary damage such as pain and suffering (non-pecuniary) are, in principle, possible as part of the range of redress available.[92]

The Strasbourg and domestic jurisprudence show that the operational duty to protect persons from a real and immediate risk of losing their life arises where those people are under the state's control (such as in prison, or hospital). The standard demanded for the performance

[84] HC Deb 29 April 2019, vol 659, col 88.
[85] ECHR Article 2; For more background: C Tomuschat, 'The Right to Life – Legal and Political Foundations' in C Tomuschat, E Lagrange, and S Oeter (eds), *The Right to Life* (Brill - Nijhoff 2010).
[86] *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 28.
[87] C Tomuschat, 'The Right to Life – Legal and Political Foundations' in C Tomuschat, E Lagrange, and S Oeter (eds), *The Right to Life* (Brill - Nijhoff 2010) 3.
[88] *LCB v United Kingdom* (1999) 27 EHRR 212 [36]; *Edwards v United Kingdom* (2002) 35 EHRR 19 [54]; *Budayeva v Russia* (2014) 59 EHRR 2 [85]; *Osman v United Kingdom* (2000) 29 EHRR 245 [115-116]; *Öneryildiz* (n 19) [89].
[89] *Öneryildiz* (n 19) [90].
[90] *Öneryildiz* (n 19) [89].
[91] *Rabone v Pennine Care NHS Trust* [2012] UKSC 2 [15]-[25].
[92] *TP v United Kingdom* (2002) 34 EHRR 2 [107].

of the operational duty is one of reasonableness, which includes consideration of the circumstances of the case, the ease or difficulty of taking precautions, and the resources available. There can also be responsibility, as shown below, if the state has assumed responsibility for the regulatory system which poses a risk to life. While the state has an obligation to ensure a safe regulatory system, such as the provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as errors of professional judgement or negligent coordination would not be sufficient to engage Article 2.[93]

In practice, litigation involving Article 2 often arises within common fact patterns, such as cases to do with protecting people from self-harm, or from the lethal use of force. There do not appear to have been any cases directly analogous to Grenfell and involving duties to protect from the risk of fire. The positive duty to protect life is not, however, confined to past fact patterns. It would, according to Lord Brown, be absurd to conclude that, just because a particular issue has not previously been resolved by the ECtHR jurisprudence, it cannot be decided on by domestic courts.[94] Indeed, given what is now known about the fire safety regulatory framework, there is an overwhelmingly strong case for arguing that the victims of the Grenfell Tower fire have suffered a violation of their Article 2 right to life. Further, as we argue below, the principles underlying Article 2 case law support the contention that the systemic regulatory failures that have enabled unsafe buildings to be built, sold, and occupied – still - without remediation constitute an "ongoing" violation of the state's duties under Article 2. It is clear that the government is fully aware of the known risk to life posed by combustible cladding post-Grenfell, and has implemented piecemeal measures as well as providing some funding for social and private housing remediation. These interim measures highlight that the government has knowledge of the potential risks, but also demonstrate a determination to limit its exposure to the costs of remediation and to distance itself from any responsibility for a problem that was known about long before Grenfell. Local authorities and central government do have a certain level of discretion when determining how to resolve the challenges posed by flammable cladding. However, as long as the risk to life remains real, public authorities cannot successfully argue that the use of interim measures discharges their positive obligations under Article 2. There are, however, a number of difficulties with this argument, as is shown below.

i. Substantive Duty

The substantive duty requires states "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".[95] We choose to refer to this as the "big picture" duty as we think that it neatly draws out the sense in which the state has a duty in relation to the "macro", not just the individual. The ECtHR has held that this may include, for example, the duty to put in place regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives, or regulations governing dangerous industrial activities.[96] In the Supreme Court decision of *Smith v Ministry of Defence* Lord Mance noted that for the big picture duty to be engaged in the particular context of dangerous activities the state "must govern the licensing, setting up, operation, security and

[93] See, *Rabone* (n 91); *R (Maguire) v HM Senior Coroner for Blackpool and Fylde* [2019] EWHC 1232 (Admin); *Sarjantson v Chief Constable of Humberside* [2013] EWCA Civ 1252.
[94] *Rabone* (n 91) [112].
[95] *Osman* (n 88) [115-116]; *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50 [36].
[96] *Öneryildiz* (n 19) [90].

supervision of the activity and must make it compulsory for all concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks".[97] By analogy, this means that the duty is engaged in the fire safety context as the state has assumed responsibility by creating the regulatory system for construction and fire health and safety through the Building Regulations and the building control inspection system.

The focus is upon the regulatory framework, not on whether there may have been failings in particular cases. In a discussion of medical negligence, it was emphasised that "the [Strasbourg] Court would normally find a substantive violation of Article 2 only if the relevant regulatory framework failed to ensure proper protection of a patient's life"; if there have been errors in particular cases this will not lead to a breach of the state's positive obligation under Article 2.[98] On the other hand, while it will usually be private parties (architects, building surveyors, developers etc.) who have designed and built a block of flats, and often a private approved inspector who has signed it off, this does not absolve the state from responsibility. It was clearly expressed in *Wos v Poland* that "the exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility" regardless of any delegation to private actors.[99] As such, the ongoing risk to life posed by these buildings engages the state's big picture duty under Article 2.

