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A matter of life and breath for Ella – the formally acknowledged threat of air pollution as a breach of the right to life

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Abstract

The death of Ella Kissi-Debrah in 2013 will be forever notable as the first instance in the United Kingdom of air pollution being recorded as contributing to the death of an individual. Whilst in itself a monumental shift in consideration of air pollution and the impact on human health, the recording by the coroner of Ella's death as having been contributed to by air pollution has significant human rights implications. This piece considers the circumstances surrounding both Ella's death and the report of the coroner and connects these to decisions of the European Court of Human Rights. It presents the argument that the failure to address a known risk to life presented by air pollution could constitute a breach of the right to life protected by Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Cases in which environmental conditions are found by the Court to have breached Article 2 are rare, but this paper contends that the formal acknowledgement of the threat of air pollution as a result of Ella's death means that failure to address it meets this threshold.

Keywords: air pollution; human rights; right to life; environment

Introduction

The date of 15 February 2013 may not ring as significant in the minds of many, but it is a day that will be etched in the memory of a family in Lewisham, London and will have an impact felt far beyond their personal grief. On that Friday, Ella Kissi-Debrah passed away at only nine years old and later became the first person in the UK to have air pollution exposure recorded as their medical cause of death. Since then, her mother and others have campaigned vehemently for legally binding targets for particulate matter pollution to be set lower and in line with World Health Organisation (WHO) Guidelines.[1] On 17 June 2021, the UK Government stated that WHO guidelines on air quality would, 'inform its ambitions in shaping these targets',[2] but did not state it would meet them. This statement was not an aspect of an announcement on new policy or some other positive action to address air pollution unilaterally taken, but in response to the coroner's Prevention of Future Deaths Report following the inquest into Ella's

[1]WHO global air quality guidelines. Particulate matter (PM2.5 and PM10), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide (World Health Organization, 2021) https://iris.who.int/bitstream/handle/10665/345329/9789240034228-eng.pdf?sequence=1, accessed 21 July 2025.

[2]Department for Environment, Food & Rural Affairs and The Rt Hon George Eustice 'Government responds to Coroner after Ella Kissi-Debrah inquest' (Department for Environment, Food & Rural Affairs, 2021) https://www.gov.uk/government/news/government-responds-to-coroner-after-ella-kissi-debrah-inquest, accessed 21 July 2025.

death. It was therefore a response to this tragic event rather than a unilateral action taken to prevent harm and promote public health. This paper will explore the implications of the declaration of Ella's medical cause of death being recorded as air pollution exposure. The narrative conclusion of the coroner's report expanded on this finding, stating that Ella, '[d]ied of asthma contributed to by exposure to excessive air pollution'.[3] This piece will focus on the impact of this conclusion for potential positive obligations upon the UK government to combat air pollution under the right to life as protected by Article 2 of the ECHR.

The ECHR contains 'no explicit right … to a clean and quiet environment' or aspects thereof, nor does it directly offer freedom from harm arising from environmental conditions.[4] Whilst none of the 'articles of the Convention are specifically designed to provide general protection of the environment as such', there is a rich vein of case law concerning the human rights implications of environmental conditions.[5] Pedersen notes that '[t]he closest the Convention comes to creating a substantive human right to the environment is primarily through the case law on Article 8, where it has become well established that serious environmental damage may lead to a violation of Article 8'.[6] For this reason, the majority of cases which have been brought before the European Court of Human Rights (ECtHR/the Court) concerning the environment and its protection which have resulted in a breach being upheld have been brought under Article 8, the right to respect for private and family life.[7] This has been because of the high threshold set by the Court for establishing a breach under Article 2. Indeed, a number of complaints of a violation of Article 2 on the grounds of environmental harm have been declared admissible by the Court, but they 'fall to be examined under Article 8 of the Convention'.[8] The threshold for harm having been caused to the individual as a result of environmental conditions has been clearly stated by the Court as reflecting what would be recognised as a criminal law burden of proof, since it has been held that harm should be shown 'beyond reasonable doubt'.[9] There are debates as to the utility of Article 2 in relation to the protection of broad environmental standards as a result. Lord Carnwath noted that Article 2 claims 'tend to be at the extreme end of the scale'.[10]

The limitations of Article 2 as a means to ensure environmental quality are evident from the need to establish a relatively direct causation between the conditions, the threat to life, and an awareness of that threat on the part of the state. Discussions of such causation in the case of *LCB v The United Kingdom* gives a clear indication that the expectation in this regard is set high by the Court. In turn this allows significant scope for what might be reasonably expected of the state in relation to preventing threats to life from environmental conditions.[11] *LCB v The United Kingdom* is emblematic of this. In the case the Court emphasised that the failure on the part of the applicant to establish, based on expert evidence, 'that there [was] a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived'[12] was pivotal. This causal link must also be one of which it was reasonable to expect the state to be aware, 'given the information available to the state at the relevant time'.[13] This suggests that any applicant must not only be able to demonstrate causation, but also awareness on the

[3]P Barlow 'Prevention of future deaths report – Ella Kissi Debrah' (HM Courts, Tribunal and Judiciary, 2021) https://www.judiciary.uk/wp-content/uploads/2021/04/Ella-Kissi-Debrah-2021-0113-1.pdf, accessed 21 July 2025.

[4]*Hatton and Others v The United Kingdom* Application No 36022/97, 8 July 2003, para 96.

[5]*Kyrtatos v Greece* Application No 41666/98, 22 May 2003, para 52.

[6]OW Pedersen 'European environmental human rights and environmental rights: a long time coming' (2008) 21 Georgetown International Environmental Law Review 73 at 91.

[7]As alluded to, there are many examples of such cases but perhaps most notably: *Kyrtatos v Greece*, above n 3; *Tatar v Romania* Application No 67021/01, Admissibility Decision, 5 July 2007; *Lopez Ostra v Spain* Application No 16798/90, 9 December 1994; *Hatton and Others v The United Kingdom*, above n 4; and *Guerra and Others v Italy* Application No 14967/89, 19 February 1998.

[8]*Tatar v Romania*, above n 7.

[9]*Grimkovskaya v Ukraine* Application No 38182/03, 21 July 2011, para 60.

[10]Lord Carnwath 'Human rights and the environment' (Justice Human Rights Law Conference, 10 October 2018) 3, available at https://supremecourt.uk/uploads/speech_181010_b96a8a3d48.pdf, accessed 21 July 2025.

[11]*LCB v The United Kingdom* Application No 23413/94, 9 June 1998, paras 36–41.

[12]Ibid, paras 38 and 39.

[13]Ibid, para 41.

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part of the state of the causative effects. It should be noted that the Court has been quite candid in this regard, stating that 'Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life … [I]t must be stressed however that cases in which issues under Article 2 have arisen are exceptional'.[14]

This paper will argue that the declaration of poor air quality being recorded as the medical cause of death of Ella Kissi-Debrah not only meets this causal requirement in her case, but also places prevention of harm to individuals arising from air pollution within the positive obligations of the UK under Article 2. Whilst the paper therefore focuses on the implications of Ella Kissi-Debrah's case relating to the right to life, the arguments presented are of significance for securing wider health justice discourse. This includes discourse surrounding rights concerning the environment in which we live, and the handling of variable and broad environmental harms with multifaceted sources and intersecting social, economic and scientific considerations.

1. Establishing a positive obligation – the significance of the Prevention of Future Deaths Report

Following the identification of Ella's cause of death as 'air pollution exposure' at the end of the inquest into her death in December 2020, coroner Philip Barlow produced a Report to Prevent Future Deaths under his duty to do so set by Schedule 5 to the Coroners and Justice Act 2009. Paragraph 7 of Schedule 5 required Barlow, as the coroner responsible for the inquest, to report the matter to a person he believed could take action in response to a:

> concern that circumstances creating a risk of other deaths will occur, or will continue to exist, in the future, and in [his] opinion, action should be taken to prevent the occurrence or continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances.[15]

These reports became a duty, having previously been a discretionary act on the part of coroners, under the Coroners and Justice Act 2009. This was owing to their procedural significance in preventing future deaths, occurring in circumstances similar to those they considered, by highlighting risks to life to relevant public authorities. Whilst there is a duty to produce such reports in circumstances set out in the Act, whether these arise remains based upon the judgement of the coroners themselves. To afford some sense of scale to their production, over 400 such reports were produced in 2022, a slight decrease on the previous year.[16] The effectiveness of these reports has been questioned, particularly in the context of healthcare, and it has been said that they have 'a much smaller impact than they could and should have'.[17] However, they remain an important means by which coroners can raise wider concerns arising from individual deaths and have these recorded, requiring a formal response.

