

Self-defence and the Right to Life: the Use of Lethal Or Potentially Lethal Force, UK Domestic Law, the Common Law and Article 2 ECHR

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Self-defence and the right to life; the use of lethal or potentially lethal force, UK domestic law and article 2 ECHR

Steve Foster* and Gavin Leigh**

Abstract

The issue of the use of fatal force by state actors and its compatibility with the state's duty to protect life was given a high public and judicial profile in the recent Grand Chamber's decision in *Armani Da Silva v United Kingdom*,¹ involving the killing of Charles de Menezes in 2005 when he was mistaken for a suicide bomber some two weeks after the London bombings. Whilst that case provides the context for discussion on the use of fatal force, this article focusses on two recent High Court decisions - *R (Davis) v Commissioner of the Police of the Metropolis* and *R (Collins) v Secretary of State for Justice* - that raised self-defence and the law's compatibility with the state's duty to protect life. The article proceeds by drawing out the facts of each case, then turns to the law of self-defence in English domestic law and its use in these two cases. It then examines the compatibility of both use of force by state actors in both *Davis* (and *Da Silva*), and the use of force by private homeowners in *Collins*, with art. 2 ECHR, and in particular whether the UK's framework for self-defence is art.2 compatible.

Introduction

The issue of the use of fatal force by state actors and its compatibility with the state's duty to protect life was given a high public and judicial profile in the recent Grand Chamber's decision in *Armani Da Silva v United Kingdom*,² involving the killing of Charles de Menezes in 2005 when he was mistaken for a suicide bomber some two weeks after the London bombings. Although this case did not consider the substantive issue of whether the force used *in this case* was 'absolutely necessary' as required by art.2 of the European Convention, or whether the operation was planned with sufficient care so as to satisfy the requirements of art.2, the Grand Chamber did comment on the compatibility of the UK's law on self-defence, and was satisfied that it was consistent with art.2 despite domestic law not making reference to the words 'absolutely necessary' employed in the Convention right to life.³ This case will be revisited later in this article, which is primarily concerned with whether domestic substantive law relating to self-defence is Convention compatible.

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¹ (App. No. 5878/08); decision of 30 March 2016.

² (App. No. 5878/08); decision of 30 March 2016.

³ The case will be considered later on in this article, when examining the decision in *Davis*, below. On the facts the Grand Chamber concluded that there had been no violation of art.2 as the authorities were found to have carried out an effective investigation into the shooting and that all aspects of the authorities' responsibility for the shooting had been thoroughly investigated.

Rather, this article focusses on two recent High Court decisions that raised self-defence and the law's compatibility with the state's duty to protect life. In one decision,⁴ the court rejected a claim in battery and negligence brought by a person who had been shot by a police officer on the grounds that the officer was acting in self-defence and had not been negligent in using such force; despite errors having been made in the conduct of the police operation. This decision will be examined to see whether it is consistent with the European Court's approach in this area and whether, in general, domestic law provides sufficient protection to the right to life protected under art.2. The High Court has also recently ruled on the compatibility of s.76 (5A) of the Criminal Justice and Immigration Act 2006, relating to the use of self-defence by householders in the protection of their property and themselves, with the state's duty to protect life under art.2.⁵ This case involved the use of fatal force by one private individual against another, thus engaging the state's positive obligation to protect individuals from attack, and human rights breaches, by other private actors, and raising the question whether the domestic law of self-defence is sufficiently sympathetic to the rights of the victim of such force so as to be compatible with the state's positive obligation under the ECHR, together with the case law of the European Court of Human Rights in this area.⁶

Compatibility of domestic law with Article 2

With the possible repeal of the Human Rights Act 1998 and its replacement with a British Bill of Rights,⁷ attention will focus on whether UK common law can accommodate the principles and requirements of the rule of law and relevant international human rights law. At present domestic law which impacts on these principles answers primarily to the rights contained in the ECHR.⁸ However, whatever the debate concerning sovereignty and the relationship between the Convention and domestic law, it is clear that the latter exists independently from the Convention and its rights, and must therefore be developed within the domestic legal system. Accordingly, attention is now focussed on the common law's ability to accommodate principles of fairness, justice and respect for human rights; whether that is achieved, as presently, in the light of Convention rights, or under a proposed domestic Bill of Rights.

