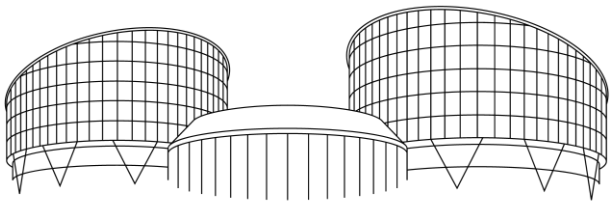

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF VAN COLLE v. THE UNITED KINGDOM

(Application no. 7678/09)

JUDGMENT

STRASBOURG

13 November 2012

FINAL

29/04/2013

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

In the case of Van Colle v. the United Kingdom,

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

Lech Garlicki, *President,*
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 23 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 7678/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr Irwin Van Colle and Mrs Corinee Van Colle ("the applicants"), on 28 January 2009.

2. The applicants were represented by Mr H. Smith, a solicitor practising in Middlesex. The United Kingdom Government ("the Government") were represented by their Agent, Ms L. Dauban, of the Foreign and Commonwealth Office.

3. The applicants complained under Articles 2 and 8 of the Convention that the police failed to protect the life of their son from an individual who was the accused in criminal proceedings in which their son was a witness.

4. On 9 February 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants, Mr and Mrs Van Colle, are British nationals who were born in 1945 and 1946, respectively. They are married and live in

Middlesex. The application concerns the murder in 2000 of their son, Giles Van Colle, who was born in 1975.

A. The background facts and Giles Van Colle's murder

6. In March 1999 Detective Constable ("DC") Ridley arrested Mr Brougham (who had numerous aliases) on suspicion of theft from "Southern Counties". He was released without charge.

7. In September 1999 Giles Van Colle, an optometrist, hired Mr Brougham who was using the alias Lee Jordan and who thereby concealed a criminal record (common assault in 1993, for which he was fined £156 (pounds sterling), and disorderly behaviour in 1999). When Giles Van Colle raised with Mr Brougham a query about his national insurance number, the latter reacted in an aggressive manner, raising his voice and trapping Giles Van Colle against a wall. On 24 December 1999 Mr Brougham did not turn up for work and never returned. Giles Van Colle wrote to him requiring him to pay for repairs to defective equipment which Giles Van Colle thought was Mr Brougham's fault and referring to a possible claim in the small claims court. Mr Brougham did not reply.

8. On 17 February 2000 DC Ridley again arrested Mr Brougham on suspicion of theft from Southern Counties and searched his garage. Optical equipment was found. Giles Van Colle later identified some of the property as his own in statements to the police. A police officer told the second applicant that Mr Brougham was "a nasty piece of work" who was wanted elsewhere by the police.

9. On 23 April 2000 Mr Brougham was charged with three offences of theft and obtaining property by deception. He was bailed unconditionally. The victims were said to be Giles Van Colle, Southern Counties and Alpha Optical. The latter company was owned by a Mr P and a supplier of Giles Van Colle. The total amount involved was £4000 and the material allegedly stolen from Giles Van Colle was worth approximately £500.

10. In April 2000 Mr Brougham was convicted of theft (retaining a hire vehicle beyond the hire period).

11. During the summer of 2000 Mr Brougham offered Mr H (Southern Counties) the sum of £1000 not to give evidence against him. Mr H did not report this and it emerged only after the murder of Giles Van Colle.

12. On 10 August 2000 Mr Brougham telephoned Mr P and offered to pay £650 for the Alpha Optical material. An arrangement was made for Mr Brougham to meet a colleague the next day but Mr Brougham cancelled it. Mr P reported this to DC Ridley who took statements from Mr P and his colleague. These statements were discussed by DC Ridley with prosecution counsel at a directions hearing at a Crown Court on 20 September 2000 and were sent by him to the Crown Prosecution Service ("CPS").

13. On 24 September 2000 Giles Van Colle's car was set on fire. A fireman expressed the view that the fire had started accidentally so that Giles Van Colle did not suspect arson and did not report the incident to DC Ridley.

14. On 13 October 2000 Mr Brougham telephoned Mr P and offered him a bribe not to give evidence. Mr P immediately reported this to DC Ridley who advised him to refuse any such offers.

15. On 13 October 2000 Mr Brougham also telephoned Giles Van Colle at his practice and said words to the effect: "I know where you live. I know where your businesses are and where your parents live. If you don't drop the charges you will be in danger". A customer of Giles Van Colle present when the call came through later gave evidence to the High Court that Giles Van Colle told him he had just received a "death threat" from a former employee and was quite shocked. Giles Van Colle dialled the emergency services number. The police officer noted the above threat, recording that:

> "The voice sounded to the victim like a former thieving employee ... also known as Daniel Brougham ... who is currently under investigation by Dave Ridley ... in connection with various acts of dishonesty but as far as the victim knows no charges have been made as yet."

16. Giles Van Colle was told to report the threat to DC Ridley. He did so between 16 and 18 October 2000 and DC Ridley also made a contemporary note to much the same effect:

> "Mr Van Colle – know where you live, businesses are – parents live if you don't drop the charges you'll be in danger – aggressively said ...
>
> Sounded like Lee Jordan – employee – spoke - quietly - malice – intent – foreign accent like Lee J's."

17. On about 17 October 2000 Mr Brougham visited a Mr A (Southern Counties) and offered him £400 not to give evidence. Mr A refused but did not report the matter to DC Ridley.

18. On 19 October 2000 DC Ridley took statements from Giles Van Colle and Mr P. In his statement Giles Van Colle said that he believed the caller was Mr Brougham because of the accent and because he had no involvement in any other legal matter whether civil or criminal and he described himself as having been "totally shaken up" by the call. DC Ridley stated during later disciplinary proceedings that, while Giles Van Colle believed it was Mr Brougham, he was not definite and DC Ridley would have expected him to be definite if it really was Mr Brougham since they had worked together for a period of time. Mr P had not described Mr Brougham as threatening. DC Ridley sent the CPS a copy of the statements.

19. On 25 October 2000 the trial was listed for the week commencing 27 October 2000. DC Ridley spoke to prosecution counsel about the events of 13 October 2000 and the statements taken. DC Ridley understood from

this discussion that the best use of the statements was for them to be served in support of the theft prosecution.

20. On 28 October 2000 Mr P's wife's car was set alight. An Automobile Association inspector concluded that the fire might have been caused accidentally. In the early hours of 29 October 2000 there was also a fire at Mr P's business premises (an unlocked outbuilding used to store material of little value). The fire officer was inconclusive as to the cause of the fire. When Mr P reported both fires to DC Ridley, asking if Mr Brougham could be responsible, DC Ridley considered it unlikely and advised Mr P, if he had concerns, to contact the Metropolitan Police Service which, on 4 November 2000, informed him that there was no evidence of arson. It was later, during the investigation into Giles Van Colle's murder in 2001 that the relevant experts found that both fires had been started deliberately.

21. On 5 November 2000 DC Ridley was seconded to another station on an urgent unconnected murder investigation.

22. In preparation for the theft trial, on 9 November 2000 the CPS served notices of additional evidence on Mr Brougham which contained the statements of Giles Van Colle and Mr P of 19 October 2000. The High Court later found that Mr Brougham was unaware of the notice until 22 November and that, in any event, service of the two statements, without more, would have reassured Mr Brougham that no further action was being contemplated by the police in relation to his attempts to prevent the witnesses from testifying.

23. On 9 November 2000 Mr Brougham telephoned Giles Van Colle. The latter was sure that Mr Brougham was the caller. Mr Brougham said:

> "Give Alpha Optical a call and get them to drop the charges, you motherfucker ... Do you hear me? Do you hear me?".

24. Giles Van Colle did not respond and Mr Brougham hung up. On the same day Giles Van Colle left a message on DC Ridley's answerphone indicating his concern and stating that he would contact DC Ridley on his mobile.

25. By letter dated 10 November 2000 Giles Van Colle's insurers notified him of an investigator's finding that his car fire was consistent with a "malicious vandal attack". Giles Van Colle did not see a link between this and Mr Brougham and did not report the result. On the same day, he received a standard letter from the police indicating that his evidence was crucial and that he was bound as a witness to attend at court.