Barlow was unequivocal in his report following the death of Ella Kissi-Debrah, stating that, 'There was no dispute at the inquest that atmospheric air pollution is the cause of many thousand premature deaths every year in the UK. Delay in reducing the levels of atmospheric air pollution is the cause of avoidable deaths.'[18] This aspect of the report, which also considers greater provision of information to the public and those at particularly at risk from low air quality, is addressed directly to the Department for Environment, Food and Rural Affairs (DEFRA), the Department for Transport (DfT) and the Department of Health and Social Care (DHSC). Addressing of the Prevention of Future Death report to multiple governmental departments is significant. Not only is it illustrative of the complexity of the issue

[14] *Makaratzis v Greece* Application No 50385/99, 20 December 2004, para 49.

[15] Coroners and Justice Act 2009, Sch 5, para 7.

[16] Ministry of Justice 'Coroners statistics 2022: England and Wales' (Ministry of Justice, 11 May 2023) https://www.gov.uk/government/statistics/coroners-statistics-2022/coroners-statistics-2022-england-and-wales, accessed 21 July 2025.

[17] R King and EW Benbow 'Are the recommendations in coronial prevention of future death (PFD) reports realistic and achievable?' (2022) 90(1) The Medico-Legal Journal 27–31 at 31.

[18] Barlow, above n 3.

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of air pollution, but also its wide-ranging impacts and direct relationship with wider matters of health, social and environmental justice. Whilst the piece does not consider the impact of air pollution beyond the scope of the likelihood of a successful claim by an individual under Article 2, there is significant potential for wider legal research of its health, social and environmental effects.

The coroner's report was a momentous declaration for Ella's family and those who continue to campaign for 'a world where everyone can breathe air that is free from toxic pollution, regardless of where they live, their economic status or their ethnic background'.[19] The inquest and subsequent Report to Prevent Future Deaths received national press coverage which acknowledged their significance.[20] The full range of potential legal implications of these acknowledgements are uncertain, particularly as the case of Ella Kissi-Debrah herself against certain governmental authorities has recently reached an undisclosed settlement.[21] However, as will be explored, the significance of direct attribution of causality by an expert with a statutorily recognised role in highlighting risks to life, identifying government departments who ought to address these concerns, cannot be overstated in the context of human rights law.

The response to existing air pollution and its causes is a multifaceted and complex policy area that cannot be addressed by one single solution.[22] Consideration of the legality of policy responses in this area must inevitably account for social and economic interests and the capacity of the state to address potential harm to individuals. The balancing of these concerns is a feature of the jurisprudence of the ECtHR in relation to environmental conditions and their impact to the individual. Indeed, the ECtHR has explicitly acknowledged in a number of such cases that 'the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one'.[23] Even in the context of impacts which present threats to life arising from environmental harms, the Court has shown itself willing to account for the necessity for the state to make 'choices which they must make in terms of priorities and resources'.[24]

This approach does not preclude the possibility of harm breaching this threshold altogether. The Court has stated, in cases relating both to environmental harms and other threats to life, that 'it is sufficient for an applicant 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'.[25] The Court has made clear that Article 2 applications on the grounds of insufficient response to an identified risk of harm are possible. However, there is still a marked reluctance on its part to adopt a wider approach which would be, 'to substitute for the views of the local authorities its own view of the best policy to adopt'.[26] As Boyle notes in relation to the Court's jurisprudence surrounding environmental harms, there is an 'understandable reluctance to allow the European Court of Human Rights to become a forum for appeals against the policy judgments of governments, provided that they do not disproportionately

[19]Ella Roberta Foundation http://ellaroberta.org/about-the-foundation/ accessed 8 July 2024.

[20]S Laville 'Ella Kissi-Debrah: how a mother's fight for justice may help prevent other air pollution deaths' *The Guardian* (16 December 2020), https://www.theguardian.com/environment/2020/dec/16/ella-kissi-debrah-mother-fight-justice-air-pollution-death, accessed 21 July 2025; 'Air pollution: coroner calls for law change after Ella Adoo-Kissi-Debrah's death' *BBC News* (16 December 2020) https://www.bbc.co.uk/news/uk-england-london-56801794, accessed 21 July 2025; 'Air pollution a cause in asthma death of nine-year-old, coroner says in landmark ruling' *The Telegraph* (16 December 2020) https://www.telegraph.co.uk/news/2020/12/16/air-pollution-recorded-cause-death-girl-9-uk-first/, accessed 21 July 2025.

[21]Greater London Authority 'Request for mayoral decision – MD3183 – Settlement relating to legal claim from the family and estate of Ella Adoo-Kissi-Debrah' (published 2 February 2024) https://www.london.gov.uk/md3183-settlement-relating-legal-claim-family-and-estate-ella-adoo-kissi-debrah, accessed 21 July 2025.

[22]S Nadadur et al 'The complexities of air pollution regulation: the need for an integrated research and regulatory perspective' (2007) 100(2) Toxicological Sciences 318.

[23]*Hatton and Others v The United Kingdom*, above n 4, para 97.

[24]*Oneryilidiz v Turkey* Application No 48939/99, 30 November 2004, para 107.

[25]Originating in *Osman v United Kingdom* Application No 23452/94, 28 October 1998, para 116, this is also reiterated in *Oneryilidiz v Turkey*, above n 24.

[26]*Oneryilidiz v Turkey*, above n 24, para 107.

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affect individual rights'.[27] This is due to both the complexity and collective action nature of many environmental issues, but also their entwined relationship with social and economic policy, which is firmly within the margin of appreciation of states under the jurisprudence of the Court. In *Hatton*, the Court made it clear that:

> Environmental protection should be taken into consideration by states in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.[28]

As such, it is clear that whilst egregious breaches of rights arising from environmental policy will be upheld as breaches, impacts to individuals are to be balanced against social and economic factors.

In the case of Ella Kissi-Debrah herself, it is worthy of note that the procedures which gave rise to the Prevention of Future Deaths Report, and subsequent response of the UK government, would likely meet the obligations of Article 2 from a procedural standpoint. This is because the procedural obligations on the state with regard to an investigation are simply that an effective investigation into a death must occur. This has been held to entail an independent[29] and adequate investigation,[30] based upon evidence concerning the incident occasioning the death,[31] producing a conclusion based upon 'thorough, objective and impartial analysis of all relevant elements'.[32] In the case of Ella Kissi-Debrah, the coroner's report provided 'an objective analysis of clinical findings, including the cause of death'.[33] This is a fact with which her mother, Rosamund Adoo-Kissi-Debrah, has agreed, stating that she was surprised by how 'decisive and comprehensive' the outcome of the inquest into Ella's death was.[34] Indeed, it was on the basis of the thorough findings of the inquest process that she, on behalf of her daughter's estate, began legal action against the government departments to which the coroner's report was addressed, an action that reached a settlement in 2024.[35]

By contrast, the substantive protections afforded to Ella's life, and the protection of the lives of those currently living in areas of high air pollution, might be questioned. The statements in the coroner's report would have considerable implications for the very regulations which failed to prevent her death and continue to fail those living in similar circumstances. The formal acknowledgement of air pollution as a cause of death establishes procedural awareness of the risk to life arising from air pollution. In short, it is officially recognised as having killed a UK citizen, been involved in the deaths of others, and as posing a continuing threat to the lives of those whom the state is obliged to protect. This might seem a small leap, given that there had clearly been a death, but scaling this issue from the death of a single individual to a threat to the wider public is a necessary hurdle to overcome if a positive obligation upon the state to protect *any* individual from the harm of air pollution is to be accepted. As Puraite and Deviatnikovaite note, this is by no means a radical conclusion, 'it is obvious that, for example, an individual claim regarding air pollution caused by a neighbouring manufactory and the outcome of such a case would have a direct influence on the whole

[27] A Boyle 'Human rights and the environment: where next?' in B Boer (ed) *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015) p 225.

[28] *Hatton and Others v The United Kingdom*, above n 4, para 122.