The problem any claim under Article 2 will have to overcome is that it may be difficult to demonstrate that the ongoing violation of Article 2 is attributable to "systemic or structural dysfunction" and is not merely an "error".[100] Human error, including negligent error, is inherent in any institution or regulated industry. In the context of soldiers not being equipped with the correct phones in a conflict zone, the Court of Appeal in *R (Long) v Secretary of State of Defence* observed that it would be unrealistic to expect the state to be "liable to protect the lives of soldiers which is broken whenever such an error is made by an individual soldier which increases or fails to mitigate a risk to the lives of other soldiers".[101] As such, individuals living in unsafe blocks will have to demonstrate that the fire safety defects in their buildings are caused not by, for example, a building error or a "concatenation of unfortunate events"[102] but rather by a failure to "ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum."[103]

ii. Operational Duty

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[97] *Smith v Ministry of Defence* [2013] UKSC 41 [105] (citing *Öneryildiz* (n 19) [89-90]).
[98] *Lopes de Sousa Fernandes* (n 89) [187].
[99] *Wos v Poland* (2007) 45 EHRR 28 (in the context of administering a compensation scheme). See also: *Assanidze v Georgia* (2004) 39 EHRR 32 [116]: "[T]he Convention does not merely oblige the higher authorities of the Contracting states themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels. The higher authorities of the state are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected." See also: A Mowbray: 'One of the most prevalent types of positive obligation is the duty upon states to take reasonable measures to protect individuals from infringement of their Convention rights by other private persons."; A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 225.
[100] *Lopes de Sousa Fernandes* (n 89) [192]; *R (Long) v Secretary of State of Defence* [2015] EWCA Civ 770 [72]; *Öneryildiz* (n 19) [93].
[101] *Long* (n 100) [74].
[102] *Long* (n 100) [17].
[103] *Stoyanovi v Bulgaria* App no 42980/04 (ECtHR, 9 October 2010) [61].

The operational element of the duty requires authorities to take preventive operational measures to protect an individual or group whose life is at risk. This can require some very practical measures to be taken, but must not "impose an impossible or disproportionate burden on the authorities".[104] Although this limb was developed in particular contexts, such as protecting prisoners from fellow prisoners, the courts are willing to expand the circumstances in which the duty is owed. Further, as Baroness Hale has noted, the ECtHR has a tendency "to state the principle in very broad terms, without defining precisely the circumstances in which it will apply".[105] In *Öneryildiz v Turkey* a number of the applicant's close relatives were killed when a methane explosion in a nearby refuse tip caused a landslide which engulfed the applicant's house.[106] The Grand Chamber found a violation of Article 2 as the state had failed to take steps to prevent the explosion. In finding a violation, the Grand Chamber gave decisive weight to the fact that the tip was, from the beginning, operating in breach of the relevant technical standards and the risk of explosion had been known for some considerable time before.[107] Indeed, it was "impossible" for the state departments responsible for managing the tip not to have known of the risk.[108]As such, it was apparent that the state knew or ought to have known that there was a real and immediate risk to life. Further, a solution was available (installing a gas extraction system) that would not divert the state's resources to an excessive degree.[109]

A number of distinguishing features between *Öneryildiz* and the fire safety context discussed in Part I of this article mean that it is not directly analogous. In *Öneryildiz* the refuse tip was owned and operated by public bodies, unlike (apart from social housing blocks) the complex matrix of primarily private actors in the fire safety and cladding scandal.[110] Further, *Öneryildiz* was decided in the context of it involving dangerous activities and it is artificial to argue that the risk to life in high-rise buildings arises as a result of a dangerous *activity*. Further, whereas there was a known breach of standards in *Öneryildiz*, there is a lively debate about whether some forms of construction *did* breach Building Regulations. The ongoing cladding scandal is also somewhat different from *Budayeva v Russia*, where the ECtHR appears to have given significant weight to the fact that there was no ambiguity about the scope or the timing of the work that needed to be performed and the government gave no reasons why no such steps were taken.[111] Not all fire safety risks have yet been identified as testing has, to date, only been required in ACM buildings, and there remain uncertainties about what work needs to be done for some blocks.[112]

Further, although ACM buildings (and other blocks with fire safety defects) are at risk in general, there is generally no knowledge of a particular and heightened danger of an actual outbreak of fire at any individual site. This leads on to the questions as to what level of knowledge of risk is required, at what point in time the requisite knowledge arises, and whether

[104] *Osman* (n 88) [115], [116]; J Wright, 'The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg' (2016) 7 Journal of European Tort law 58.
[105] *Rabone* (n 91) [96].
[106] *Öneryildiz* (n 19).
[107] ibid [98]-[100].
[108] ibid [101].
[109] ibid.
[110] ibid [9].
[111] *Budayeva* (n 88) [149].
[112] Although it would be perverse to argue that because the Government has not conducted testing it can therefore claim it has no knowledge of risk, as this would be a deliberate closing of its eyes.

the level of harm is relevant. In *Osman v United Kingdom*, the Strasbourg Court emphasised that the question is not whether there is gross negligence or wilful disregard of the duty to protect life, but that it is sufficient to "show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge".[113] In *Osman* itself, there was found to be insufficient knowledge of an immediate risk to life. A schoolteacher who had formed an unhealthy attachment to a teenage pupil shot the boy and his father, injuring the boy and killing the father. The police were aware of various threats but, on the facts, the Court held that they did not know that the lives of the Osman family were at "real and immediate risk".[114] Case law on the "operational duty" suggests that there needs to be specific knowledge of risk in order for there to be liability, and the result in *Osman* suggests that this may be hard to establish. It is, however, important to see this as intertwined within the general positive duty to protect life. In the context of fire safety, it is the failure to establish a regulatory framework consistent with the first limb that has created the risk to life that triggers the operational duty. The scale of possible harm also appears relevant, as in *Budayeva v Russia*, where the ECtHR gave significant weight to the fact that *any* mudslide was capable of "devastating consequences."[115] This, of course, is equally true in the context of *any* fire in a high-rise building with flammable cladding or a related fire safety risk. As the last twenty years have unequivocally demonstrated, *any* fire in such a context is capable of *devastating consequences*. The government's own amended guidance to the Housing Act 2004 notes that an uncontrolled fire in high-rise buildings with ACM cladding could cause severe health effects that are "life-changing or life threatening".[116]