The use of lethal, or potentially lethal, force by an officer of the state not only raises issues regarding self-defence in any criminal or civil proceedings, but also on whether such use of force is in violation of art.2 ECHR, which states that everyone's life shall be protected by law.⁹ Article 2(2) requires the use of such force to be *absolutely necessary* in pursuance of any of the legitimate aims listed in that provision, including

⁴ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB)

⁵ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33

⁶ The domestic courts currently must take into account such decisions by virtue of s.2 Human Rights Act 1998.

⁷ See R Slowe 'The Conservatives proposals for A British Bill of Rights' [2015] EHRLR 372

⁸ As included in the Human Rights Act 1998, s.1 and Schedule 1

⁹ For an extensive coverage of Article 2 and its case law, see DJ Harris, M O'Boyle, EP Bates and CM Buckley *Law of the European Convention on Human Rights*, 3rd edition (OUP 2014), chapter 5, and A Mowbray *Cases, Materials and Commentary on the European Convention on Human Rights*, 3rd edition (OUP 2012), chapter 4

the defence of any person from unlawful violence.¹⁰ In addition, because art.2 imposes a positive obligation on the state to protect everybody's life from threats from other private individuals,¹¹ any legal system must ensure its law complies with art.2 and the standards it lays down with respect to the use of lethal (or potentially lethal) force when that force has been used by non-state actors. Thus, relevant domestic law must provide sufficient protection to the individual against the arbitrary use of force and this requires an examination of whether any law of self-defence is sufficiently compatible with the standards contained in art.2.¹²

Facts and decision in *Davis*

The claimant had served a sentence of imprisonment for firearms offences, having waved a pistol at police while fleeing and fired it at the door to a block of flats. After his release, the police received information that he was planning a robbery and had been trying to acquire a gun. A team of specialist firearm officers was briefed and was told, erroneously, that the claimant had fired at police while committing the earlier offence. The claimant was subsequently placed under surveillance. One of the officers thought that he had seen him in a car with three others, fiddling with what appeared to be a gun in his waistband. The claimant and others were also observed attempting to start the car with jump leads. An armed officer approached the car and said that he saw a small black object with a square end; believing that a gun was pointing at him and that he was about to be shot. The officer shot the claimant, causing injuries, and no gun was found in the car. There was inconsistent evidence as to whether the claimant, who was a front-seat passenger in the car, had reached into the foot-well immediately before the shot was fired, and the defendant claimed that the small square black object was probably the end of the jump-lead handles. The claimant brought proceedings against the police for battery, negligence and breach of his right to life under art.2 ECHR.

With respect to the claim in battery, in the High Court of England and Wales, Nicol J held that whether the officer who had shot the claimant had held an honest belief that he was in imminent lethal peril was a question as to his subjective state of mind, although whether any such belief was reasonable required an objective assessment.¹³ In the court's view, the two were not to be equated; if there was good reason why the officer might have had that fear that was a matter which might be relevant in deciding whether he did in fact have such a fear.¹⁴ On the evidence, there could have been no good reason for the officer to fire unless he feared for his life: he was an experienced officer who had undergone rigorous training and taken part in a large number of armed operations, but had never before fired his weapon. In addition he had many commendations for professionalism in tackling armed suspects and no disciplinary

¹⁰ Article 2(2) allows such force in other stated circumstances, but the use of it in defending persons from unlawful violence, or effecting a lawful arrest as in *Davis*, below, is at the centre of the issues dealt with in this article

¹¹ *Osman v United Kingdom* (2000) 29 EHRR 245

¹² See F Leverick, 'Is English self-defence law incompatible with Article 2 of the ECHR?' [2002] Crim. Law R 347

¹³ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) [29]

¹⁴ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) [62], applying *Ashley v Chief Constable of Sussex* [2006] EWCA Civ. 1085; [2007] 1 WLR 398

convictions.¹⁵ The officer believed that the claimant was a very dangerous individual and that he was in possession of a gun; the jump-lead handle could have been mistaken for a pistol. On the other hand, the claimant had a history of giving false information to the police and his evidence could not be accepted without reliable corroboration. Accordingly, the officer's belief that he was facing imminent lethal peril was a reasonable one and he had acted in lawful self-defence and the latter claim failed.¹⁶