[29] *Ogur v Turkey* Application No 21594/93, 20 May 1999.

[30] *Ramsahai and Others v The Netherlands* Application No 52391/99, 15 May 2007.

[31] *Salman v Turkey* Application No 21986/93, 27 June 2000.

[32] *Armani Da Silva v The United Kingdom* Application No 5878/08, 30 March 2016, para 234.

[33] *Salman v Turkey*, above n 31, para 105.

[34] T Kirk 'Air pollution "made material contribution to Ella Kissi-Debrah's death", coroner finds' *The Standard* (16 December 2020) https://www.standard.co.uk/news/london/air-pollution-contributed-ella-kissidebrah-death-london-inquest-b337127.html, accessed 21 July 2025.

[35] GLA, above n 21.

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society'.[36] Establishing this obligation before the ECtHR, however, is more complex and it 'is a fine line separating legitimate interference with Convention rights in pursuit of specific collective goals – which is consistent with the Convention – from violating'.[37]

The recording of death as having been caused by air pollution – and crucially that 'the principal source of her exposure was traffic emissions'[38] – is a significant step in establishing both that an obligation to protect life exists in such instances, and also that there is a positive obligation on the government to prevent harm arising from that source. The report evidences that a continuing (not merely imminent) and serious environmental harm has been identified as a 'principal source' of a cause of the death of an individual and remains a threat to others. Such a threat, known to the state, would give rise to a positive obligation to, as an absolute minimum, consider whether it might be addressed. This is irrespective of whether it could be abated entirely or mitigated to the greatest extent reasonable to expect. The Court has 'observed that the Article 2 positive obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake'.[39] However, this, 'is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular … operational choices which must be made in terms of priorities and resources'.[40]

The Court has rejected applications under the auspices of Article 2, directing them instead to be considered on the basis of Article 8, the right to respect for family and private life, on the grounds that causality between and environmental harm and the impact felt by the applicant was not fully established or that the impact was not severe enough to constitute a threat to life. This is evidenced by the admissibility decision in *Tatar v Romania*, where the Court declared itself 'master of the characterisation to be given in law to the facts of the case' before citing a number of similar cases in which Article 8 had been applied in circumstances concerning impacts to environmental conditions over a wide area.[41] The distinction in this instance is in the awareness that the death of Ella Kissi-Debrah and subsequent coroner's report has established. The state is now indisputably aware of the adverse environmental conditions. This was a crucial aspect of the decision in *Moreno Gomez v Spain*,[42] where acoustic disturbances at night were acknowledged officially by the authorities.

Further to this, the UK government has also been informed, via its own procedures for preventing harms, that air pollution is, and will continue to be, a cause of excess deaths. Whilst a stringent burden is placed upon the state to protect life, the case law of the ECtHR has constrained the use of Article 2 to instances only of the most egregious harms caused by environmental conditions which cause immediate risks to or loss of life.[43] It is in response to this constraint, however, that the recording of the cause of death of Ella Kissi-Debrah as air pollution is so significant. The acknowledgement by experts of harm as being so severe as to have caused death would in itself be significant, as it would indicate that this bar of egregious harm occasioning death had been met. The fact that this was also declared in a legally recognised forum strengthens this point significantly. However, the impact of that forum having been established by the state itself as part of a statutory requirement to 'prevent the occurrence of continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances'[44] cannot be overstated.

Therefore, there would seem to be a clear basis for an application under Article 2 that air pollution poses a threat to life and thus the state is under a positive obligation to address that harm. There are,

[36] A Puraite and I Deviatnikovaite 'The right to a healthy and safe environment in the case-law of the European Court of Human Rights' (2013) 5(1) International Security 17.

[37] S Greer *The European Convention on Human Rights. Achievements, Problems and Proposals* (Cambridge University Press, 2008) p 265.

[38] Barlow, above n 3.

[39] *Ciechońska v Poland* Application No 19776/04, 14 June 2011, paras 63 and 64.

[40] Ibid.

[41] *Tatar v Romania*, above n 7.

[42] *Moreno Gomez v Spain* Application No 4143/02, 16 November 2004.

[43] A clear example being the aforementioned admissibility decision in *Tatar v Romania*, above n 7.

[44] Coroners and Justice Act 2009, Sch 5, para 7.

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however, crucial factors that such a reductive analysis of the prospects for an application of this type omits, namely the variance of pollution and time. The risk to life can now be regarded as having been 'known, [or] ought to have been known to the authorities',[45] and as a result the 'positive obligations under Article 2 must be construed as applying',[46] where that risk is present.

There is therefore a basis in principle for the existence of a positive obligation to act to prevent a threat to life owing to the nature of air pollution. However, it is then necessary to assess whether the contention that severe air pollution levels would in practice be regarded as causing consistent harm, of which a relevant authority was aware, are significant enough to constitute a breach of the right to life.[47]

2. Overcoming the complexity of diffuse harm and its implications for standing

As noted, the ECtHR has generally adopted a restrictive approach to the application of Article 2 to harms from environmental conditions.[48] This creates particular challenges for those seeking to apply to the Court where those harms are cumulative, and potentially attributable to a number of sources which are regulated to varying degrees by the state. Both are features attributable to air pollution. Addressing pollution of complex composition, derived from commonplace activities such as the driving of cars, inevitably also raises equally complex balances of competing social, economic and environmental policy considerations. Such balancing is something with which the Court is very familiar and is emblematic of its case law which considers environmental conditions. Air pollution on a single residential street, for example, might raise issues in housing, transport, and energy policy to name but a few.[49]

An applicant claiming a positive obligation upon a state under Article 2 to address a threat to life caused by environmental harm must show that, '[t]he preventive measures required by the positive obligation in question fall precisely within the powers conferred on the authorities and may reasonably be regarded as a suitable means of averting the risk brought to their attention'.[50] The composite nature of the harm being done in the instance of air pollution, and necessity of a multifaceted policy and procedural response from the state would inevitably result in a high bar to establish that the state had not adopted a 'suitable means' of averting the threat to life. As Morrow states, this 'is a formidable obstacle for claimants, as causation is a particularly vexed issue in environmental cases'.[51]

This can be seen in the few cases in which environmental harm amounting to a breach of Article 2 has been upheld by the Court. Successful applicants have, for the most part, based their application around a singular source point of harm, and the solutions to the risks raised by it, where the state in question was aware of both. For example, in the case of *Oneryildiz v Turkey* the applicant was living in a slum built on land surrounding a rubbish tip which had not had adequate safety procedures put in place to counter the build-up of methane from decomposing waste. The consequence was an explosion which destroyed ten homes and killed nine relatives of the applicant. As has been outlined above, the success of the case of *Oneryilidiz* was predicated upon the fact that '[i]t was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks … or of the

[45] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* Application No 47848/08, 17 July 2014, para 130.
[46] Ibid.
[47] Note that whilst the procedural admissibility of such a case is not explored here, the principle that the parent of a deceased individual might bring a claim under Art 2 as an indirect victim is well established – see inter alia for example *Van Colle v United Kingdom* Application No 7678/09, 13 November 2012.
[48] See for example the different approaches adopted by the Court in relation to evident harm and threats to life based on available information in *Oneryilidiz v Turkey*, above n 24, and *LCB v The United Kingdom*, above n 11.
[49] *Hatton and Others v The United Kingdom*, above n 4 is perhaps the most cited example of the balancing of varied individual and wider public interests. However, perhaps the most relevant to the circumstances surrounding the death of Ella Kissi-Debrah are the cases of *Grimkovskaya v Ukraine*, above n 9, and *Cordella and Others v Italy* Application Nos 54414/13 and 54264/15, 24 June 2019, as they too concerned air pollution.
[50] *Oneryilidiz v Turkey*, above n 24, para 107.
[51] K Morrow 'Worth the paper that they are written on: human rights and the environment in the law of England and Wales' (2010) 1 Journal of Human Rights and the Environment 66 at 73.

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necessary preventive measures'.[52] In this case the risk arose from a single point source of the substance resulting in harm and a single consequence thereof, both of which were known to the authorities in question. It should be noted that the rubbish tip itself, despite being composed of varied forms of waste, was the point at which once combined they produced the methane which caused the harm in question. Thus this point of combination would be regarded as a single point source of the harm-causing substance.