Iii Reasonableness and the Margin of Appreciation

The standard demanded for the performance of the operational duty is one of reasonableness which includes consideration of the circumstances of the case, the ease or difficulty of taking precautions, and the resources available.[117] Central to this consideration is what is referred to as the margin of appreciation that recognises that the relevant authority should have some discretion when determining the appropriate course of action.[118] The response of the UK government may be to argue that remediating defective buildings is not its responsibility and also that it would impose an impossible and disproportionate burden.[119] We are, however, focussing only on defects that engage the positive obligation to preserve life under Article 2, not broader problems with defective or sub-standard housing.[120] Even so, the scale of

[113] *Osman* (n 88).
[114] ibid.
[115] *Budayeva* (n 88) [148].
[116] Secretary of State for Housing, Communities & Local Government 'Housing Health and Safety Rating Systems Operating Guidance' (HC 1774) para. 8.01; S. Bright 'Local Authorities Have Teeth' (Housing After Grenfell Blog, 3 December 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2018/12/local-authorities-have-teeth> accessed 29 May 2019.
[117] *Re Officer L* [2007] UKHL 36.
[118] *Cossey v United Kingdom* (1991) 13 EHRR 622.
[119] Where would 'remediation' stop? The Chartered Institute of Housing estimated for England an immediate £10 billion repair backlog, with an additional £10 billion needed to modernise homes lacking central heating and double glazing (33) Chartered Institute of Housing and Graham Moody Associates, Council Housing – Financing the Future – Final Report (Coventry: CIH, 1998). There is, however, a crucial distinction between defects that provide an immediate risk to life, engaging Article 2, and other repair needs.
[120] The problem of defective or sub-standard housing in the UK remains a persistent problem. However, it is beyond the scope of this paper. For more information see, United Nations Committee

identifiable risks could be enormous. A recent news report by *The Sunday Times* states that up to 196,000 people in 82,000 flats (68,000 of them privately owned) could be in danger. The total bill for fixing the problem could be £1.4bn, of which £1.2bn is for private blocks (six times more than the government has pledged for this sector).[121] Further, for the government to pay for remediation would inevitably take funding from other priorities; for example, concerns were expressed when it was revealed that the funding for the remediation of unsafe cladding on social housing was the result of money being moved from an existing fund for affordable homes.[122] The result is that, even if it can be demonstrated that there is an ongoing violation of Article 2, the domestic and Strasbourg courts may be reluctant to intervene out of a fear of imposing excessive obligations.

iv Summing up Article 2

There will be all sorts of arguments to be had about whether there is an actionable breach of Article 2 in particular instances, but without doubt, the UK government has assumed the responsibility of creating and operating a regulatory system to ensure buildings are constructed well and are safe. As demonstrated in Part I, the adopted system has failed catastrophically.[123] There has been no reform to Building Regulations, notwithstanding calls for change long before Grenfell. In addition, the government was aware of the risks posed by unsafe cladding and other defects but it was only in response to the public outcry following Grenfell that interim measures were implemented. The mitigating measures remain inadequate due to their limited scope and the as yet untested use of interim safety measures such as the "waking watch". In *Budayeva v Russia,* while having regard to the authorities' wide margin of appreciation in matters where the state is required to take positive action, the ECtHR noted that it must "consider whether the government envisaged other solutions to ensure the safety of the local population."[124] To do this, the ECtHR requested that the Russian government provide information on the regulatory framework, land-planning policies, and specific safety measures implemented at the material time for deterring natural hazards. The ECtHR concluded that the interim measures intended to stop mud-slides were not adequately maintained.[125] In an analogous manner, the safety measures instituted by the UK government

on Economic, Social and Cultural Rights, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (14 July 2016) UN Doc E/C.12/GBR/CO/6, para 49 where the United Nations Committee on Economic, Social and Cultural Rights described the lack of available, affordable, accessible, and adequate housing in the UK as a 'persistent critical situation'. The number of homes categorised as unfit for human habitation is alarming – the most up to date figures show that 19% of homes in England and Wales do not comply with the *Decent Homes Standard.* The Homes (Fitness for Human Habitation) Act 2018 is an attempt to redress this problem. For guidance see, G Peaker 'Fitness for Habitation – a thumbnail guide' (Nearly Legal, 21 December 2018) <https://nearlylegal.co.uk/2018/12/fitness-for-habitation-a-thumbnail-guide/> accessed 11 June 2019.

[121] M Lee, T Calver, and J Ungoed-Thomas 'Grenfell two years on: the true scale of the cladding scandal revealed' *The Sunday Times* (London, 9 June 2019) 14.

[122] J Bibby, 'Should safe cladding come at the expense of new affordable homes? (Shelter, 25 May 2018) <https://blog.shelter.org.uk/2018/05/should-safe-cladding-come-at-the-expense-of-new-affordable-homes/> accessed 12 May 2019; R Booth, 'Minister ready to fund replacement of Grenfell-style cladding' (The Guardian, 8 May 2019) <https://www.theguardian.com/uk-news/2019/may/08/ministers-ready-to-fund-replacement-of-grenfell-style-cladding> 11 June 2019.

[123] L Farha, 'Grenfell Tower is a terrible betrayal of human rights' *The Guardian* (London, 21 June 2017).

[124] *Budayeva* (n 88) [156].