26. It was later found by the High Court (as it was disputed) that it was more likely than not that Giles Van Colle made mobile telephone contact with DC Ridley before 17 November 2000 as regards the telephone call of 9 November 2000. DC Ridley accepted that on that date he requested Giles Van Colle to send him a written account of that telephone call of

9 November. On 19 November 2000 Giles Van Colle wrote the account. On 20 November he sent the account by facsimile to the police station. On 21 November a police officer gave it to DC Ridley and, at approximately 15.00 on 22 November, DC Ridley spoke to Giles Van Colle and arranged a meeting for 23 November 2000 in order to take a statement. DC Ridley later confirmed that he intended arresting Mr Brougham on witness intimidation charges after obtaining Giles Van Colle's statement.

27. At approximately 19.30 on 22 November 2000 Giles Van Colle was shot dead by Mr Brougham as he was leaving work.

28. Mr Brougham was arrested and charged with the murder of Giles Van Colle. He was released on bail. In March 2002 Mr Brougham was convicted of his murder and sentenced.

B. The Police Disciplinary Panel ("the Panel")

29. On 12 June 2003 the Panel (comprising a Deputy Chief Constable and two Superintendents) found DC Ridley guilty of failing to perform his duties conscientiously and diligently in connection with the intimidation of Giles Van Colle and Mr P. The Panel considered, *inter alia*, the following allegations against DC Ridley, namely that he:

> "1. failed to investigate thoroughly whether offences of intimidation of witnesses and doing acts tending and intended to pervert the course of public justice had been committed;
>
> 2. failed to analyse the available evidence carefully, both individually and with others, through proper channels of line management; ...
>
> 4. failed to consider carefully the power to arrest the said Mr Daniel Brougham."

30. The Panel found that the relevant events amounted to an "escalating situation of intimidation" as regards Messrs P and Van Colle and that DC Ridley was in a "unique position" during that time "with the fullest picture of the developing situation". The Panel found that during that period he had failed to "perform his duties conscientiously and diligently in connection with the improper contacts made with these witnesses". As to the specific elements of the charge:

> 1. The Panel accept that DC Ridley did obtain statements when the inappropriate approaches to witnesses were reported to him by witnesses. [H]owever, the Panel's view is that an investigation includes seeing this through to a satisfactory conclusion. ... it was apparent that the 2 phone calls to [Mr P] and Van Colle on 13 October [the] subject of statements taken on the 19 October did amount to substantive offences of witness intimidation and attempting to pervert the course of justice. In a full and proper investigation, the public would at least have expected contact with Mr Brougham in an attempt to prevent recurrences, but more probably he should have been arrested.

> Furthermore, on the 29 October when [Mr P] reported the 2 fires ... a thorough investigation would have taken account of previous incidents and initiated a more detailed examination of the circumstances.
>
> 2. The Panel felt that on the evidence presented, the officer failed to adequately analyse and properly identify possible links between events, that would have resulted in a different course of action, had he done so. In particular, he failed to identify on 13 October that the calls to [Mr P] and Mr Van Colle were probably both made by Mr Brougham. Further on 29 October 2000 he failed to analyse and assess the information regarding the two fires in the context of the previous threats and intimidation.
>
> In respect of the final call from Van Colle the officer stated he was happy to wait to make his statement. However, DC Ridley was in possession of additional facts i.e. the fires, which may have affected Van Colle's level of concern. This issue merited greater urgency. The Panel acknowledged the informality of the line management arrangements presented in the evidence and that none of his immediate line managers contradicted the actions the officer was undertaking and that he drew comfort from this together with discussions he had with counsel at court in respect of this case.
>
> ...
>
> 4. On the basis of the 2nd statement taken from [Mr P] on 19 October the Panel [is] of the view that there was sufficient evidence to arrest for attempting to pervert the course of justice. The Panel is also of the view that in the case of Van Colle there was evidence sufficient to justify grounds for arrest. It is the view of the Panel that an arrest under these circumstances was both necessary and proportionate and was likely to have been beneficial to the ultimate outcome of the case. It is acknowledged that the officer through his counsel accepted that he did make a wrong decision about not arresting Mr Brougham and the panel accepts that there would have been no guarantee that this would have averted the ultimate tragedy."

31. The Panel fined DC Ridley 5 days' pay noting, *inter alia*, his excellent service record, that the findings related to errors of judgment and not to malicious or dishonest acts and the mitigation given on his behalf.

C. Proceedings under the Human Rights Act 1998 ("HRA")

32. The applicants (the first applicant being the administrator of the deceased's estate) brought a claim against the Chief Constable of the Hertfordshire Police under sections 6 and 7 of the HRA claiming damages for a breach of Articles 2 and 8 of the Convention. The defence accepted the findings of the Panel and that DC Ridley gave inadequate consideration to the steps he could have taken in response to the threats reported to him. However, the claim was defended on the basis that the criticisms of DC Ridley's conduct were made with the benefit of hindsight; that at the time of the murder no-one could reasonably have predicted that Mr Brougham would take such a drastic step; and that the circumstances surrounding DC Ridley's admitted "errors of judgment" or "operational errors" could not be

said to be so exceptional as to be incompatible with Giles Van Colle's Convention rights and unlawful under the HRA.

1. The High Court (Van Colle v Chief Constable of the Hertfordshire Police [2006] EWHC 360 (QB))

33. The trial was held from 7-15 June 2005. The trial judge died before delivering judgment. The parties agreed that the case could be concluded by a new judge on the basis of the transcript and the documents.

34. On 10 March 2006 the High Court delivered its judgment. There was little dispute on the facts. The court found that the respondent acted in violation of Articles 2 and 8 by failing to discharge the positive obligation on the police to protect the life of Giles Van Colle and it awarded damages to Giles Van Colle's estate and to the applicants.

35. The High Court identified the legal principles to be derived from *Osman v. the United Kingdom* (28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) as to the scope of the positive obligation under Article 2 to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another. The court appeared to adopt the principles drawn from the judgment of Auld J in *R(Bloggs61) v. Secretary of State for the Home Department* ([2003] 1WLR 2724) and, in particular, accepted that:

> "(5) Where it is the conduct of the state authorities which has itself exposed an individual to the risk to his life, including for example where the individual is in a special category of vulnerable persons, or of persons required by the state to perform certain duties on its behalf which may expose them to risk, and who is therefore entitled to expect a reasonable level of protection as a result, the *Osman* threshold of a real and immediate risk in such circumstances is too high. If there is a risk on the facts, then it is a real risk, and "immediate" can mean just that the risk is present and continuing at the material time, depending on the circumstances. If a risk to the life of such an individual is established, the Court should therefore apply principles of common sense and common humanity in determining whether, in the particular factual circumstances of each case, the threshold of risk has been crossed for the positive obligation in Article 2 to protect life to be engaged."

36. As to the telephone call of 13 October 2000, the High Court found:

> "It is accepted by the Defendant both that DC Ridley took no further steps at this time in response to the threat to [Giles Van Colle] made by Mr Brougham, and that he should have done more by contacting or arresting Mr Brougham. His explanation for failing to arrest Mr Brougham, namely that he felt [Giles Van Colle] had not made a sufficiently clear and positive identification of Mr Brougham is, as he now accepts, unsatisfactory in the circumstances. In his evidence at trial he accepted in cross-examination that this had been a serious threat, that it involved the threat of physical danger, that it disclosed an offence of witness intimidation, and that it indicated a risk to [Giles Van Colle's] life. He also conceded that he should have appreciated this at the time. In allowing himself to be dissuaded from a more positive response to this threat by what he regarded as a doubtful identification [Counsel for the Chief Constable] submits, as DC Ridley himself accepted in evidence, that DC Ridley made an error of judgment. The judgment he exercised, however, related only

to whether he had reasonable grounds to arrest Mr Brougham, to charge him with criminal offences relating to his interference with witnesses, and to prosecute him successfully in connection with such charges. It is clear on the evidence, and DC Ridley himself accepted it, that he did not give any thought at all to [Giles Van Colle's] safety and to the need for steps to be taken to protect him in the light of the threat which had been made."