By contrast, the complexity presented by air pollution is vast, as there is no single point at which emissions occur which can feasibly be managed directly. Multiple point sources with varied policy considerations contribute to the forms of air pollution highlighted by Philip Barlow in his report, namely nitrogen dioxide and particulate matter. Particulate matter is a broad categorisation of varied pollutants and can be described as 'everything in the air that is not a gas and as such it is made up from a huge variety of chemical compounds and materials some of which can be toxic'.[53] Due to their inherent variance they are categorised by particle size in micrometres as PM 10 and the smaller PM 2.5. They are small enough to enter the lungs and bloodstream, and cause damage to internal organs, particularly where exposure to high concentrations is prolonged and for those with existing vulnerabilities such as age and respiratory problems.

Despite a variety of sources, one of the major contributors to the presence of these substances in the air is transport – and specifically road transport.[54] The sources of the pollution more broadly are identifiable, but road transport is regarded as both a prominent source and one which might be impacted upon by alterations in policy approaches.[55] – this is nowhere more true than in the urban context in which Ella Kissi-Debrah lost her life. Indeed, in her case, the Prevention of Future Deaths Report was clear that '(t)he principal source of her exposure was traffic emissions'.[56] As with many policy approaches which concern environmental impacts though, the response to these impacts is not so straightforward as to simply stop the activity which is causing the harm in question. With a single site, or a single substance causing harm, as was the case in *Oneryilidiz v Turkey*, this might be argued to be achievable – though this would be to oversimplify such issues. However, in relation to road transportation and air pollution more broadly this is certainly not the case. The Court has acknowledged this complexity in considering cases of environmental impacts of economically and socially beneficial activities which are either irreplaceable or cannot be adapted swiftly.[57] However, this acknowledgement is caveated by the statement that:

> the Court notes that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.[58]

In short, action can be reasonably expected of states despite lack of data or solutions to the harms being caused not being absolute or only progressively realisable. Whilst note should be made that this

[52] *Oneryilidiz v Turkey*, above n 24, para 101.

[53] Department for Environment Food and Rural Affairs 'Emissions of air pollutants in the UK – Particular matter (PM10 and PM2.5)' (DEFRA, 19 February 2024) https://www.gov.uk/government/statistics/emissions-of-air-pollutants/emissions-of-air-pollutants-in-the-uk-particulate-matter-pm10-and-pm25#major-emission-sources-for-pm10-and-pm25-in-the-uk, accessed 21 July 2025.

[54] Ibid.

[55] See for but one example, A Goodkind et al 'Fine-scale damage estimates of particulate matter air pollution reveal opportunities for location-specific mitigation of emissions' [2019] 116 Proceedings of the National Academy of Sciences 8775.

[56] Barlow, above n 3.

[57] *Oneryilidiz v Turkey*, above n 24, para 49.

[58] *Hatton and Others v The United Kingdom*, above n 4, para 128.

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statement in the case *of Hatton v United Kingdom* came in response to an application under Article 8 of the ECHR, and not Article 2, the statement is a broader comment on the Court's views on governmental decision-making processes concerning complex environmental harms. Therefore, it is clear that complexity cannot be avoided under the guise of precaution.

The obligation to prevent harm arising, even where said harms are themselves complex, or can only be addressed through multifaceted governmental policy choices, is central to a number of cases with an element of environmental protection recently considered by the ECtHR. Perhaps most significant amongst these are those concerning the actions taken by governments in response to the threats of climate change.[59] Though it should be made very clear that air pollution and climate change are distinct issues, there are some clear connections between these cases and that on which this paper is focused. Many of the substances highlighted as potentially harmful to individuals' ability to breath also contribute to global warming and thus climate change, and the fundamental connection between efforts to address both is now reflected in atmospheric chemistry and physics.[60]

Similarly, the complexity resulting from the varied sources of greenhouse gases, like those constituting air pollution, presents opportunities for arguments that an obligation to protect individuals from their harms is too onerous a burden upon a state and should not arise.[61] Judge Tim Eicke noted this potential contention when he said that it is in the 'procedural context that some of the main difficulties in relation to climate change litigation may arise'.[62] He highlighted that environmental harms have generally been seen by the Court as needing to expose the individual 'personally to a danger that was not only serious but also specific, and above all, imminent'.[63] Citing the *Fadeyeva* case, he reiterated that the various rights employed in this regard are, 'not violated every time that environmental deterioration occurs … interference must directly affect the [applicant]'.[64] This argument is supported by Boyle, who suggests in relation to climate change that the 'causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims'.[65] Similarly Bouwer refers to those cases which are successful concerning such broad and complex issues of environmental harm as 'holy grail' cases, which should be regarded with caution when considering the future of litigation in these areas.[66]

This is perhaps why, in relation to air pollution, the most prominent legal efforts to press for governmental action have been based upon failure to meet targets in relation to air quality set in EU law. These actions, undertaken by environmental law charity ClientEarth, concerned first, the finding of the failure to meet specific deadlines for setting plans to address air pollution, and secondly the inadequate government response to having done so being identified by the courts.[67] Neither decision relied on human rights obligations towards individuals, beyond a single reference to the Charter of Fundamental Rights of the European Union and as such are not within the focus of this paper.

Environmental harm from varied sources, and in particular where the resulting impacts are both cumulative and indirect, as is the case with air pollution, have presented a barrier to applicants to the

[59]See the discussion in relation to climate change in this regard in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* Application No 53600/20, 9 April 2004, para 410 onwards.

[60]J Seinfeld and S Pandis *Atmospheric Chemistry and Physics: From Air Pollution to Climate Change* (Wiley, 3rd edn, 2016) p xxiv.

[61]This was noted, for example, as an aspect of the Swiss government's argument in *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, above n 59, para 338.

[62]T Eicke 'Human rights and climate change: what role for the European Court of Human Rights' (Inaugural Annual Human Rights Lecture Department of Law, Goldsmiths University, 2 March 2021) para 34, available at https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4#_ftn49, accessed 21 July 2025.

[63]Ibid.

[64]*Fadeyeva v Russia* Application No 55723/00, 9 June 2005, para 68.

[65]Boyle, above n 27, p 238.

[66]K Bouwer 'The unsexy future of climate change litigation' (2018) 30(3) *Journal of Environmental Law* 483.

[67]*R (on the application of ClientEarth) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs (Respondent)* [2015] UKSC 28; and *ClientEarth (No 2) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin).

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ECtHR. Whilst there have been applications upheld in instances of long-term pollution or other exposure to harm, these have all been in cases where the applicant was consistently highly proximate to an identifiable source of harm which can be isolated. For example, in the application of *Lopez Ostra v Spain* under the auspices of Article 8, the applicant lived metres from a waste treatment plant.[68] Similarly in *Brincat and Others v Malta* the applicants were working consistently in environments which exposed them to asbestos and had claims upheld under both Articles 2 and 8.[69] Any successful applicant in relation to air pollution would therefore probably need to live close to a source of that pollution, for an extended period. Furthermore, the ECtHR largely handles applications which concern infractions upon the individual rights of the applicant(s). The applicant is most often expected to demonstrate a breach of said rights in relation to themselves.[70] Clear exceptions are instances where the individual whose rights were breached is deceased or does not have capacity to act. Group actions, therefore, have tended to be focused upon breaches of the same rights arising from the same impact upon more than one applicant. On these grounds the Court has consistently rejected *actio popularis* applications, and made it clear it intends to continue doing so.[71] For group actions, therefore, the establishing of harm resulting in death or serious risk to life remains a requirement for all individual members of the group bringing a claim before the Court for a breach of Article 2.

Potential victim status has been considered by the Court in cases such as *Soering*[72] and arguably presents an avenue for applications under Article 2 which would befit the nature of the harm air pollution causes. However, the identification of a potential victim still requires the threat to be proven to the specific individual in question. It should also be noted that this status has applied to cases where removal to another physical location (outside the jurisdiction of the state) is fundamentally entwined with the breach. As such, the varied sources and intensity of harm being caused by air pollution, coupled with the need for the victim to be consistently proximate to it may present a significant challenge to any applicant wishing to suggest a threat to their life on this basis.