[125] ibid.

in relation to fire safety at the material time have not removed real and imminent risk to the lives of thousands of individuals living in unsafe blocks. The adequacy of the regulatory framework in relation to the particular situation of Grenfell will be determined in Stage 2 of the Grenfell Tower Inquiry, but the available evidence already demonstrates that the UK government persists in its ongoing failure to do everything within its powers to remedy the risk to life for other sites.[126]

C. Article 8: Right to Respect for Home, Private and Family Life

> "I'm having to choose between homelessness and bankruptcy".[127]

Ritu Saha, Leaseholder at Northpoint, Bromley

> "The financial stress and feeling unsafe in my own home is taking a huge toll on our lives—we are also getting married in two months and this huge cladding bill has overridden everything. We want to move so we can start a family but are unable to as the flat is not sellable, and we can't raise a family in such a flammable building."[128]

Anonymous Leaseholder cited in the House of Commons

Article 8 provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence."[129] Like Article 2, the courts have recognised that Article 8 entails positive obligations.[130] In *Botta v Italy* the ECtHR held that the positive obligation under Article 8 arises where there is a "direct and immediate link between the measures sought by an applicant and the latter's private and/or family life."[131] In the context of dangerous activities there is often an overlap between interference with Articles 2 and 8.[132] Although the boundaries between the state's positive and negative obligations under Article 8 do not lend themselves to precise definition, the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.[133]

While the cladding scandal has resulted in residents in high-rise buildings having to make difficult decisions about whether to remain, Article 8 does not recognise a right to be provided with a home. Nor does the jurisprudence of the ECtHR acknowledge such a right.[134] What Article 8 adds to the analysis is that it provides a framework for taking account of the broader impacts of fire safety on the lives of those anxious about their personal safety and

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[126] G Van Bueren, 'Grenfell Tower: An Avoidable Tragedy - The Right to Life and the Right to Housing' (The British Institute of Human Rights Blog) <https://www.bihr.org.uk/blog/grenfell-life-housing> accessed 29 May 2019.
[127] M Lee, T Calver, and J Ungoed-Thomas (n 121).
[128] HC Deb 29 April 2019, vol 659, col 88.
[129] ECHR, Article 8.
[130] *Marckx* (n 82) [31]; *Airey v Ireland* (1979-80) 2 EHRR 305.
[131] *Botta v Italy* (1998) 26 EHRR 241 [34].
[132] *Budayeva* (n 88) [133].
[133] *Hristozov v Bulgaria* App no 47039/11 and 358/12 (ECtHR, 3 November 2012) [117].
[134] *Chapman v United Kingdom* (2001) EHRR 18 [99]; D Maxwell 'A Human Right to Housing?' (Housing After Grenfell Blog, 25 February 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/02/human-right-housing> accessed 12 June 2019.

financial security.[135] The notion of "private life" is underpinned by the primacy of personal autonomy and quality of life.[136] Significantly, this includes both physical and mental effects.[137] In addition to the mental health impacts, some occupiers have reported having put plans to raise a family on hold, being unable to take up new employment opportunities, feeling "trapped" in a property that they cannot sell, and being fearful of bankruptcy or losing their homes.[138] These fall within the focus of Article 8 which recognises the "right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilments of one's own personality"[139]; the importance of physical and moral integrity,[140] as part of private life; personal autonomy; and the importance of protecting "security, identity and lifestyle".[141] For those buildings where remediation has begun, individuals living in unsafe blocks are complaining about noise from drills and other equipment, high levels of dust, loss of light, general disruption, and cold while the cladding is removed – all things that can be recognised within Article 8.[142]

D. Article 3: The Prohibition of Inhumane or Degrading Treatment

> "I genuinely believe nothing will be done until we have a second tragedy in a private block […] I feel constantly stressed, anxious, depressed, lost, abandoned and devastated by something that cannot be my responsibility."[143]

Anonymous Testimony Collected by the UK Cladding Action Group

Under Article 3, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[144] Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.[145] These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[146] Only particularly serious violations will come within Article 3, and assessing this is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex,

[135] *Niemietz v Germany* (1993) 16 EHRR 97 [29-33]; *Hatton v United Kingdom* (2002) 34 EHRR 1 [107].
[136] *Goodwin v United Kingdom* (2002) 35 EHRR 18 [90l].
[137] *Fadeyeva* (n 19) [69].
[138] N Barker, 'Two-thirds of private flats with Grenfell-style cladding in London' (Inside Housing, 10 May 2019) <https://www.insidehousing.co.uk/news/news/two-thirds-of-private-flats-with-grenfell-style-cladding-in-london-61378> accessed 9 June 2019.
[139] *X v Iceland* App No 6825/74 (ECtHR, 18 May 1976).
[140] *X and Y v Netherlands* (1986) 8 EHRR 235.
[141] *Chapman* (n 134).
[142] *Merono Gomez v Spain* (2005) 41 EHRR 40 (noise from bars and nightclubs); *Dees v Hungary* (2013) 57 EHRR 12 (noise and vibration from heavy traffic).
[143] E Snaith, 'Stress and anxiety of living in flats with Grenfell-style cladding causing relationship and family breakdowns, report says' *The Independent* (London, 29 April 2019).
[144] ECHR, Article 3.
[145] *E v United Kingdom* (2003) 36 EHRR 519 [88]; *A v United Kingdom* (1999) 27 EHRR 611 [22].
[146] *E* (n 145); *Osman* (n 88) [116].

age, and state of health of the victim.[147] The impact must be serious and cause "either actual bodily injury or intense physical or mental suffering"[148] but can include feelings of fear, anguish, and inferiority.[149] Residents will face a significant evidential hurdle to satisfy any court that the necessary tests of proximity, knowledge and reasonableness in relation to Article 3 are satisfied. In practice those who have experienced mental suffering, anguish, and feelings of inferiority may be best to focus on Article 8.