37. As to the fires on 28 and 29 October, the High Court found:

"26. Given the seriousness of these incidents, [Mr. P]'s distress and his suspicions that Mr Brougham was behind the fires, further and prompt investigation and action by DC Ridley was called for. In this I find myself in agreement with the [Panel's] conclusions that DC Ridley failed to respond to an escalating picture of intimidation involving two prosecution witnesses in the same case, and in particular that he failed to analyse carefully the available evidence, both individually and with others through proper channels of line management. These conclusions are accepted in this trial as correct and DC Ridley acknowledges that the report to him of these fires should have prompted an immediate response, but that he failed to act and failed to consider protection. These events in my view called for a pro-active approach; an investigation and analysis of the possible links between the various incidents which had, by early November, been reported to him by the witnesses. Questions should have been asked of the other prosecution witnesses [Mr A and Mr H], and information re the fires on 28 and 29 October shared with the Van Colles, all of which would have elicited important information about the nature and extent of Mr Brougham's activities and would then have required an assessment of the need for witness protection for both [Mr. P] and [Giles Van Colle] and the appropriate steps to be taken. If that had been done it is likely in particular, in my view, that [Giles van Colle] would have reported the fire to his own car on 24th September, especially after his insurers reported their findings that it had been started deliberately. Instead, the matter was understandably regarded by [Giles Van Colle] and his parents as wholly unconnected with Mr Brougham. Even when [Giles Van Colle] raised with his mother whether the deliberate fire to his car, as found by the insurers, could be linked to Mr Brougham's threats, she stated in her evidence that she had merely observed to him that they had been watching too much television .... That it was for the officer in the case, and not the witnesses themselves, to evaluate all the material information and make an informed assessment of the risk and the need for protection is clear from the evidence, not least from DC Ridley himself in accepting that it was to him that any witness who had suffered intimidation would primarily look for support ...

27. ... Viewed objectively, at the time these events were unfolding, by late October or early November a disturbing pattern of behaviour was emerging, which was capable of being identified with appropriate and reasonable enquiries by the officer in the case. It called for immediate action. There was none. Meanwhile, it appears that on 5th November DC Ridley was seconded to an urgent murder inquiry ...."

38. As to the telephone call of 9 November, DC Ridley confirmed in evidence that he intended to arrest Mr Brougham on witness intimidation charges after taking Giles Van Colle's statement but that the latter's safety had never been in his mind. The High Court noted the special position of those required to be prosecution witnesses at criminal trials and the contents of the Hertfordshire Constabulary's Witness Protection Policy ("the Protocol"). While the level of protection to be given obviously depended on the circumstances, the fact that the witness was also the victim was a factor

which might give rise to an increased likelihood of intimidation. In this respect, it concluded:

> "37. Whilst particular measures are clearly a matter of judgment for the individual officer in any given situation the essential requirement, reading this policy as a whole, is for police officers to consider and assess all the circumstances and the risk in any particular case, in order to reach an informed decision as to the need for protection and the level of protection required for the witness or witnesses affected. The very existence of this policy indicates that the Defendant recognised that the police had a duty to protect witnesses who are the victims of intimidation. It is therefore a matter of regret, as is clear from DC Ridley's evidence at this trial, that he had throughout been wholly unaware of the policy and the guidance contained within it. In reply to questions from the judge he also agreed that he had had no training in relation to the contents of the policy or about witness protection generally. It appears that the policy was placed on the Hertfordshire Constabulary intranet but DC Ridley had received no instructions about it or about following the guidance it contained. He therefore accepted that he had not had regard to its contents when dealing with this case ...."

2. The Court of Appeal (Van ColIe v Chief Constable of the Hertfordshire Police [2007) EWCA Civ 325)

39. On 24 April 2007 the Court of Appeal unanimously rejected the Chief Constable's appeal. The Court of Appeal noted that DC Ridley's actions were to be judged without hindsight and on the basis of the information which was available to him or would have been available to him if he had taken all proper steps at the time.

40. The Court of Appeal agreed with the High Court and the Panel that the telephone calls of 13 October put "a different complexion on the case" and that DC Ridley ought to have investigated further. DC Ridley's failure to contact or arrest Mr Brougham after taking the statements on 19 October 2000 was not a "mere error of judgment, but a failure on the part of DC Ridley as a professional police officer to carry out his duties properly" where there was evidence of intimidation of a witness. The Panel, comprising experienced police officers, had not judged DC Ridley with hindsight but on the basis of the information available to him at the time.

41. As regards the fires on 28 and 29 October 2000, the Court of Appeal, in agreement with the High Court and the Panel, found that DC Ridley was in "a unique position ... with the fullest picture of the developing situation" and had failed to assess the information about the two fires in the context of the previous threats and intimidation: this was not a mere error of judgment but "a failure on the part of DC Ridley as a professional police officer to carry out his duties properly by investigating the fires further."

42. As to the failure to act after the threatening phone call of 9 November 2000, the Court of Appeal agreed with the Panel noting that the Chief Constable had always accepted that DC Ridley should have acted with greater urgency after this call was reported to him.

43. The Court of Appeal agreed with the High Court's review of, and reliance on, the Protocol: while DC Ridley may not have been informed or trained in use of the Protocol, the acts or omissions of the police had to be judged on the assumption that the officer concerned had been provided with appropriate guidance so that the High Court was correct in finding that the acts or omissions of DC Ridley had to be judged in light of the Protocol.

44. The Court of Appeal also agreed with the High Court as to the principles governing the *Osman* test, the Court of Appeal relying expressly on the judgment of Auld J in *R(Bloggs61) v. Secretary of State* (cited above).

45. Applying those principles, the Court of Appeal found that there was indeed a real and immediate risk of which DC Ridley ought to have been aware, given: the telephone calls of 13 October (he should have appreciated that it was Mr Brougham); the fires in Mr P's car and premises (given the previous connected events, reasonable enquiries at the time could have yielded the later forensic confirmation that it was arson); the threat to Giles Van Colle on 9 November (in view of the existing threats and events); the fact that DC Ridley accepted that throughout the relevant time he did not give any thought to the need to protect Giles Van Colle; and the failure to give DC Ridley instruction on the Protocol. The Court of Appeal rejected the argument that this put an excessive burden on the police and concluded that:

> "94. In short we do not disagree with the judge's conclusion, which was consistent with that of the [Panel], that the police should have taken action to protect [Giles Van Colle]. They should have known that there was a real risk to his life and that the risk was and would remain immediate until the date of Mr Brougham's trial. In these circumstances they should have done all that could reasonably have been expected of them to minimise or avoid the risk. ... we conclude that ... the judge was correct to hold that the police were under a duty to take preventive measures in relation to [Giles Van Colle] and that they were in breach of that duty and therefore acted incompatibly with [Giles Van Colle's] right to life under Article 2 of the Convention."

46. The Court of Appeal again agreed with the High Court that the protective measures that were reasonably open to DC Ridley could have had a real prospect of altering the outcome and avoiding Giles Van Colle's death. DC Ridley had accepted that, if he had complied with the Protocol, there would have been a real prospect that Giles Van Colle's life would have been saved and, indeed, that it was more likely than not that his death would have been avoided had the relevant steps been taken. If the police had acted as they should have done, it was highly likely that Mr Brougham's bail would have been revoked, that he would have been remanded in custody and that Giles Van Colle would not have been murdered.

47. In the circumstances, the police had been in breach of their duty by failing to take the relevant steps and their failure was incompatible with the right to life under Article 2 of the Convention. It was unnecessary to deal with the applicants' claim under Article 8 of the Convention. The Court of

Appeal reduced the damages awarded to the deceased's estate and to the applicants.

3. The House of Lords (Van Colle v Chief Constable of the Hertfordshire Police (2008) UKHL 50)

48. On 30 July 2008 the House of Lords unanimously allowed the appeal of the Chief Constable. In the same judgment they also decided a parallel appeal concerning reported threats to the police where the victim claimed damages under the common law alleging a negligent failure by the police to protect him (*Smith (FC) v. Chief Constable of Sussex Police* ([2008] UKHL 50).

49. Lord Bingham considered that the scope of the *Osman* obligation to protect lay at the heart of the appeal. Each "ingredient" of paragraph 116 of the *Osman* judgment was of importance. In examining the various pleadings on the question, Lord Bingham noted that the State relied on *In re Officer L* ([2007] UKHL 36) which pointed out that "the test of real and immediate risk is one not easily satisfied, the threshold being high" and he added that "I would for my part accept that a court should not lightly find that a public authority has violated one of an individual's fundamental rights or freedoms, thereby ruling, as such a finding necessarily does, that the United Kingdom has violated an important international convention". He saw force in the submission that the test formulated by the Strasbourg Court in *Osman* was "clear and calls for no judicial exegesis". In addition, in its *Osman* judgment, the Strasbourg Court had "roundly rejected" the submission by the State that the relevant act had to amount to gross negligence/wilful disregard of the duty to protect life. He continued:

> "Such a rigid standard would be incompatible with the obligation of member states to secure the practical and effective protection of the right laid down in article 2. That article protected a right fundamental in the scheme of the Convention and it was sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge."