This challenge is even more significant for those seeking to present such harm as endangering a broader populace. They are faced with the further requirement to show that sufficient harm to occasion a threat to life (or immediate and proximate threat of such a harm) for all individuals within that populace. The small number of cases concerning environmental conditions which have been upheld under Article 3 ECHR, the prohibition of torture and inhuman or degrading treatment, are indicative of the limitations of the ECtHR in this regard. In *Florea v Romania* and *Elefteriadis v Romania* the applicants were incarcerated and forced to share cells with smokers.[73] They were therefore proximate to the harm, and unable to remove themselves from it without the direct intervention of the state. Further, the applicants had pre-existing medical conditions raising their personal risk of harm of which the state was aware. These were the pivotal factors in both cases.

For a successful application to the Court on the basis of harms arising from air pollution, therefore, the applicant would be advised to demonstrate to the Court: proximity to the harm; an inability to avoid that harm; and, where possible, a particular susceptibility to it. Petersmann summarises this by stating that whilst there has been some relaxation on the imminence of harm caused by environmental conditions by the Court, 'the requirement for a direct link between potential environmental harms and the infringements it would cause on the rights of the applicants remains intact'.[74]

[68] *Lopez Ostra v Spain*, above n 7.

[69] *Brincat and Others v Malta* Application Nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014.

[70] As acknowledged by the Court itself in *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, above n 59, para 415.

[71] See *Burden v The United Kingdom* Application No 13378/05, 29 April 2008, and *Aksu v Turkey* Application Nos 4149/04 and 41029/04, 15 March 2012.

[72] *Soering v The United Kingdom* Application No 14038/88, 7 July 1989.

[73] *Florea v Romania* Application No 37186/03, 14 September 2010, and *Elefteriadis v Romania* Application No 38427/05, 25 January 2011.

[74] M-C Petersmann *When Environmental Protection and Human Rights Collide* (Cambridge University Press, 2022) p 70.

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3. Temporality and severity of harm

Upholding a positive obligation on states to protect individuals from death owing to the harm caused by air pollution would not necessarily reflect a significant alteration to the position of the Court in relation to environmental harm to date. Harm from air pollution would not be likely to be successfully denied by the state, and neither would the need to mitigate said harm. The declaration of air pollution as a cause of death prevents a contention of a multifaceted large-scale harm being difficult to attribute directly to a threat to life of an individual and thus creating a reasonable expectation of a response on the part of the state. There would, however, be another clear counterargument from the state, one which is frequently used to defend the current pollution levels in urban areas and their potential to cause harm. That is the complex temporality and absence of linearity of the harm caused.[75]

In relation to air pollution, there are 'good' and 'bad' days and times for air quality. These can be attributed to factors including temperature, humidity, wind speed, and the amount of emission sources at any given time on any given day.[76] As such, an air pollution reading taken in the early morning of a Sunday in a city would differ considerably from that in rush hour on a Monday morning. Indeed, many air quality readings are taken as a 24-hour rolling mean to mitigate this variability.[77] This, in turn, has presented issues for the ability of the relevant governmental authority (Department for the Environment, Food and Rural Affairs, DEFRA in the UK) to 'provide information to the public to warn of exposure'.[78] As a result, in reply to a report of the Committee on the Medical Effects of Air Pollutants (COMEAP) in 2011, DEFRA stated that it 'is not possible to provide public information about an unexpected pollution episode until it is well established'.[79] The same COMEAP report, however, suggests that 'air pollution in the UK does not rise to levels at which people need to make major changes to their habits to avoid exposure; nobody need fear going outdoors'.[80] As such, adaptations made to address air pollution, and to improve the notification of those at particular risk of harm from it might ensure that a suggestion that the state had failed to meet its positive obligations under Article 2 would not be upheld.

However, the impact of air pollution on Ella Kissi-Debrah as an asthma sufferer, and all those in proximity to large roads, is not based upon a single 'bad' day, but on a pattern of environmental conditions known to cause 'many thousand premature deaths every year in the UK'.[81] Ella herself endured such conditions for years, according to the Report to Prevent Future Deaths. Whilst not fatal in all cases, air pollution is life-limiting and harmful to all regardless of pre-existing respiratory conditions. The Royal College of Physicians stated in a 2016 Report that outdoor air pollution alone added 40,000 deaths to the annual mortality burden.[82] The College noted that:

> Long-term exposure to either background or locally generated air pollution impairs lung function growth in children. Reducing exposure to air pollution reverses this effect, thereby allowing more

[75]Discussion of such issues is common in cases where disturbance or harm arises from an industrial site which does not operate constantly. See for example *Moreno Gómez v Spain*, above n 42, and *Hatton and Others v The United Kingdom*, above n 4, where the impact was acutely felt at night, but the impact during the day was not considered.

[76]See by way of illustration the categorisation of daily average pollution; DEFRA 'Days with "moderate" or higher air pollution' (30 April 2024) https://www.gov.uk/government/statistics/air-quality-statistics/days-with-moderate-or-higher-air-pollution-includes-sulphur-dioxide, accessed 21 July 2025.

[77]UK Air Information Resource 'What is the daily air quality index?' (DEFRA) https://uk-air.defra.gov.uk/air-pollution/daqi?view=more-info&pollutant=pm25#pollutant, accessed 21 July 2025.

[78]Committee on the Medical Effects of Air Pollutants 'Review of the UK air quality index' (The Health Protection Agency for the Committee on the Medical Effects of Air Pollutants, 2011) p 9 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304633/COMEAP_review_of_the_uk_air_quality_index.pdf, accessed 21 July 2025.

[79]Ibid.

[80]Ibid, p 10.

[81]Barlow, above n 3.

[82]Royal College of Physicians 'Every breath we take: the lifelong impact of air pollution (Royal College of Physicians, February 2016) p xiii https://www.rcp.ac.uk/media/jzul5jgn/every-breath-we-take-the-lifelong-impact-of-air-pollution-full-report.pdf, accessed 11 July 2024,

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> young people to achieve their maximum lung function growth potential. In adults, there is emerging evidence that air pollution accelerates the decline in lung function during ageing.[83]

In short, justifying avoiding an 'excessively burdensome' response to air pollution levels by a state on the basis of variability, inherent or otherwise, is made far more difficult by the identification of prolonged exposure to air pollution as a cause of death. This would be true even in an area where levels would have been considered to be within existing regulatory limits. This is compounded by increasing acknowledgement of the impacts of prolonged exposure to pollution even at what had been considered 'background levels'.

The identification of air pollution as a cause of death owing to prolonged, as well as acute, exposure demands an effective investigation under human rights law.[84] It also evidences the knowledge of the state of the cumulative harm over prolonged periods caused by air pollution. In the case of *Brincat and Others v Malta*, the Court held that in assessing whether a state was aware of the long-term harms of exposure to asbestos, it would not simply take the submissions of the respondent state in this regard but, 'rely on other factors, most evident amongst them being objective scientific research'.[85] Whilst not completely eliminating the imbalance in availability of information to the state and that to an applicant to the Court, this does go some way to reducing the hurdle applicants must overcome to prove their 'allegations beyond reasonable doubt' when alleging a breach of Article 2.[86] The acknowledgement of this type of long-term harm, and the ability to rely on scientific research beyond that espoused by respondent states, would thus negate the potential for the inherent variability of air pollution levels to constrain a submission that said pollution could give rise to a breach of Article 2. This would also align with established approaches of the Court in relation to cumulative impacts of air pollution under Article 8. In *Grimkovskaya v Ukraine* the Court stated 'cumulative effect of noise, vibration and air and soil pollution … significantly deterred the applicant from enjoying her rights'.[87] Persistently low air quality conditions, which included 'levels of nitrogen dioxide and particulate matter in excess of World Health Organisation Guidelines'[88] highlighted in the coroner's report into Ella Kissi-Debrah's death would therefore constitute a continued harm or impact which occasions (or might occasion) death and thus could be argued to breach Article 2.