E. Article 1 of Protocol No. 1: The Right to Property

A1P1 may bring a further dimension to the discussion. It protects against interferences with the "peaceful enjoyment of possessions", often referred to as the right to property.[150] The ECtHR has taken an "autonomous" approach to the meaning of "possession" to denote an object of economic value.[151] Again, A1P1 does not depend merely on the state's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and effective enjoyment of possessions.[152] Whereas the other Articles focus more directly on the person, A1P1 may provide a lens through which financial loss to leaseholders could be accommodated. The inability to sell a flat in a building with no remediation plans has led to some suggesting that these flats are worthless, and certainly many flats will have suffered a dramatic loss in value and even those that are eventually remediated may suffer from long-term loss in value due to stigma.

At first sight, there is intuitive merit to the notion that leaseholders have been subject to an interference with their property and have been forced to bear an "individual and excessive" burden. The difficulty for leaseholders, however, will be showing that there has been an interference with the peaceful enjoyment of possessions, deprivation of possessions, or controls on the use of those possessions.[153] Any claim under A1P1 faces the difficulty that (unless there has been a refurbishment project since purchase) the "possession" (the flat itself and the property right) has not changed; the risk was always there, even though it is only in the aftermath of Grenfell that the defects have been identified. Merely identifying or becoming aware of problems that result in a diminution in value is unlikely to constitute an interference under A1P1.

There may, however, be a potential A1P1 case if occupiers are required to move out following service of a prohibition notice; there will then be an "interference", "control of use" or perhaps even a *de facto* deprivation.[154] Even if an individual has retained legal title, the ECtHR has recognised that there this can nonetheless be treated as expropriation (referred to as *de facto* expropriation). For example, when further investigating the realities of the situation, leaseholders will have lost all meaningful use of their leasehold interest.[155]

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[147] *Eremia v Moldova* (2014) 58 EHRR 2 [48]; *Kudla v Poland* (2002) 35 EHRR 11 [91].
[148] *Kudla* (n 147) [92].
[149] *Ireland v United Kingdom (*1979-80) 2 EHRR 25 [162-181]; *Hristovi v Bulgaria* App no 42697/05 (ECtHR, 11 October 2011).
[150] ECHR, Article 1 Protocol No 1.
[151] *Broniowski v Poland* (2005) 40 EHRR 21.
[152] *Budayeva* (n 88) [172]; *Öneryildiz* (n 19) [133].
[153] *Sporrong & Lönnroth* (1983) 5 EHRR 35 [61].
[154] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182 [93].
[155] *Depalle v France* (2010) 54 EHRR 535 [559]; *Cusack v Harrow London Borough Council* [2013] UKSC 40 [35].

F. Preliminary Conclusions

Although the fire safety and cladding scandal engages Articles 2, 3, and 8, as well as A1P1, the strongest claim is probably based around Article 2. There exists a "real" and "imminent" threat to life, and the government has tacitly accepted the risk through the implementation of interim safety measures after Grenfell.[156] Further, as noted above, while the former Minister for Housing and Planning, Kit Malthouse MP stated that his "primary concern is to make sure that every resident is safe tonight", serious questions remain unanswered as to the effectiveness of interim measures such as the use of a "waking watch".[157] Given what is now known about the fire safety regulatory framework, there is a strong case for arguing that Article 2 has been violated. This view is supported by the Equality and Human Rights Commission and several other commentators.[158] It may also be the case that where residents have suffered particular personal harm the right to a private life and autonomy under Article 8 is also being violated (and in extreme cases, this may even amount to inhuman and degrading treatment under Article 3).

The final section considers some of the difficulties there will be, however, in turning these arguments into actionable and successful claims.

4. Making Rights Real

Turning an alleged violation of human rights into a justiciable claim is not straightforward, even though individuals living in unsafe blocks should easily cross the threshold of having to show that they are victims under the HRA and ECHR.[159] Many reported cases in relation to Article 2 follow events or tragedies that have already occurred, and which have caused serious physical harm.[160] When lives have been lost, courts can more easily identify specific harm and establish a causal link between the harm sustained and the alleged failure. In both the domestic courts and the ECtHR, successful applicants tend to be those who focus on claims for damages; in these cases, applicants argue that the state has failed in its duty. This kind of claim is, perhaps, more readily seen as apt for those who were victims of Grenfell; where damages can be seen as compensation for lives lost, rather than where the human rights argument is being used for those living under the Sword of Damocles, in constant fear of what would happen if there is a fire.

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[156] See, *Nencheva v Bulgaria* App no 48609/06 (ECtHR, 18 June 2013) [121-123] the Bulgarian State was held to be in breach of its obligations under Article 2 for not having taken sufficiently prompt action to ensure effective and sufficient protection of the lives of young people in a social care home. The ECtHR gave decisive weight to the fact that the authorities had been made aware of the dangerous living conditions.

[157] S. Bright and D. Maxwell 'Is Everyone Safe Tonight' (Housing After Grenfell Blog, 7 May 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/05/everyone-safe-tonight> accessed 29 May 2019.

[158] EHRC (n 2).

[159] HRA 1998, s 7(1); ECHR, Article 34.

[160] For example, in *Öneryıldız* (n 19) a methane explosion at a rubbish tip in Ümraniye buried 10 dwellings and the applicant lost 9 members of his family. In *Budayeva* (n 88) a series of mudslides hit the residential town of Tyrnyauz (Тырныауз) causing 8 fatalities. Further, significant damage to property was reported with one of the mudslides destroying part of a nine-story block of flats with directly resulted in 4 of the casualties.