50. In its formulation of the "real and immediate risk" test the Strasbourg Court emphasised what the authorities knew or ought to have known "at the time". For Lord Bingham, this latter phrase was a "crucial part" of the test since, where a tragic killing occurred, it was all too easy to interpret the events with the benefit of hindsight and that was what the Court of Appeal had done. Moreover, Lord Bingham also agreed that the *Osman* test depended not only on what the authorities knew but also on what they ought to have known so that:

> "stupidity, lack of imagination and inertia did not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further enquiries or investigations: it is then to be treated as knowing what such further enquiries or investigations would have elicited."

51. However, the lower courts had misdirected themselves in considering that a witness was in a special category of vulnerable person at a special and distinctive risk, in attaching weight to the Protocol and in treating the *Osman* test as lowered in such a case. The Strasbourg Court had set down one test in *Osman* and Lord Bingham cited with approval Lord Carswell in *In re Officer L* (cited above) who had pointed out that "the standard is constant and not variable with the type of act in contemplation". Moreover, the Court's case-law had demonstrated that the *Osman* test had been applied in situations widely different from the present. Accordingly, the *Osman* test remained the same and the central question was whether DC Ridley, making a reasonable and informed judgment on the facts and in the circumstances known to him at the time, should have appreciated that there was a real and immediate risk to the life of Giles Van Colle and that could only be answered in the light of all the circumstances of any particular case.

52. Since the lower courts had misdirected themselves on the *Osman* test, Lord Bingham reviewed the facts and noted the following 11 factual matters: Mr Brougham was charged with minor offences and a custodial sentence was improbable; Mr Brougham's record was that of a petty offender and, with only a hint of violence in his record, he could not have appeared to be prone to violence; there was nothing to suggest at the time that he had criminal associates; Mr Brougham's first approach to Mr H was not reported to DC Ridley (it was thus irrelevant); Mr Brougham's approach to Mr P on 10 August was reported to DC Ridley and, while irregular, it was not suggestive of violence to Mr P, let alone to Giles Van Colle; the fire which damaged Giles Van Colle's car on 24 September was not reported to DC Ridley (it was thus irrelevant); the bribe offered by Mr Brougham to Mr P on 13 October was serious criminal conduct but it did not suggest, and might well have appeared inconsistent with, violence and could not have been interpreted as any threat to the life or security of Giles Van Colle; as to the telephone call to Giles Van Colle on 13 October, the latter took some days to call DC Ridley and, in the context of the case, the prospect of the threat being implemented could reasonably be seen as remote; Mr Brougham's offer of a bribe to Mr A on about 17 October was not reported to DC Ridley (it was thus irrelevant); the fires concerning Mr P were considered to have been accidental and, even if attributed to Mr Brougham, it would have suggested that he was willing to go to some lengths to avoid conviction but hardly a threat to the life or security of anyone, let alone Giles Van Colle. While the post-murder investigation found that those fires were deliberate, it was unrealistic to suppose that, at the time, a minor case of theft could have been thought to merit an intensive investigation of the kind which properly followed a murder; the telephone call made by Mr Brougham on 9 November 2000 was unpleasant in content and aggressive in tone, but it contained no threat.

53. While considerable emphasis had been laid by the applicants on the Panel's findings, Lord Bingham noted that the Panel's conclusions lacked any suggestion that DC Ridley should have apprehended any imminent threat to the life or safety of Giles Van Colle, a factor underlined by the Panel's references to errors of judgment and the modest penalty. Moreover, the fact that DC Ridley confirmed in evidence that the question of witness protection never came to his mind was plainly explained by the fact that he did not perceive a real and immediate threat to the life of Giles Van Colle and he was proposing to arrest Mr Brougham on 23 November on witness intimidation charges only. Lord Bingham continued:

> "The question is whether, making a reasonable and informed judgment on the facts and circumstances which were or should have been known to him at the time, he should have apprehended such violence. The fact that [Giles Van Colle] was a witness in a forthcoming Crown Court trial was of course a relevant fact, but not one of great weight having regard to the minor character of the charges and the unlikelihood of a severe penalty. Approaching the matter in this way, and applying the standard *Osman* test, I cannot conclude that the test was met in this case. If a comparison be made with *Osman*, the warning signs in this case were very much less clear and obvious than those in *Osman*, which were themselves found inadequate to meet the test."

54. As to the applicants' complaint under Article 8, Lord Bingham noted that the police did not interfere with Giles Van Colle's right to respect for his family life and his personal autonomy so that any complaint had to rest on DC Ridley's failure to prevent the interference by Mr Brougham, and Article 2 was clearly the Article under which this claim was to lie.

55. Lord Hope, in his judgment, agreed that:

> "66. The extent of the positive obligation has been defined [in *Osman*]. The relevant part of that paragraph has been quoted by Lord Bingham .... It declares that the court must be satisfied that the authorities knew or ought to have known "at the time" of the existence of "a real and immediate risk to the life" of an identified individual from the criminal acts of a third party. If they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, the positive obligation will have been violated. In *In re Officer L* ... Lord Carswell said that the real and immediate test is one that is not readily satisfied, the threshold being high. I read his words as amounting to no more than a comment on the nature of the test which the Strasbourg court has laid down, not as a qualification or a gloss upon it. We are fortunate that, in the case of this vitally important Convention right, the Strasbourg court has expressed itself in such clear terms. It has provided us with an objective test which requires no further explanation. The question in each case will be whether on the facts it has been satisfied.
>
> The *Osman* test tells us that the facts must be examined objectively at the time of the existence of the threat, and that the positive obligation is breached only if the authorities knew or ought to have known at that time that it was a threat to life which was both real and immediate. In this case everything depends on what DC Ridley knew or ought to have known as the events unfolded before him. ..."

56. Adopting the reasoning of Lord Bingham, he considered that the *Osman* test had not been met. Giles Van Colle was not in a special category

to whom a lower threshold applied: the *Osman* test was not variable and the first sentence of paragraph 116 of the *Osman* judgment defined the limits of the positive obligation on the State to be observed in every case.

57. Lord Phillips concurred with Lord Bingham, adding that one matter was left unclear by *Osman* which was the test to be applied when deciding whether the police "ought to have known" of the risk to life. There were at least two possibilities: that they "ought to have appreciated on the information available to them" or they "ought, had they carried out their duties with due diligence, to have acquired information that would have made them aware of the risk". Lord Phillips considered that the former was the meaning intended but, even applying the latter, there was no valid basis for concluding that the police ought to have known that there was a real and immediate risk to the life of Giles Van Colle.

58. Lord Brown was in full agreement with Lord Bingham. He noted that threats to witnesses were a problem: Home Office/Association of Chief Police Officers ("ACPO") statistics showed that 10% of crimes led to incidents of intimidation. He underlined, however, that the *Osman* test was "clearly a stringent one" which was not easily satisfied, as recognised by the *Osman* judgment itself. It was "a constant one" which did not vary depending on the circumstances so that the fact that Giles Van Colle was a witness was undoubtedly relevant but only to the extent that realistically it increased the likelihood that Mr Brougham would actually carry out his threat to kill or seriously injure him. Nothing on the facts compared to the increased risk to life of political journalists considered in *Kiliç v. Turkey* (no. 22492/93, ECHR 2000-III). It was an indication of the stringency of the *Osman* test that, even on the comparatively extreme facts of *Osman*, the Strasbourg Court found its own test not to be satisfied.

59. Lord Carswell agreed with Lord Bingham and Lord Hope's judgments.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Human Rights Act 1998 ("HRA")

60. The HRA came into force in England, Wales and Northern Ireland on 2 October 2002. Section 6 of the HRA makes it unlawful for a public authority to act incompatibly with Convention rights, unless it is not possible to act differently by virtue of primary legislation. A successful claim would render the public authority liable to the plaintiff (section 7 of the HRA) and a judge can award damages (section 8 of the HRA).