Temporality is commonly considered in cases concerning the procedural limb of Article 2, the obligation for investigations into deaths to be conducted. The Court has made clear that there is a 'requirement of promptness and reasonable expedition is implicit in this context'.[89] Whilst in relation to the substantive aspect of the right to life and the positive obligation to protect it the Court has considered duration of risk to life, there is little direct reference to the promptness of practical measures adopted to safeguard life.[90] A claim of lack of promptness in response to a threat to life would also likely be met with a contention that a delayed response was owing to the need to balance other policy considerations with the harm caused by the various sources of air pollution. For example, the need for a transport policy which supports the economy both in terms of transporting individuals to places of work and being affordable for them, which has in itself been recognised as a fundamental social justice issue by Layard.[91] Delays to the implementation of measures to address breaches are by no means uncommon. Although beyond the focus of this paper, the UK's own record on addressing the judgments of the Court in relation

[83]Ibid, p 55.
[84]*McCann and Others v The United Kingdom* Application No 18984/91, 27 September 1995.
[85]See in this regard *Brincat and Others v Malta*, above n 69.
[86]*Grimkovskaya v Ukraine*, above n 9, para 60.
[87]Ibid, para 68.
[88]Barlow, above n 3.
[89]*Dzieciak v Poland* Application No 77766/01, 9 December 2008, para 105.
[90]*Oneryilidiz v Turkey*, above n 24.
[91]A Layard 'Vehicles for justice: buses and advancement' (2022) 49(2) Journal of Law and Society 406.

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to prisoner voting are indicative of the potential for practical responses to the outcomes of cases to be slow.[92] The contention in relation to effects of air pollution, however, is within the context of an immediate and persistent threat to life from a cumulative harm, rather than delay to implementation of a judgment where a risk to life is not present. The presence of a risk to life would demand reasonable promptness from the state. Establishing of this risk would also mean that a government could be accused of not having made sufficient steps towards improving air quality even if it was manifestly unable to reduce levels of pollution below WHO guidelines in the short term.[93]

The longevity of harm has been considered indirectly by the Court in cases such as *Hatton*.[94] Part of the judgment in that case considered the significance of constant monitoring of harms and policy reviews in response to the data it produced. The periodic review of policy in light of new evidence weighed in the favour of the government's position that permitting night flights from Heathrow was a justifiable policy approach given the economic benefits. In the case of air pollution, a similar argument might be made – that policy on the causes of air pollution such as that identified in Ella's case is constantly reviewed. As has been noted, however, the Court was clear in *Hatton* that the lack of availability of 'comprehensive and measurable data' could not be used to justify an absence of a decision on an environmental harm which was recognised.[95] Indeed this is arguably not the case in relation to air pollution, as this is tracked on a rolling 24-hour basis with data made publicly available.[96] Regardless of this, the Court has acknowledged that policies of this type are inevitably, and understandably, changeable. However, this is not a free pass to governmental inaction in the face of environmental harms which are variable, complex or have multiple sources and accumulate over time. In the context of air pollution, accumulation is a particular issue.

The harm caused by air pollution is in many cases not instantaneous, unless pollution is particularly severe. Many of us are fortunate enough not to notice when travelling between areas of higher or lower pollution. This was, of course, not the case for Ella. An individual's lack of awareness of the varied but cumulative impact is not an indication of a lack of harm. Indeed, there are many potential harms of which individuals will be unaware, but which are sufficiently responded to by the state so as to prevent any contention of an unaddressed risk to life. This has also been noted in the emerging body of case law from the ECtHR but also other jurisdictions in relation to climate change. Discussing the *Urgenda* case[97] van Zeben notes that the fact the cause of the harm (and thus the harm itself) occurs, 'over time and space, not by the actions of one specific actor … does not negate [the state's] duty of care to break the chain of causation'.[98] As such, monitoring and constant review of the potential for harm is required, but must be effective, otherwise it would not exempt a state from a positive obligation to protect from the harm. The case of *Budayeva v Russia* is emblematic of this obligation to monitor.[99] The case concerned a mudslide which devastated a town, killing eight people. The case focused on the extent to which it was reasonable to expect the state to have put in place measures which would have prevented these deaths. This included consideration of the monitoring of foreseeable risks. The Court held that 'appropriate investigations and studies' should be undertaken, as:

> the state is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point

[92]Committee of Ministers of the Council of Europe 'Execution of the judgments of the European Court of Human Rights: Five cases against the United Kingdom' Resolution CM/ResDH(2018)467 (6 December 2018).

[93]WHO global air quality guidelines, above n 1.

[94]*Hatton and Others v The United Kingdom*, above n 4.

[95]Ibid, para 128.

[96]UK Air Information Resource, above n 77.

[97]*Urgenda Foundation v State of the Netherlands* [2015] HAZA C/09/00456689.

[98]J van Zeben 'Establishing a governmental duty of care for climate change mitigation: will Urgenda turn the tide?' (2015) 4(2) Transnational Environmental Law 339.

[99]*Budayeva and Others v Russia* Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008.

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> to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use.[100]

The Russian Government provided details of monitoring and early warning systems which were in place, but the applicants demonstrated the failure, despite the existence of these systems, to warn those in the town sufficiently of the risk. The Court concluded as a result that there was 'no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area … regarding the foreseeable exposure of residents … to mortal risk'.[101] It is apparent that the presence of warning systems or constant monitoring of risks is insufficient in discharging the positive obligation of the state to mitigate harm from foreseeable hazards. There is added to this a consideration of their effectiveness and whether they are in fact a deterrent to the threats to the right to life. In line with the margin of appreciation afforded to states in matters of positive obligation by the Court, the form of mitigation or risk aversion therefore is not relevant; instead, effectiveness of the measure chosen is crucial.

Further evidencing this, the Court conceded in *Budayeva* that not all harms can be monitored, as the cost and practicality of such review will not always be determined to be a reasonable burden upon the state.[102] This burden is balanced against the severity of the harm in question, the likelihood it will occur, and other measures being taken to limit that impact. The recognition and public recording of air pollution as a threat to life weighs heavily upon this balancing of competing interests therefore. In *Hatton*, the Court established the central question of whether 'the authorities … overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected … and the conflicting interests of others and of the community as a whole'.[103]

Whilst the Convention is explicit in relation to the existence of qualifications to Article 8 which can be read as an overarching acceptance of some assessment of proportionality, this cannot be said of Article 2, the text of which does not contain the same limitations on the right. We must instead identify within jurisprudence of the Court an application of balancing or proportionality in the context of harm which might occasion death. Such an approach can clearly be seen in the case of *Oneryildiz v Turkey*, where the Court acknowledged that 'an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources'.[104] In relation to air pollution, the significance of the harm caused by it being both a severe threat to those with conditions such as Ella's but also the community as a whole significantly impacts this balancing exercise and the expectation on a state to respond to it. The economic benefits reaped for the wider community in the case of night flights was balanced only against their impacts on those in the immediate vicinity of the harm, those beneath the flight path and close to it. By contrast, the need to phase out harmful emissions to avoid severe economic and social impacts is balanced against acute harms to those in positions such as Ella's, but also against constant and cumulative harm to health to which all individuals are now officially recognised as being exposed in areas of poor air quality.

The position in relation to air pollution compared to that in *Hatton* is therefore considerably different in terms of balancing immediate and long-term harms against the community interest. The harm in question is now accepted officially as capable of causing death, and is a harm inflicted upon all in relative proximity to most urbanised areas, and in particular those living near or frequenting busy roads. The Court held in *Hatton* that there was no violation of the lower threshold set for Article 8, as a fair balance had been struck between the rights of the narrower group of individuals impacted upon and the

[100] Ibid, para 137.
[101] Ibid, para 158.
[102] *Budayeva and Others v Russia*, above n 99.
[103] *Hatton and Others v The United Kingdom*, above n 4, para 129.
[104] *Oneryilidiz v Turkey*, above n 24, para 107.

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conflicting interests of the community.[105] Such a satisfactory balance arguably could not be so easily achieved in relation to air pollution. *Hatton* and similar cases offer insights as to how the Court has handled cases in which there was a need to balance social and economic interest against environmental harms to individuals. However, they are simply not comparable in terms of the severity and ubiquity of harm wrought upon individuals by air pollution.