This section will consider other potential avenues of redress for individuals living in unsafe blocks. The first looks at whether it is possible to challenge public "acts", such as policy announcements or decisions to exercise, or not, public powers. The second explores whether the failure to comply with the operational duty to protect life in the context of fire safety gives rise to a claim.

A. Trigger Event

If the government makes some policy announcement or takes a decision, this may provide a moment (that we call a "trigger event"), that can be challenged for compliance with public law and human rights. Interested parties often bring challenges to government announcements, public policy, and legislation. So, for example, the charity Client Earth has brought three successful judicial review claims against the government in order to challenge published Air Quality Plans for a failure to comply with its legal obligations.[161] Another example can be observed in the "right to rent" litigation. The right to rent scheme (as it became known) was piloted in the West Midlands and required private landlords to check the immigration status of all tenants. The government decision to roll out the scheme nationwide was (successfully) challenged by the Joint Council for the Welfare of Immigrants on the grounds that this was incompatible with the ECHR and irrational.[162]

Adopting this approach, it may be that a declaration can be sought by occupiers or other interested parties (perhaps the UK Cladding Action Group or Tower Blocks UK) that, pursuant to s 4 of the HRA, a particular act or inaction of a public body is incompatible with the ECHR.[163] One trigger event could be the recent government announcement that £200 million will be made available to remove and replace unsafe cladding from around 170 privately owned high-rise buildings.[164] The intention was that this funding would "unblock progress in remediating private sector high-rise residential buildings" by motivating hitherto recalcitrant freeholders to undertake remediation in the knowledge that it will be paid for.[165] While this announcement received a significant amount of media attention, it left many important issues unanswered and it is the limitations in its scope and clarity that may provide a reason for challenge.[166] For example: what if a freeholder (or management company) still fails to initiate the necessary remediation work? Neither occupiers nor leaseholders can do the work themselves as they do not have powers over the "common parts" of the building which is the area in which the majority of safety remediation, including cladding, has to take place. Nor do occupiers or leaseholders have power to compel freeholders to do the work,

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[161] *R (Client Earth) v Secretary of State for Food, Environment and Rural Affairs (No 3)* [2018] EWHC 315 (Admin).

[162] *R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin) (This decision is currently being appealed). For a response to this decision see, R Ekins 'The High Court's 'right to rent' decision is a travesty' (The Spectator, 2 March 2019) <https://blogs.spectator.co.uk/2019/03/the-high-courts-right-to-rent-decision-is-a-travesty/> accessed 9 June 2019.

[163] HRA 1998, s 4.

[164] Ministry of Housing, Communities & Local Government Press Release, 'Government to fund and speed up vital cladding replacement' (9 May 2019) <https://www.gov.uk/government/news/government-to-fund-and-speed-up-vital-cladding-replacement> accessed 12 May 2019.

[165] HC Deb 9 May 2019, vol 659, col 688 (James Brokenshire MP).

[166] *All-Party Parliamentary Group*, *Cladding Forum*, Portcullis House, Westminster (8 May 2019).

and the powers that local authorities have to enforce fire safety remediation are fraught with uncertainty and complexity.[167] The announcement has also resulted in a "cladding lottery" in which buildings with "Grenfell style" ACM cladding will be able to access funds (although only for ACM remediation, not for other fire safety defects that are already known or are discovered when the cladding is removed), but hundreds more buildings clad in similar, but crucially different, flammable cladding will not qualify for funding.[168] Thousands more buildings are currently being tested, and new fire safety defects are emerging as more intrusive fire risk assessments are being undertaken[169] The £200m cladding fund is limited to remediation of ACM cladding and the statement makes clear that it "will not be repeated in other circumstances."[170] The announcement is, therefore, too narrow in scope to address the human rights violations of individuals living in unsafe blocks with non-ACM fire-safety defects, it may also turn out to be too little in financial terms to rectify all ACM buildings, and it fails to address the fundamental question of who will ensure that remediation takes place.

It is not only the central government that may be subject to public law challenges. Local authorities may also be vulnerable to challenge. They do, for example, have powers under the Housing Act 2004 ("HA 2004") to take enforcement action if there is unsafe cladding, or there are other fire hazards.[171] Following Grenfell, the Housing, Health and Safety Rating System was amended to make it clear the local authorities have the power to assess the outside of buildings for fire hazards.[172] Under the HA 2004 local authorities have duties to inspect if they have reason to consider it would be appropriate to see if there are any category 1 or category 2 hazards.[173] If a category 1 hazard is found, then the local authority has a duty to take appropriate enforcement action.[174] If occupiers request the local authority to take action, and they refuse, this refusal decision may provide a trigger event that can be challenged. In practice, leaseholders may be unlikely to go down this route as the risk for them is that if enforcement action is taken, and the building is remediated by the freeholder, the costs will simply be passed onto them. This would not be true, however, of other occupiers, such as tenants who are not exposed in any meaningful way to cost recovery.

B. Systemic Failure

[167] Bright (n 15)
[168] For example, at the 10-storey building at Northpoint, in Bromley, as well as polyethylene-filled ACM, the tower block has two other types of material that tests have deemed flammable: high-pressure laminate (HPL) and aluminium window panels with bonded insulation (see M Lee, T Calver, and J Ungoed-Thomas (n 121)).
[169] Apps, 'The cladding scandal is everybody's fight' (n 16).
[170] Letter from Melanie Dawes to James Brokenshire MP (8 May 2019) para 18 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800820/MD_to_SoS_Letter_Private_Sector_Remediation.pdf> accessed 12 May 2019; J Simpson, 'Government's £200m cladding fund 'will not be repeated', warns chief in housing civil servant' (Inside Housing, 10 May 2019) <https://www.insidehousing.co.uk/news/news/governments-200m-cladding-fund-will-not-be-repeated-warns-chief-housing-civil-servant-61371> accessed 13 May 2019.
[171] S Bright, 'Part 3: To enforce or Not? Local Authorities and Cladding Removal' (Housing After Grenfell Blog, 13 March 2019) <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/03/part-3-enforce-or-not-local-authorities-and-cladding-removal> accessed 9 June 2019.
[172] ibid.
[173] Housing Act 2004, s 4; Bright (n 171).
[174] Housing Act 2004, s 5.