B. In re Officer L ([2007] UKHL 36)

61. Lord Carswell, in giving the majority judgment, noted as follows as regards *Osman v. the United Kingdom*:

> "Two matters have become clear ... First, this positive obligation arises only when the risk is "real and immediate". The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised ...:
>
> > "... a real risk is one that is objectively verified and an immediate risk is one that is present and continuing."
>
> It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high. There was a suggestion in [another case] that a lower degree would engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. ... I do not think that this suggestion is well founded. In my opinion the standard is constant and not variable with the type of act in contemplation, and is not easily reached. Moreover, the requirement that the fear has to be real means that it must be objectively well-founded. ... a real and immediate risk for the purposes of Article 2 ... does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk. ... the existence of subjective fears is not a prerequisite to the finding that there is a risk which satisfies the test of Article 2, and, conversely, if a risk to life exists, Article 2 will be engaged even if the person affected robustly disclaims having any subjective fears. That is not to say that the existence of a subjective fear is evidentially irrelevant, for it may be a pointer towards the existence of a real and immediate risk, but in the context of Article 2 it is no more than evidence.
>
> Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of article 2. As the [Court] stated in paragraph 116 of *Osman*, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available."

C. The Hertfordshire Constabulary's Procedures and Guidelines regarding the Intimidation of Witnesses ("the Protocol")

62. The Protocol, in operation at the relevant time, provided guidance to police officers on witness intimidation and, notably, identified varying levels of witness intimidation and proposed tools for dealing with each. While attention was drawn to the offences of intimidating, harming or threatening to harm a witness, the focus of the Protocol was effective witness protection.

63. The Protocol divided witness intimidation into three 'Tiers', the second of which related to case specific intimidation "involving actual

threats to a witness or to his/her family in an attempt to prevent that person from supporting a prosecution or giving evidence". The Protocol added:

> "The threats must have been made although not life threatening. Judgement is needed in such cases in order to assess the actual risk presented by the threat made. Action which can be taken includes the temporary removal of the witness from his or her home or a number of other measures which are listed in this policy. Tier 2 Witness Intimidation is a Divisional responsibility assisted by HQ Crime Management Department when appropriate."

> The level of protection or assistance to be given to a witness obviously depended on the circumstances although the fact that a witness was also the victim was recognised as a factor which "might give rise to an increased likelihood of intimidation".

64. The Protocol included "prompts" as to measures which could be taken for Tier 2 witness intimidation "to deal with the perpetrator" including proceedings for witnesses intimidation, conditions on bail to avoid such intimidation and effective surveillance of bail conditions. It also includes prompts to protect and support witnesses including providing the witness with information about intimidation and what action they should take if so confronted, informing the witness of any bail conditions, the installation of panic alarms including alarms around a person's neck, installing security lighting or home-based CCTV, alternative temporary accommodation and fast-tracking the case in which the person is a witness.

THE LAW

65. The applicants complained under Articles 2 and 8 that the police failed to protect their son from the risk posed to his life.

66. Article 2, in so far as relevant, provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ..."

Article 8, in so far as relevant, provides as follows

> "Everyone has the right to respect for his private and family life, his home and his correspondence. ..."

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

A. The submissions of the parties and of the third party

1. The Government

67. The Government had one preliminary objection. They argued that, in so far as the applicants complained on their own behalf, they were not victims. The Government accepted that the first applicant could, as executor of his son's estate, complain on his son's behalf. They maintained that the Court has recognised that damages are only awarded to surviving family members if they themselves were victims of a breach of Convention rights and, notably, where they themselves suffered inhuman treatment in the context of death or where there was a failure to properly investigate as that directly affected survivors. They explained that their wider concern was the risk of a multiplicity of claims arising from a death.

68. Alternatively, the Government argued that the case was manifestly ill-founded or, further in the alternative, that there had been no violation of the Convention.

69. They submitted that the appropriate test, which determined whether a positive obligation on the State to take preventative operational measures arose, was set out in the *Osman* judgment. The applicants succeeded before the lower courts because those courts accepted a lower threshold than the *Osman* test. However, the lower courts did so on the basis of earlier domestic case-law which had already been rejected by the House of Lords in the case of *In re Officer L* (paragraph 61 above) before the present applicants' case came before the House of Lords.

70. The Government therefore were of the view that the House of Lords were correct to apply the *Osman* test and to reject a different test based on Giles Van Colle being in a special category of person. The same *Osman* test and threshold had been applied in numerous contexts including cases where the deceased person's exposure to risk followed an act of the State. The need to avoid a disproportionate operational burden on the authorities did not change according to whether or not the authorities themselves had influenced the situation. In the present case, there was a strong public interest in pursuing the prosecution and it would have been disproportionate to impose a positive obligation on the State to avoid any risk to the life of witnesses even where the State could not have known of an immediate and real risk to life. The applicants did not cite one case where the Court had diluted the *Osman* test.

71. In any event, it was incorrect to suggest, as the applicants did, that an increased protective burden for witnesses would be feasible because Giles Van Colle purportedly fell within a limited category of person. In the year

2009/2010 the CPS prosecuted 18,174 cases in the Crown Court and 39,882 cases (excluding motoring offences) in the Magistrates' Court, with civilian witnesses giving oral evidence in the majority of those cases and written statements in even more cases. Threats to witnesses were commonplace, as accepted by the Court of Appeal in the present case. While the Home Office/ACPO statistics showed that as many as 10% of crimes led to intimidation, it was rare for such to amount to acts of serious violence against witnesses, such acts being largely confined to "professional criminals" who risked a long sentence or in cases of domestic violence. In those serious cases (currently approximately 2000) a range of protective measures is employed.

72. If a person was in a particularly vulnerable category, that did not dilute the *Osman* test but constituted one of the factors to be considered together with all of the circumstances of the case in determining whether the protective burden had been satisfied. Moreover, Giles Van Colle was not especially vulnerable in the *Kiliç v. Turkey* sense (no. 22492/93, ECHR 2000-III) and nothing in his circumstances made him more likely to be at risk than the thousands of others giving evidence in criminal trials.

73. Turning therefore to the application of the *Osman* test in the present case, the Government maintained that the House of Lords had correctly applied it: Mr Brougham's act was wholly disproportionate and unforeseen. Since the lower courts had misdirected themselves on the test to be applied, the House of Lords had to answer the central question as to whether Mr Broughman posed a "real and immediate risk" to the life of Giles Van Colle. Since the lower courts had used the transcript of evidence and since there was little dispute on the facts, the House of Lords was as appropriately placed as those courts to analyse the facts. The Government adopted Lord Bingham's review of the evidence as did all other members of that court. In such matters of evaluation and assessment requiring the application of settled principles to the facts of a particular case, the Government argued that the States were entitled to a certain margin of appreciation and it was, as a general rule, for the domestic courts to assess the evidence before them so that the Court would only interfere if the assessment of the evidence or the establishment of the facts by the domestic court was manifestly unreasonable or otherwise arbitrary.

74. The Government commented in some detail on the application of the *Osman* test to the facts of the present case making essentially four main points. In the first place, they maintained that the applicants analysed the case with too much hindsight. Secondly, they listed several factors which were previously found by this Court to amount to a "real and immediate risk" and which were absent in the present case including an absence of prior relevant history. Thirdly, they argued that the risk factors in the *Osman* case, where no breach was established, were far more serious than those in the present case. Fourthly, the Government responded in some

detail to the applicants' criticisms of Lord Bingham's analysis and, notably, they rejected the suggestion that the House of Lords had been influenced by policy considerations and/or by the parallel *Smith v. the Chief Constable of Sussex Police* case (cited above).

2. The applicants

75. The applicants rejected the Government's challenge to their status as victims and, citing Convention case-law, reiterated that, as parents, they could bring a claim on their own behalf as well as on behalf of their son.

76. The applicants' primary argument on the merits was that, even applying the high threshold test in *Osman*, the authorities failed to fulfil their positive obligation to protect their son. A "real risk" meant a risk to be taken seriously, it was relevant that the person was particularly vulnerable and that obligation was to take such preventative operational measures as were necessary and sufficient to protect the life of Giles Van Colle. In this latter respect, the applicants accepted that the *Osman* test did not amount to a "but for" test.

77. Alternatively, they argued that the responsibility of the State could be engaged at a lower threshold than envisaged in *Osman* where the risk to life arose from the State's placing of an individual in a vulnerable position, such as requiring a person to give evidence in a criminal trial. In such cases, the policy concerns which led to a high threshold of risk in *Osman* applied with less force since witnesses were a restricted category of person whose identity/vulnerability would be known to the police.