Whilst the focus of this paper is upon the impact of the Prevention of Future Deaths Report of Ella Kissi-Debrah noting that her death was caused by air pollution, it cannot be ignored that Ella's pre-existing condition of asthma exposed her to greater risk of harm, and death, as a result of that pollution. Her condition, whilst inherently common (over 1 million children in the United Kingdom are treated for asthma),[106] was severe in nature, a fact noted by the coroner in his report.[107] Despite this, the coroner's stated concerns included reference to the 'number of deaths from air pollution in the UK' and that there is 'no safe level' for particulate matter in the air. Whilst there was an undeniably higher risk to Ella, and her health condition was a clear contributing factor in her death, harm as a result of air pollution will continue to occur to all those exposed to it. The report identifies a far wider risk of harm to the populace as a whole, not just to those with pre-existing conditions, to which the state is obliged to respond. Petersmann has noted that the Court has, 'accepted that a case might be admissible even before the actual pollution occurred, when the nature of the activity carries a potential risk pointing to a sufficiently close link to the applicant's rights'.[108] Where the harm in question arises from the air breathed in common routes and public spaces from ubiquitous activities such as road transport, it would seem that air pollution is a clear example of such a potential future risk.[109]

4. Reasonable attribution and expectations on state authorities

Responsibility for air pollution, and specifically the nitrogen dioxide and particulate matter listed in the Prevention of Future Deaths Report[110] as having caused Ella's death, lies with the Secretary of State for the Environment. The Air Quality Standards Regulations 2010[111] outline their responsibility for monitoring air pollution and ensuring that levels of listed substances do not exceed limit values and 'where possible' remain below target values. The existence of a Prevention of Future Deaths Report and its ability to directly address those responsible for air pollution would be sufficient to dismiss any contention of a complete lack of action on the part of the state to respond to Ella's death and potential future deaths. For this reason, as noted, the focus of this paper concerns the sufficiency of that state response when balanced against the degree of harm being caused.

The nature of air pollution, originating from multiple sources, and arising as a consequence of complex socio-economic activities such as transport and industrial production, could be argued to be beyond the reasonable remit of a single governmental authority. This creates a difficulty in assessing the adequacy of extant responses to the threat of air pollution. Any such response would itself have to be as complex as the pollution it hopes to address, in order to be worthwhile. There are, however, evident counterpoints to this contention. The first is the statutory attribution of responsibility for both the monitoring of air pollution and responses to the data produced by it to the Secretary of State (at the time of writing for Environment, Food and Rural Affairs) within the Air Quality Standards Regulations and the Environment Act 2021. This demonstrates that whilst it is a multifaceted issue, a central authority for responding to it has been identified. The second is the response(s) to the coroner's findings in Ella's case.

[105] *Hatton and Others v The United Kingdom*, above n 4, para 129.

[106] NHS England 'Childhood asthma' (NHS England, 2019) https://www.england.nhs.uk/childhood-asthma/, accessed 21 July 2025.

[107] Barlow, above n 3.

[108] Petersmann, above n 74, p 69.

[109] *Hardy and Maile v The United Kingdom* Application No 31965/07, 14 February 2012.

[110] Barlow, above n 3.

[111] The Air Quality Standards Regulations 2010, SI 2010/1001.

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One combined response was provided by three government departments (DEFRA, the DfT and the DHSC), and 11 other individual responses, two of which are governmental in nature and all of which have either statutory or professional roles in relation to health and the environment.[112] It should be noted that the coroner himself chose to address these offices with the Prevention of Future Deaths Report. However, they do not deny their role in addressing the issue of air pollution. The suggestion that there is no relevant authority owing to the inherent complexity of the matter withstands little scrutiny and would have significant implications for other complex and interrelated areas of policy if accepted. Governmental authorities are either statutorily responsible or have acknowledged their own role in addressing this issue. As such, whilst some question of what body is responsible might be raised, the suggestion that none was could not be sustained. Whilst a prima facie logical point, this is a contention which the ECtHR has previously had to address. In the case of *Grimkovskaya v Ukraine* the Court dealt with arguments from the Ukrainian government that domestic remedies had not been exhausted, as the applicant had not brought proceedings against what was in their view the relevant authority.[113] The Court dismissed the objection, stating that whether the issues at hand could in fact be resolved by the authority suggested as the more appropriate respondent was the focus of considerations of admissibility.[114]

The attributability of harm to a particular state authority is entwined with the necessity to exhaust domestic remedies. Where harm capable of causing death is attributed to the state but all relevant domestic remedies are not exhausted, any potential case would be declared inadmissible by the Court. There is first a distinction between the absence of a relevant authority altogether, and the misidentification of any or all relevant authorities. The absence of any relevant authority altogether might be based on two grounds. First, the absence of an ability for the state to be able to address the issue, ie fundamental incapacity owing to which the state could not reasonably be expected to respond.[115] Secondly, the absence of an authority with clear responsibility for the issue raised, but the issue itself being one to which the state could reasonably be expected to respond.[116] Neither is relevant to the issue of air pollution, however, for the reasons noted above. The failure to identify all potentially relevant authorities in relation to the addressing of air pollution is a concern for potential applicants contending a risk to life due to air pollution. This is due to the complexity and variety of both the sources of air pollution, and the range of corresponding authorities which might be deemed as having responsibility. In the UK the clear attribution of responsibility for air pollution (both PM 2.5 and other forms of air pollution) by the Environment Act 2021 to the Secretary of State for the Environment removes this risk. Air pollution as an environmental harm in particular presents this risk to applicants, as it encompasses multiple substances from differing sources such as polyaromatic hydrocarbons, ozone and sulphur dioxide, inter alia. *Grimkovskaya* would suggest that the state could not use this as a means to defend a failure to discharge an evident positive obligation arising from a substantiated harm. However, where a framework for air quality governance was present, albeit complex, and not followed by an applicant, there could be a contention that domestic remedies had not been exhausted. Care must be taken by any applicant to ensure not only that the domestic remedies have been exhausted in relation to a single authority, but also that those which might be sought via other authorities have been fully considered.

Reasonable attribution to a state authority is distinct from the ability to identify one. The latter is resolved by the case of Ella Kissi-Debrah owing to their being identified in the Prevention of Future Deaths Report and the responses from the government authorities to which it was addressed. As noted, those authorities had been the focus of a legal action undertaken by Rosamund Kissi-Debrah on behalf of her daughter's estate which had reached the point of a case management conference before being settled

[112]All responses can be viewed at 'Ella Kissi Debrah' (HM Courts and Tribunals Judiciary, 21 April 2021) https://www.judiciary.uk/prevention-of-future-death-reports/ella-kissi-debrah/, accessed 21 July 2025.

[113]*Oneryilidiz v Turkey*, above n 24.

[114]*Grimkovskaya v Ukraine*, above n 9, para 49.

[115]For example owing to the lack of availability of information as noted in *LCB v The United Kingdom*, above n 11.

[116]See the discussion in *Özel and Others v Turkey* Application Nos 14350/05, 15245/05 and 16051/05, 17 November 2015, regarding the lack of attribution of responsibilities in relation to responses to natural disasters.

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in 2024.[117] This legal action would appear to indicate that, in this context, the domestic court was satisfied with the identification of relevant governmental authorities to the harm. A contrary decision would of course be unlikely given the coroner's identification of the relevant authorities to which to address the concerns raised by his report.

There is, however, a distinction between identifying relevant authorities and what can be reasonably expected of them in addressing a highly complex harm from varied sources. For example, government permission for a road route, and the continued operation of it (once the route has been established) are distinct matters as considered in *Grimkovskaya*.[118] However, making this narrow distinction is crucial to the reasonable attribution of responsibility for harm (potential or actual) to a state authority. Further, it is only from this that it is possible to establish what response to said harm can be reasonably expected. Noteworthy here, given the established margin of appreciation for states in relation to potential harms to citizens, is the drafting of the Air Quality Standards Regulations 2010. The Secretary of State can be forced only to 'endeavour to maintain the best ambient air quality compatible with sustainable development'[119] below limit values. This allowance for the Secretary of State is, at best, to be described as vague. Some ability to allow for air pollution to ensure the maintenance of certain public services is inevitable and justifiable, but such a vague parameter is also open to less than scrupulous interpretation. In this regard the ECtHR has made clear that Article 2 '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'[120] and that this should not be construed so as to 'impose an impossible or disproportionate burden on the authorities'.[121] Similarly the Court is conscious of the limits on capacity of the state to monitor each and every risk which might present itself, stating that 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising'.[122] Thus it is for the applicant to establish only:

> that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals … and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[123]

Further to this, where existing regulatory measures are insufficient, there is an 'obligation on the authorities to take preventive … measures to protect an individual whose life is at risk'.[124] To suggest, therefore, that a positive obligation to protect life from harm caused by air pollution has arisen requires demonstrating that established regulatory mechanisms fail to avoid an immediate risk to life which was known about, and would not impose an excessive burden upon the state. The requirement to attribute this to specific existing government authorities is not present. Consequently, whilst an applicant must address accessible and relevant authorities in exhausting domestic remedies, the obscuring or absence of them would not preclude an action. In the case of air pollution in the UK, the Prevention of Future Deaths Report established that there is an immediate (and ongoing) risk to life. The report makes government knowledge of that risk undeniable whilst also clearly identifying the relevant authorities with powers to respond. Focus therefore must turn to a reasonable assessment of adequacy of response to that risk by those authorities.