An alternative argument is that the state has failed in its duty to implement appropriate systems to protect life, whether at the big picture level or at the individual level where an operational duty to protect in a specific context has arisen. This kind of claim can be pursued by occupiers either by way of a declaration that the regulatory framework fails to protect life and/or by a claim for damages. The declaration route would focus on the argument that there is an ongoing risk to life as a direct result of a systemic failure, the failure being the defects with the building regulations and building control inspection frameworks that were discussed earlier. It was this kind of claim that was being pursued in the case of *R (on the application of Mrs Pearl Scarfe) v HMP Woodhill*.[175] Here, Garnham J considered a challenge against HMP Woodhill on the grounds that the prison had failed to comply with its Article 2 duty to protect prisoners from suicide. In that particular case the remedy sought was a declaration. The reason why the claim did not succeed was because there had been individual errors rather than a system failure. Garnham J observed that, while individual error may give rise to claims for damages (for example for vicarious liability), such an error would not justify a declaration of incompatibility under Article 2.[176] By contrast, in the context of high-rise residential buildings the regulatory framework as a whole has failed.

In addition, where there are known fire safety problems in particular buildings, there are specific risks to life that may be thought of also as operational failures: the "system" has failed to provide a framework that ensures safe construction, and once buildings have undergone fire risk assessments that identify a risk to life this triggers the operational duty. Unless remediation occurs, or there are mitigating measures that remove the risk to life, there is an operational failure, and this may justify an award of damages in the particular circumstances of an individual case.

These kinds of claims are quite different from what Garnham J was referring to when he discussed individual errors, although in certain contexts it may be difficult to determine the dividing line between a systemic or framework failure, operational failures, and mere errors. After all, as the Master of the Rolls noted, all system or framework errors are made by human beings.[177] What occupiers must therefore identify is "a failure to provide an effective system of rules, guidance and control within which individuals are to operate in a particular context". This is to be contrasted with an error which involves "an individual's failure to operate properly within the system provided by the state", which would not violate Article 2.[178] An error might be, for example, where cladding falls, due to it being incorrectly installed, and kills a resident. This building error does not constitute a violation of Article 2, but could involve private law claims against the builder.

These operational duties may be placed not only on central government but also on other public bodies where they have a responsibility for the particular site. As public bodies, both local authorities and some housing associations have responsibilities under the HRA, and this means that they will also have positive obligations, including the operational duty, in relation to their own housing stock.[179] Once a fire risk is known, the operational duty will apply to them, and they do, as building owners, have the power to remediate and fix the problem. If they choose to take lesser measures, such as hiring a waking watch, it is questionable as to whether this will be enough to discharge their duties, although as many local councils are

[175] *R (Mrs Pearl Scarfe) v HMP Woodhill* [2017] EWHC 1194 (Admin).
[176] ibid [48].
[177] *Long* (n 100) [25].
[178] *Long* (n 100) [25].
[179] *Weaver* (n 24) [84].

notoriously cash-strapped, this may factor into whether their response is reasonable in the circumstances.

Applying all this to fire safety in high-rise buildings is far from straightforward. At a simple level, it could be said that once the fire spread risks became known following earlier fires and emerging industry awareness of the dangers then a failure to ban the use of combustible cladding and to require the installation of sprinklers is, in itself, a regulatory failure. But the legal analysis will undoubtedly be complicated by differences between industry experts on what does and does not involve a breach of ADB, or the building regulations themselves, as discussed above. In defence of the state, some may argue that the guidance is clear: the Building Regulations specify that the "external walls of a building shall adequately resist the spread of fire". True. But the very fact that this principle-based system fails to lay down clear rules on what is and is not permissible, and leaves wriggle-room for different interpretations, is surely not fit for purpose. In some cases, there is a clear breach of building regulations, as appears to have occurred in *Re St Francis Tower, Ipswich*.[180] The particular issue before the Tribunal involved consultation on proposed service charges, but they were provided with evidence about the state of the building and refer to a "staggering" catalogue of fire safety failures, including the building being lived in even though there appears to have been no building control sign off. It may be argued that this case, and other situations like it, involve "human error" – a developer using the wrong product, a builder using poor construction methods, an inspector not paying close enough attention etc. However, given the widescale problems identified in Part I, it is clear that the real and imminent risk to life caused by fire in high-rise buildings is attributable to structural and systemic failures which have allowed a culture of economy and disregard to flourish.