78. In either event, the applicants considered that the facts of the case demonstrated an escalating set of circumstances, including direct and specific threats to life, which constituted a serious risk to the life of a particular person placed in a vulnerable position by the State through a request to testify as a crucial witness in a criminal case. Despite this, DC Ridley did not make basic further enquiries which would have revealed the fuller picture of intimidation. He took no steps to assess or address the risk to Giles Van Colle and he therefore took no steps to protect him. DC Ridley accepted that there was a risk to life of which he should have been aware but which he did not consider at the time. There was a difference between a police officer who, following a risk assessment, finds that there was no relevant risk (a professional judgment this Court should be slow to second-guess) and the gross negligence of DC Ridley who did not assess risk at all.

79. The applicants considered that certain factors supported the above conclusions. In finding against DC Ridley as it did, the Panel implied that he had failed to identify a real risk to Giles Van Colle's life. The police had recognised, by adopting the Protocol, the need for a particular police procedure to protect witnesses given their vulnerability and the strong public interest in witnesses testifying without fear of reprisal. The public

was also entitled to suppose that a police officer had all the support, guidance and instruction available: however, DC Ridley had never seen the Protocol. Furthermore, the measures reasonably open to the police to remove the risk and the extent to which they were taken had to be considered. While the High Court and the Court of Appeal accepted that the applicants did not have to prove that "but for" the failure to act, Giles Van Colle would not have been murdered, those courts found that even that test would be satisfied on the facts of the case. Finally, this case was stronger than the *Osman* case; Giles Van Colle was a witness in criminal proceedings and there were direct death threats. It was similar to *Akkoç v. Turkey* (nos. 22947/93 and 22948/93, § 80, ECHR 2000-X) and to *Kontrová v. Slovakia* (no. 7510/04, § 52, 31 May 2007).

80. Moreover, the applicants contested the House of Lords' judgment.

81. In the first place, even if the House of Lords correctly identified the *Osman* test (which the applicants did not accept), that court applied it conservatively. The House of Lords had allowed itself to be overly influenced by policy issues which it considered militated against the liability of the police for a failure to protect life under Article 2 and by the case decided by it at the same time, in which it rejected the contention that the police owed a duty of care under tort law to individuals to protect them from harm from criminals (*Smith v. the Chief Constable of Sussex Police* [2008] UKHL 50). The applicants argued that the House of Lords (Lord Bingham, Lord Hope and Lord Brown, at paragaphs 45 *et seq.* above) demonstrated "unwarranted scepticism" to a suggestion that the police had not done all that could reasonably have been expected of them and put an "impermissible gloss" on the *Osman* judgment.

82. Secondly, the applicants considered the analysis of Lord Bingham to be too brief and to take an unjustifiably narrow view of the facts. While the charges against Mr Brougham were described as minor, the starting point for theft charges was a custodial sentence and, in any event, his escalating activities against witnesses demonstrated that he did not consider the charges minor; while Mr Brougham was described as a petty offender, he had a previous conviction for assault and had assaulted and threatened Giles Van Colle. In any event, a proven history of assault, of mental health problems or of involvement with criminal gangs could not be a pre-condition for the recognition of a real and immediate risk whereas a proven escalation of violent behaviour could suffice; Lord Bingham failed to acknowledge the impropriety of Mr Brougham's approach to Mr P on 10 August; he described the Giles Van Colle car fire as irrelevant to DC Ridley's state of mind, as also the fires concerning Mr P and the offers of a bribe to Messrs A and H. DC Ridley should, in view of the applicants, have been putting relevant questions to Giles Van Colle and to those witnesses about any suspicious events, in which case he would immediately have had a clearer picture of unfolding and escalating violence. While he

acknowledged that the bribe to Mr P was criminal, Lord Bingham did not explain why it was not indicative of any future violence. Lord Bingham illogically considered Giles Van Colle's short delay in calling the police after the telephoned death treat as indicative of the unlikely prospect of its being implemented; he also considered the fires concerning Mr P to be irrelevant, whereas they were clear evidence of the conduct of which Mr Brougham was capable; and Lord Bingham's dismissal of the telephone call of 9 November as containing no threat was incorrect. The House of Lords failed to properly acknowledge the emerging picture that only DC Ridley could have observed of Mr Brougham's escalating violence as his trial approached.

83. The applicants further argued that the House of Lords failed to give sufficient weight to the findings of the Panel or to DC Ridley's admissions that there was a risk to Giles Van Colle's life of which he should have been aware and that he had neither identified any risk nor made any risk assessment. The House of Lords also failed to make any reference at all to the Protocol although its existence answered the "defensive policing" and "allocation of resources" issues which so influenced the House of Lords' decision-making.

84. The applicants rejected the Government's suggestion that a margin of appreciation should apply when assessing the judgment of the House of Lords. The case concerned the unqualified right protected by Article 2 and, since there were no disputed facts, the Court's case-law about domestic findings of fact was not relevant.

3. Equality and Human Rights Commission ("EHRC")

85. The EHRC also argued that the threshold for the engagement of responsibility under Article 2 was lower when the authorities had put the individual at risk, as in the case of the setting up of an inquiry and the calling of witnesses. A positive obligation to protect life could arise even where the individual could not show a real and immediate risk to life, each case depending on its own facts and the question being one of fact and degree. The EHRC criticised the House of Lords' judgment and appeared to argue that, while that court applied the right test, it imposed an impossibly high threshold in so doing, a threshold so high that it amounted to an inappropriate "but for" test.

B. Admissibility

86. As to the Government's argument that the applicants could not claim to be victims of a violation of Article 2 in their own right, the Court recalls that close family members, such as parents, of a person whose death is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation of Article 2, the question of whether

they were legal heirs of the deceased not being relevant (for example, *Yaşa v. Turkey*, 2 September 1998, § 66, *Reports of Judgments and Decisions* 1998-VI; *A.V. v. Bulgaria*, no. 41488/98, (dec.) 18 May 1999; *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II; *Koku v. Turkey*, no. 27305/95, 31 May 2005; and *Opuz v. Turkey*, no. 33401/02, ECHR 2009). Indeed, the Court notes that the Chief Constable accepted the applicants' indirect victim status in the domestic HRA proceedings. The Court therefore rejects this preliminary objection of the Government.

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

C. Merits

88. The Court recalls its established case-law to the effect that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction (*L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III). It may imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (*Osman v. the United Kingdom*, § 115). The scope of any such positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the Court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Osman v. the United Kingdom*, cited above, § 116).

89. The Court has also borne in mind that, in assessing the scope of such positive obligations under Article 2, the obligation of Contracting States under Article 1 to secure the practical and effective protection of the rights and freedoms laid down therein should be taken into account (*Kontrová v. Slovakia*, cited above, § 51).

90. A number of preliminary matters were disputed by the parties.

91. In the first place, the applicants and the third party argued that the *Osman* test should be adapted by lowering the threshold for State responsibility when the State created the relevant risk for the deceased such as by calling him as a witness in criminal proceedings. The Government disagreed.

The Court notes that the *Osman* test has been applied by this Court in numerous cases where the State can be considered to have placed the individual in a vulnerable position. No reference was made in any of those cases to changing the *Osman* test or the threshold which had to be reached to satisfy that test (a lethal methane explosion in a dump for which the municipality was responsible, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 101, ECHR 2004-XII; the suicide of a prisoner, *Keenan v. the United Kingdom*, cited above, §§ 89-90 and 95, and *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I; the murder of a prisoner, *Paul and Audrey Edwards v. the United Kingdom*, cited above, §§ 54-56; as well as the release and transfer from detention or police custody, *Mastromatteo v. Italy* [GC], no. 37703/97, § 67-79, ECHR 2002-VIII; *Medova v. Russia*, no. 25385/04, §§ 95-96, 15 January 2009; and *Tsechoyev v. Russia*, no. 39358/05, §§ 135-136, 15 March 2011). In these cases and, further, in other cases concerning prior threats by third parties later ending in the killing of another individual, the fact that the deceased may have been in a category of person who may have been particularly vulnerable was but one of the relevant circumstances of the case to be assessed, in the light of all the circumstances, in order to answer the first of the two questions which make up the *Osman* test of responsibility (*Osman*, § 116; *Kiliç v. Turkey*, §§ 62-63 and 66; *Akkoç v. Turkey*, §§ 77-78 and 81; and *Koku v. Turkey*, §§ 125-128 and 131, all cited above, as well as *Gongadze v. Ukraine*, no. 34056/02, §§ 164-165 and 168, ECHR 2005-XI).