[117] GLA, above n 21.
[118] Ibid.
[119] Air Quality Standards Regulations 2010, SI 2010/1001, reg 17.
[120] *Osman v United Kingdom*, above n 25, para 115.
[121] Ibid, para 116.
[122] Ibid.
[123] Ibid.
[124] *Opuz v Turkey* Application No 33401/02, 9 June 2009, para 128.

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The Court has repeatedly made clear that the positive obligations placed upon states are subject to the margin of appreciation they are afforded, as 'national authorities have direct democratic legitimation and are … in principle better placed than an international court to evaluate local needs and conditions'.[125] Similarly the Court has made clear its view that it is 'certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere'.[126] On the specific issue of air pollution and road traffic the Court held in *Grimkovskaya* that, 'it would be going too far to render the Government responsible for the very fact of allowing cross-town through traffic to pass through a populated street'.[127] Such a permission is a necessary aspect of urban planning, where zero harm or impact, given other extant constraints upon decision-makers, is accepted as impossible to achieve.[128] Gearty goes further, proposing that '[e]nvironmental protection needs a more direct guarantee in human rights law than can be provided by the right to privacy or by civil and political rights generally'.[129] This is as a result of the need for local authorities to have the capacity to make appropriate decisions relative to that locality. However, where such a decision is actively causing harm occasioning risk to life, either in terms of it being known that a new project will do so, or at the point at which it becomes apparent that an existing one is doing so, the question then becomes whether action ought to be taken to address it. The assessment of a 'reasonable expectation' placed on the state in relation to the action demanded by that positive obligation is also relative to the degree of harm.[130] As noted by the Court in *Powell and Rayner v UK*, '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'.[131] The distinction created by the Prevention of Future Deaths report in response to the death of Ella Kissi-Debrah, and cases such as *Powell* and *Hatton* discussed above, is the ubiquity of the harm in question. The impact of air pollution is not bound to a single geographic location, nor to members of a particular profession, or during a particular period of time. The report instead outlines a continuing and constant risk of harm which can result in a threat to life which is widespread. Few risks of harm which have been considered by the Court, outside of climate change, can be said to have as broad an impact. The spatial and temporal nature of air pollution as a harm, and the implications of this for human rights law, are certainly worthy of further consideration, though that is beyond the scope of this paper. However, addressing the focus of the work at hand, Shelton noted in 1991 that it is 'accepted that environmental harm may violate … the right to life'.[132] Over three decades later, it has been formally recognised that air pollution poses a constant risk to life. As such, it seems a small step forward to consider that it would not be a reasonable response for any government to fail to adequately address levels of air pollution which have been acknowledged as causing that risk.

Conclusion

The death of Ella Kissi-Debrah will remain a fixed point in time at which the first death attributed to air pollution was declared in the UK. The immense emotional value for her family of the legal validation of a previously unrecognised impact on Ella by air pollution, also bears significant legal ramifications. This paper outlines how the official declaration that her death was caused by air pollution removes the hurdles

[125] *Hatton and Others v The United Kingdom*, above n 4, para 96.

[126] *Powell and Rayner v The United Kingdom* Application No 9310/81, 21 February 1990, para 44.

[127] *Grimkovskaya v Ukraine*, above n 9, para 65.

[128] The seminal discussion of this striking of a 'fair balance' between such competing interests in this area is to be found in *Hatton and Others v The United Kingdom*, above n 4.

[129] C Gearty 'Do human rights help or hinder environmental protection' (2010) 1 Journal of Human Rights and the Environment 7.

[130] *Hatton and Others v The United Kingdom*, above n 4, and *Budayeva and Others v Russia*, above n 99.

[131] *Powell and Rayner v The United Kingdom*, above n 126.

[132] D Shelton 'Human rights, environmental rights, and the right to environment' (1991) 28 Stanford Journal of International Law 103.

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for an application to the ECtHR regarding a breach of the Article 2 right to life by poor air quality which occasions a threat to life.

Prior to the coroner's Prevention of Future Deaths Report in this case, there were several potential barriers to such a claim being made. These included: that the harm was comprised from multiple sources; that the harm developed over too significant a length of time as to be attributable to the state; and that Ella Kissi-Debrah was so acutely susceptible to air pollution that an excessive burden would be placed upon the state to address air pollution to a degree sufficient to avoid harm to her altogether. These issues in turn also give rise to potential procedural issues, and specifically potential difficulties for applicants to the Court in showing that all domestic remedies had been exhausted and an appropriate authority to which to attribute responsibility could be identified. It is argued that the recognition of air pollution as a cause of death through this report removes these barriers.

Knowledge, now officially acknowledged, of the harm being caused places a positive obligation upon the state to address said harm in spite of it being from a diverse range of sources. Provided they were relatively proximate to an area of low air quality for a prolonged period, it could not be denied that the low air quality did 'directly affect the [applicant]'.[133] Similarly, the cumulative and long-term nature of the harm caused by air pollution might give rise to contention of an excessive burden being placed upon the state by requiring that it be addressed beyond merely monitoring and informing citizens of potential harm. However, the declaration of that harm as a cause of death raises the expectation upon the state to prevent recurrence. This expectation would be further raised by the fact that air pollution is not a singular event. Though there are rises and falls in severity, the impact of low air quality is, in part, cumulative and thus constantly causing harm which might give rise to death. This factor distinguishes the case of Ella Kissi-Debrah and those at risk of harm caused by air pollution from the established position in relation to singular instances of environmental harm reflected in *Budaeyeva*, where a village was at risk due to mudslides which caused deaths rather than constant cumulative harm.[134] Rather than a merely monitoring and forewarning expectation, there is a clear argument for a preventative aspect to the positive obligations imposed on the state to prevent death. Furthering this argument is the nature of the report issued by the coroner. Whilst recognising the cause of death in Ella's case as being attributable to air pollution is significant, the report has the explicit purpose of preventing future deaths. As such, the obligation to respond not only arises, but is arguably implicitly accepted by the establishment of processes to identify risks causing death which require state responses. The reality is that, without intervention to address levels of air pollution, the state has now been told by an expert official, within a process established by the state to safeguard lives, that there will be further deaths.

The conclusion of this piece is not to propose that a case be brought before the Court by the family of Ella Kissi-Debrah – and indeed the abovementioned recent settlement reached between her mother and the government would likely preclude this possibility.[135] Instead, it is to note that the hurdles to such a case being brought by an individual (or family members thereof) harmed by air pollution are significantly lowered by the tragic death of Ella Kissi-Debrah, and the Prevention of Future Deaths Report produced in response to it. This is because there is now a clear argument for a positive obligation upon the state to take action to do exactly what its own established mechanisms demand, to prevent future deaths. Achieving both the recognition and enforcement of such an obligation is by no means easily achievable in a practical sense, but it is the contention of this paper that the specific features of the death of Ella Kissi-Debrah and response to it make doing so possible within the existing requirements set by the Court in both its procedures and principles distilled from its case law. Inevitably, and regrettably, not every death can be prevented; nor would that be a realistic proposition. However, the ending of this one life cannot be ignored on the basis of practicality or avoidance of complexity. The recognition of air pollution as a cause of death gives rise to a compelling line of argument that the state is under a positive obligation to prevent future deaths resulting from the same cause of harm. Upholding of breaches of

[133] *Fadeyeva v Russia*, above n 64, para 68.
[134] *Budayeva and Others v Russia*, above n 99.
[135] GLA, above n 21.

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Article 2, the right to life, are uncommon in the context of environmental conditions, and certainly in relation to those where harm originates from complex sources. However, it is difficult to deny that the risk of harm occasioning a threat to life posed by air pollution represents an instance in which the state is compelled to act to mitigate the harm caused by air pollution arising from its obligations under the ECHR.

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