C. Limits of Bringing a Claim

The two most important objectives for leaseholders will be: to make the property safe (which is important for all occupiers, not only leaseholders), and to avoid having to pay the cost of remediation works and interim measures. The government's funding announcements (the social and private ACM remediation funds) were intended to help with both. By providing funding, the government hoped this would push previously stubborn freeholders to make buildings safe. The particular policy response chosen by the government to the ACM problem sought to achieve remediation without merely transferring the financial burden onto leaseholders. The positive obligation on the government under Article 2 is to set up and maintain a regulatory system that preserves life, but does not, however, speak directly to the question of who pays. For all of those living in non-ACM blocks or with mixed ACM and other defects, the government funding announcements will do nothing either to make them safe or save them from massive costs. For these people, bringing a claim arguing that there is an ongoing breach of the operative duty or using the policy announcement (or refusal to carry out a Housing, Health and Safety Rating System inspection in the case of local authorities) as a trigger event for a human rights challenge may require the government (or local authority) to re-think. But what it has to re-think is how to protect life and to respect private and family life. Given that the only feasible way forward the government saw in relation to ACM buildings was to provide a fund for remediation, it may be that a similar route has to be provided for other fire safety defects. What human rights arguments less easily play into is that leaseholders

[180] *RG Securities* (n 6).

should be given financial support. So for those flat owners whose freeholders have already decided to remediate and who are now finding chunky service charge demands coming through the mail, it will be a much more difficult case to argue that human rights law can provide further redress. The most critical goal is to make buildings safe to live in, and enabling this to happen may satisfy the obligations of public bodies under Article 2. If, however, this not practically possible, or there is long-term blight on flat values, or occupiers are evacuated, then it may be that the occupiers' rights under A1P1 will come to the fore.

Even if the claimant can establish breach of their human rights, the court is not bound to grant a remedy. The remedies are discretionary and, whilst a court will usually grant an appropriate remedy if the claimant establishes that the state has acted unlawfully, there are cases where the courts may decline.[181] Where the court finds that an act of the public authority is unlawful under the HRA, it may grant such relief or remedy (or make such order) to afford "just satisfaction".[182] The primary concern in human rights cases should be to end the violation of Convention rights. As such, the courts have viewed damages as a "last resort": the HRA is "not a tort statute".[183] Despite this, large awards remain possible. In *OAO Neftyanaya Kompaniya Yukos v Russia*, the ECtHR held that it could not depart from the "firmly established" principles of *restitutio in integrum* (restoration of an injured party to the situation which would have prevailed had no injury been sustained) and ordered Russia to pay the applicants €1,866,104,634.[184]

There will be all the usual challenges entailed with any form of litigation. It is very time-consuming, it requires commitment and effort; it is stressful and emotional. In addition, there are questions about how it would be funded, especially as many individuals living in unsafe blocks are already financially stretched. There are, however, new ways of trying to fund legal actions, in particular, crowdfunding is becoming common. The website *crowd justice*, for example, has raised over £10 million to fund legal expenses for over 500 different causes. It is also possible for interest groups to represent claimants in human rights actions. For example, in 2017, the charity *Inquest* intervened in an ultimately unsuccessful challenge under Article 2 in *R (on the application of Mrs Pearl Scarfe) v HMP Woodhill*.[185] Where claimants have no private interest in the outcome of the case and the issues raised are of general public importance it may be possible to shield them from costs by applying for a Protective Costs Order which, if granted, could require the defendant to meet the costs of both parties.[186]

5. Conclusion

It is clear that *something* must be done about fire safety in blocks of flats. But unless the government is held to account for creating and overseeing a defective regulatory system, it is hard to see how this is going to happen. It is submitted that there is an ongoing violation of

[181] CPR 1998/3132 Rule 54.1, 54.1.10.
[182] ECHR Article 41; HRA 1998, ss 6(1), 8(1), and 8(2); Lord Woolf and others, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2018) para 13-54.
[183] *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 [56]; *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 [19].
[184] *OAO Neftyanaya Kompaniya Yukos v Russia* (2014) 59 EHRRSE 12 [21] and [51]. It should be noted the original application was for €90 billion. This means that the ECtHR's conception of "just satisfaction" was significantly less than the applicants originally sought.
[185] *Mrs Pearl Scarfe* (n 175).
[186] CPR 1998/3132 Rule 44.3(2); *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [74].

the human rights of individuals living in unsafe blocks. While victims in other contexts have yet to use Article 2 as a pro-active remedy, it has the potential to be used positively. As Lord Brown observed, "[n]obody has ever suggested that, merely because a particular question which arises under the Convention has not yet been specifically resolved by the Strasbourg jurisprudence, domestic courts cannot determine it".[187] To be practical and effective, the state's positive duty must be understood in a way that actively protects life. This reflects the teleological and evolutionary approach to interpretation of the ECHR. To date, the limited case law on Article 2 has proved it to be a clumsy tool, identifying gross and disproportionate violations only after tragedies have occurred. Instead of compelling states to act in the interest of protecting society, Article 2 has been used to assign blame in the hope of lessons being learned for the future. This restricted use of the right to life stems from the difficulty of proving that tragedies (actual and potential) are attributable to the state's administrative and regulatory failures. Is the evidence gleaned from the case of Grenfell and connected fires enough to prove that there is a real and imminent risk to life from construction defects? We argue that it is.

Individuals living in unsafe blocks live in fear of their lives, despite interim measures, and for leaseholders, there are also massive worries about the costs of these temporary measures and longer-term remediation. With only limited possibilities for redress in private law, the only avenue available for many occupiers is through the realisation of their Convention rights and the hope of obtaining remedies through the HRA. There is considerable (and growing) evidence that our government continues to act in a way that is incompatible with its substantive and procedural positive obligations under Article 2. Potential violations of Articles 3 and 8 further implicate the government. While Grenfell Tower painfully exposed the risk of fire in high-rise buildings, the system that allowed this to happen is, by and large, still in place, with only inadequate, piecemeal reforms being offered. The defects found in Grenfell Tower, and the culture that propagated them, were not unique: they have been found in hundreds (and potentially thousands) of buildings throughout the UK. It will be a long, costly, and emotionally draining road for residents so long as the government continues to fail to act. To avoid exacerbating the plight of people living in high-rise blocks, it is time for the government to act to ensure that everyone is safe tonight. Further change should not follow another tragedy; change should *preclude* tragedy.

[187] *Rabone* (n 91) [112].