92. Secondly, the applicants argued that, even if the correct test was identified by the House of Lords, the overall approach of the judges in applying that test was excessively strict, as evidenced by their descriptions of the test (paragraphs 49, 55 and 58 above) and they were unduly influenced by the *Smith* case decided by them on the same day. However, the Court does not consider that the impugned excerpts from the House of Lords' judgment are demonstrative, of themselves, of a departure from the principles laid down in the *Osman* case (as outlined in paragraph 88 above). There is equally no evidence to suggest that that court's approach was influenced by the substantively different tort case (the *Smith* case) examined in parallel with the present case and rejected in the same judgment. Indeed, as the Government pointed out, Lord Bingham, who gave the main judgment in the present case, dissented in the *Smith* case as he would have found in the *Smith* case that the police owed a common-law duty of care to the injured party.

93. Thirdly, the parties disagreed as to the margin of appreciation, if any, which could be accorded by this Court to the conclusions of the House of Lords. The Court recalls that, while it is not its task to substitute its own assessment of the facts for that of the domestic courts, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny (*McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000; *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001-VII; and *Selim Yıldırım and Others v. Turkey*, no. 56154/00, § 59, 19 October 2006). The Court considers that a similar approach should be applied to the House of Lords' application of the *Osman* test of State responsibility. Accordingly, while the Court must accord a certain margin of appreciation to the legal assessment made by the House of Lords, it must nevertheless apply a particularly thorough scrutiny since the complaint concerns the pre-eminent right to life guaranteed by Article 2.

94. Having identified the appropriate *Osman* test to be applied and considering that the lower courts had therefore misdirected themselves, the House of Lords proceeded to analyse in some detail, relying on relevant Convention principles and key case-law, the application of the *Osman* test to the largely undisputed facts, finding unanimously that that test for the engagement of State responsibility had not been satisfied. The applicants took issue with various aspects of the reasoning of the House of Lords and these issues have been addressed in the Court's review of the application of the *Osman* test in the present case to which it now turns.

95. The first question to be addressed is whether there was any decisive stage in the sequence of events leading up to the fatal shooting when it could be said the authorities knew or ought to have known of a real and immediate risk to the life of Giles Van Colle from Mr Brougham (*Osman*, §§ 116 and 121). The Court would clarify one issue at this point. The applicants relied much on DC Ridley's acceptance that, as a matter of fact, he never considered the need to protect the life of Giles Van Colle: however, the pertinent question for examination in the *Osman* context is rather whether, objectively considered, he ought to have done so (see also, Lord Carswell in *In re Officer L*, paragraph 61 above).

96. As regards this first question, the Court considers certain contextual matters to be significant. Mr Brougham's prosecution was not noteworthy: he was a petty offender charged with minor theft offences and the risk of a custodial sentence was low (the House of Lords, paragraph 52 above). Giles Van Colle was not the only or even the main witness in those proceedings: his role was confined to identifying his property (worth £500) which was a minor part of the alleged stolen property. Mr Brougham's record did not indicate a propensity to serious violence against the person or any unpredictability in that respect (*Osman*, § 118): he had a conviction for a minor assault (see paragraph 52 above), there was nothing to suggest he had or had used weapons before and he had no recorded history of mental illness

or instability (*a contrario*, *Bromiley v. the United Kingdom* (dec.), no. 33747/96, 23 November 1999; *Opuz v. Turkey*, cited above, § 133; *Maiorano and Others v. Italy*, no. 28634/06, § 121, 15 December 2009; *Kontrová v. Slovakia*, cited above, § 52-53; and *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 52, 15 January 2009). While, as the applicants argued, it is not necessary to prove the existence of violent antecedents in order to demonstrate a relevant risk, their absence contributed to the unforeseeability of later acts of grave violence. Finally, the statistics submitted by the Government demonstrate that, while certain incidents of intimidation are not unusual in prosecutions before the Crown and Magistrates' Courts (10%), incidents of serious violence being attempted or carried out were rare and were mainly confined to cases where the accused had a serious record and risked a long sentence or to cases of domestic violence.

97. Accordingly, the Court finds that the fact that Giles Van Colle was a witness in the prosecution of Mr Brougham did not, of itself, give reason to fear for his life and it considers this to be an important factor against which the additional risk factors invoked by the applicants have been examined below.

98. The applicants maintained that there was an escalating situation of intimidation which DC Ridley was well placed to assess and that he did not appreciate the risk or take relevant investigative steps by which he could have broadened his knowledge of the risk or take action such as arresting Mr Brougham. The Court notes the following. Prior to 13 October 2000 certain events involving another witness (an attempted bribe) and Giles Van Colle (a car fire) had not been reported to DC Ridley. The attempted bribe of Mr P was reported but this did not amount to a pattern of violence. The subsequent threatening telephone call of 13 October must be considered in that context and, indeed, when Giles Van Colle reported the matter to DC Ridley a few days later he was not sure it was Mr Brougham. The new bribe attempt (of 17 October) was unreported and did not concern Giles Van Colle. As to the subsequent fires, they concerned Mr P; the fire investigation excluded arson and, as noted by Lord Bingham, it was unrealistic to suppose that a minor case of theft warranted a deeper investigation of the fires; and there remained a significant difference between criminal damage to property and the premeditated murder of a particular individual. The subsequent phone call of 9 November to Giles Van Colle was worrying and implicitly threatening and it was clear to Giles Van Colle that it was Mr Brougham: however, it came three weeks after the first telephone call to Giles Van Colle during which time Mr Brougham had not approached him at all; and it did not contain an explicit threat of physical harm to Giles Van Colle; indeed, it concerned the charges relating to the theft from Alpha Optical rather than Giles Van Colle himself.

99. Even if the question of whether the police "ought to have known" would have required DC Ridley to make some further enquiries, particularly after the fires of the end of October (see Lord Phillips, paragraph 57 above and *Osman*, § 117) and even if such inquiries would have revealed further relevant information to DC Ridley (including, the fire in Giles Van Colle's car in September and, thus, the probable link of Mr Brougham to all the fires, as well as intimidation/attempted bribery of Messrs A and H), the Court is not convinced that this additional knowledge should have led DC Ridley to perceive Mr Brougham's activities, including the later call of 9 November, as life-threatening for Giles Van Colle (*Osman*, § 119). There remained a substantial difference between such intimidatory conduct vis-à-vis witnesses and the shooting dead of a minor witness. Accordingly, while DC Ridley's failure to enquire further than he did was criticised by the Panel as lacking in diligence, it cannot be impugned from the standpoint of Article 2 (*Osman*, § 117).

100. While the applicants relied heavily on the Panel's findings, the Panel did not apply the *Osman* test of "real and immediate risk" nor, as Lord Bingham noted (paragraph 53 above), did its conclusion imply that DC Ridley had failed that test. Although a wider dissemination of the Protocol would have been preferable, it has not been demonstrated or even suggested that an experienced police officer such as DC Ridley was as a matter of principle unable, without the Protocol, to make an assessment of risk consistent with the State's obligations under Article 2 of the Convention.

101. Finally, the Court does not agree with the applicants that their case demonstrates the same risk factors as in the *Akkoç* or *Kontrová* cases where violations of the obligation to protect life were established. In the former case (cited above), the strong risk factors included a background of conflict, a very particular political context and the specific opposition activities of Zübeyir Akkoç. In the case of *Kontrová v. Slovakia*, the situation in the applicant's family, communicated frequently to the local police, included serious allegations of long-lasting physical and psychological abuse, severe beating with an electric cable and threats with a shotgun. Equally in the above-cited *Opuz* case, the person who killed the applicant's mother had previously made clear death threats and committed numerous and grave acts of physical violence against the applicant and her mother, which facts had been well known to the authorities.

102. Importantly, and contrary to the applicants' submissions, the Court considers that the risk factors in the present case cannot be said to have been greater than those in *Osman* in which no violation of Article 2 was found. It recalls the following series of acts which had been the subject of complaints to the police against PL at the relevant time. The background was an established and worrying fixation by PL (a teacher) on a pupil (Ahmet Osman) and PL's consequent resentment of Ahmet's friendship with LG. It

was therefore alleged that PL had spread offensive rumours about Ahmet and LG; had followed LG home and stalked him; had written obscene graffiti about Ahmet and LG; had stolen files relating to the two boys from the school; and had changed his name to Osman. A series of acts of vandalism followed in May-November 1987. In particular, the Osman family complained to the police that PL had thrown a brick through a window of their home; had twice burst the tyres of Ali Osman's car; had poured engine oil and paraffin outside their home; had smashed the windscreen of Ali Osman's car; had jammed the lock of the Osmans' front door with superglue; had smeared dog excrement on their doorstep and car; had stolen more than once the bulb from their porch; and had broken all the windows of the Osmans' car. PL had also driven his car into a van in which LG was a passenger: the driver of the van reported PL's cryptic comments about "doing life" in a number of months. A decision had been taken to arrest PL for minor criminal damage, and not to protect the Osmans, LG or others, but, before it could be effected, PL had killed Ahmet's father, wounded Ahmet and a deputy headmaster and killed the latter's son.

103. Accordingly, while it ought to have been known to DC Ridley that there was an escalating situation of intimidation of a number of witnesses, including Giles Van Colle, by Mr Brougham, the Court does not consider that it can be said that there was a decisive stage in the sequence of events leading up to the tragic shooting of Giles Van Colle when DC Ridley knew or ought to have known of a real and immediate risk to the life of Giles Van Colle from Mr Brougham.

104. The applicants nevertheless underlined that, had DC Ridley arrested Mr Brougham on witness intimidation charges, Giles Van Colle's death may have been avoided (see, for example, paragraphs 30 and 46). However, since it has been established that there was no real and immediate risk to the life of Giles Van Colle, this proposition of the applicants amounts to stating that the *Osman* test is a "but for" test of State responsibility which even the applicants have accepted it is not (most recently, *Jean Pearson v. the United Kingdom*, no. 40957/07 (dec.). § 72, 13 December 2011).

105. In the circumstances, the Court finds that there has been no violation of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

106. The applicants also invoked Article 8, on their own behalf and on behalf of their son, about the State's alleged failure to protect their son.

107. The Government maintained that there was no separate issue under this Article. The case, as pleaded, concerned death and not bodily harm. It would be surprising for the Court to find no violation of an unqualified right (Article 2) and a separate issue as regards a qualified right (Article 8). The applicants argued that the same facts also gave rise to a violation of Article 8

on behalf of their son and themselves. They maintained that the rejection of the Article 8 complaint in *Osman* could be distinguished because in *Osman* there were no direct threats to the family and they relied on, *inter alia*, *Bevacqua and S. v. Bulgaria* (no. 71127/01, § 65, 12 June 2008).

108. The Court notes that the applicants did not complain about acts directed against them and it considers that the application does not give rise to issues relevant to their son's Article 8 rights which are substantively distinct from the matters arising for consideration under Article 2 of the Convention. Accordingly, the Court's conclusion above under Article 2 above, that it cannot be said that DC Ridley knew or ought to have known of a real and immediate risk to the life of Giles Van Colle from Mr Brougham, equally supports a finding that there has been no breach of any positive obligation implied by Article 8 of the Convention to safeguard the Giles van Colle's physical integrity (*Osman*, cited above, § 128; *Kontrová v. Slovakia*, cited above, § 58; and *Osmanoğlu v. Turkey*, no. 48804/99, § 107, 24 January 2008). The *Keenan* case (*Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III) is distinguishable because the separate Article 3 complaint concerned facts about treatment of the deceased in detention prior to his death which were substantively distinct from the facts to which the Article 2 complaint related. The *Bevacqua and S. v. Bulgaria* case does not assist the applicants concerning, as it did, the non-fatal ill-treatment of the first applicant by her husband which this Court considered more suitable for examination under Article 8 rather than Article 3 (no. 71127/01, § 65, 12 June 2008).

109. Accordingly, the Court also finds no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 2 of the Convention; and

3. *Holds* that there has been no violation of Article 8 of the Convention;

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

Lawrence Early	Lech Garlicki
President	Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Garlicki and Vučinić are annexed to this judgment.

L.G.
T.L.E.

CONCURRING OPINION OF JUDGE GARLICKI

Although I agree that, in the circumstances of the present case, there has been no violation of Article 2, I also believe that it may be time to have another look at the *Osman* jurisprudence (*Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII).

On the one hand, I have no doubt that the *Osman* test, as elaborated by the Court in 1998, was correctly applied by the House of Lords in the present case. Nor do I have any doubt that the substance of the *Osman* test provides us with a correct approach to situations where the authorities knew or ought to have known that human life might have been taken by another individual.

On the other hand, I have more hesitations as to the manner in which this test has been, and still is, applied. Indeed, the original application of the test in the *Osman* case itself was not unproblematic: while the test was, as such, logical and realistic, the risk factors in *Osman* were such that the application of the test could have, and perhaps should have, led to a conclusion that Article 2 had not been complied with.

In any case, as the Convention is a living instrument, the *Osman* test should also be applied in the light of present day conditions. This means that the threshold of what should be required from the authorities cannot remain at the same level as in 1998. Over the last 14 years, the Court has produced a vast body of jurisprudence on positive obligations, in general, and on the obligation to protect human life, in particular. Taking into account the present nature of those obligations, it would be illogical to apply the *Osman* test in its historical form. In short, more can be expected from the authorities today than in 1998.

That is why I am not convinced that the Chamber was correct to base its finding of no violation on the observation that "the risk factors in the present case cannot be said to have been greater than those in *Osman* in which no violation of Article 2 was found". This only means that the Court would not have found a violation had this case been decided in 1998. However, a conclusion adopted in 2012 must be based on an updated analysis of the positive obligations and not on a mechanical application of the *Osman* test in its fixed version.

In conclusion, while the House of Lords should be commended on a faithful application of the *Osman* test, it may be time for our Court to reconsider the standards for assessing when the authorities could have been expected to have known that a real and immediate risk existed.

CONCURRING OPINION OF JUDGE VUČINIĆ

With considerable hesitation, I voted to find no violation in this case. I am prepared to accept that the House of Lords could be considered to have applied properly, in a technical sense, the test developed by the Court in its *Osman v. the United Kingdom* judgment to determine whether, in the instant case, there was a real and imminent risk to the life of the applicants' son. That being said, I am still concerned by the fact that it should have been very clear from the start that Mr Brougham was violent and dangerous. The incident which took place in September 1999 - in which Mr Brougham, having been asked about his national insurance number, raised his voice and pinned Giles Van Colle against the wall - should have been seen as an early warning sign to the police that Mr Brougham deserved their particular attention. In this connection, it cannot be overlooked that Giles Van Colle was a witness, albeit not a key one, in the criminal proceedings against Mr Brougham.

Leaving aside the issue of a possible overly technical application by the House of Lords of the *Osman* test, the case gives rise to a further and very important legal issue of a more general character, namely the protection of the life of a witness in criminal proceedings in the face of intimidation by the accused. In my opinion, this issue is just as important as the matter of the correct application of the *Osman* test. The Police Disciplinary Panel in the proceedings against DC Ridley (paragraphs 29-31), as well as the High Court and the Court of Appeal in the civil proceedings brought by the applicants, were alert to the importance of the fact that Mr Brougham had killed a witness who was due to testify for the prosecution at Mr Brougham's trial. For me, it is a matter of some regret that the House of Lords did not give similar weight to this important aspect of the case, and nor did our Court.

The protection of witnesses from intimidation by the accused is important, not only in the context of the State's positive obligations under Article 2 of the Convention, but also when it comes to the proper administration of criminal justice and the rule of law within the framework of Article 6. Every witness is, in principle, obliged to testify in criminal proceedings under pain of criminal sanction. For that reason, a witness requires to be adequately protected by the State whenever he or she is confronted with threats, acts of intimidation and other sorts of pressure emanating from the accused. In such situations, including the situation in which Giles Van Colle found himself, the authorities must address the necessity of witness protection, not only by the police officer handling the case, but also by the institution of the police as a whole.

A review of the case-law following the Court's *Osman* judgment would appear to indicate that the Court has not yet been called upon to examine the protection of witnesses from the standpoint of Article 2 of the Convention. I do not wish to give the impression that the instant case is a suitable one for taking up the matter: nor am I suggesting that every witness in criminal proceedings should be given constant police protection. My point is that sooner or later the Court will have to come to grips with this key issue, possibly in the context of the fight against terrorism, organised crime and corruption.