Dismissing the claim in negligence, it was found that there was no evidence from which it could be inferred that the police had assumed any kind of responsibility for the claimant.¹⁷ If that conclusion was wrong, the claimant would be entitled to say that the error in the briefing and the mistaken identification of the claimant as the man who had fiddled with his waistband were negligent, but those errors were not material because even if they had not occurred a decision would still have been made to deploy specialist firearm officers, in view of the evidence that the claimant had been trying to acquire a firearm, and because the officer would still have perceived that the claimant was pointing a gun at him.¹⁸ Turning to the claim under art.2, since the officer honestly and reasonably believed that he was about to be shot, the shooting itself did not amount to a breach of the claimant's right to life. Although the materiality of any negligence on the part of the police was relevant to a claim under art.2, there was no material negligence either in the shooting itself or in the planning or conduct of the operation.¹⁹

Facts and decision in *Collins*

In this case the High Court was required to determine whether the so-called "householder's defence" in s.76(5A) of the Criminal Justice and Immigration Act 2008 was compatible with art.2 ECHR. The claimant had sustained serious personal injury after he had been forced into a headlock by a homeowner whose house he had broken into. A police investigation followed and the Crown Prosecution Service decided not to prosecute the homeowner.

Giving judgment, Sir Brian Leveson P held that it was clear that the statutory provision adopted and preserved the second limb of self-defence at common law, therefore the central question was whether the degree of force used by a defendant was "reasonable in the circumstances as the defendant believed them to be", and not whether the force used was proportionate, disproportionate or grossly disproportionate. In his Lordship's view, the standard remained that which was *reasonable*, and the other provisions, in particular s.76(5A) and s.76(6), provided the context in which the question of what was reasonable had to be approached.²⁰

¹⁵ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) [70]

¹⁶ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) [71] [97]

¹⁷ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) [118], following *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Robinson v Chief Constable of West Yorkshire* [2014] EWCA Civ. 15

¹⁸ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) at [139]

¹⁹ *R (Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 (QB) at [157], applying *Nachova v Bulgaria* (2006) 42 E.H.R.R. 43

²⁰ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [18]-[20]

His Lordship stated that the operation of s.76(5A) automatically excluded a degree of force which was grossly disproportionate from being reasonable in householder cases, but stressed that if the degree of force was not grossly disproportionate, s.76(5A) did not prevent that degree of force from being considered reasonable within the meaning of the second self-defence limb.²¹ On the other hand, the test did not direct that any degree of force less than grossly disproportionate was reasonable; whether it was reasonable would depend on the particular facts and circumstances of the case. Accordingly, s.76(5A) read together with s.76(3) and the common law on self-defence required two separate questions to be put to the jury in householder cases. Presuming that the defendant genuinely believed that it was necessary to use force to defend himself, those questions were: (a) whether the degree of force used by the defendant was grossly disproportionate in the circumstances as he believed them to be; (b) whether the degree of force used was nonetheless reasonable in the circumstances as he believed them to be.²² On the plain words of s.76, a jury should consider those questions disjunctively: the answer to the first question did not provide an answer to the second.²³ The effect of s.76(5A) was to allow a discretionary area of judgment in householder cases, with a different emphasis to that which applied in other cases. In deciding whether the degree of force was reasonable, it was necessary to take into account the fact that a person acting in self-defence might not be able to weigh to a nicety the exact measure of any necessary action, and that evidence of a person having only done what he honestly and instinctively thought necessary to defend himself constituted potent evidence that the force used was reasonable.²⁴ In almost all cases the degree of force used would be reasonable if it was proportionate, but that did not equate the two meanings because s.76(6) permitted a finding that force which was proportionate was nevertheless not reasonable.²⁵ Consequently, in all those circumstances, the construction placed on s.76(5A) by the editors of Archbold 2016, namely that force in a householder case was only to be regarded as unreasonable if it was grossly disproportionate, was not an accurate statement of the law.²⁶

The decisions in *Davis* and *Collins* and the domestic law of self-defence

Self-defence, if raised successfully, permits the defendant's use of force, including fatal or potentially fatal force and is referred to as private defence inasmuch as it includes the defence of others and prevention of crime.²⁷ The defence can be broken down into two parts: a belief in the need for force in the circumstances; and a proportionate degree of force used in response to that threat. As the autonomy and right to life of individuals are in conflict, it is, therefore, essential that the law of self-defence is sufficiently certain to act as a morally coherent guide, which rationalises the lawful use of lethal or potentially lethal force.

²¹ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [19]

²² *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [20]

²³ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [22]

²⁴ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [23]

²⁵ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [25]

²⁶ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [33]-[34]

²⁷ Criminal Law Act 1967, s. 3(1): 'a person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.'

The common law on self-defence was given statutory authority by s.76 of the Criminal Justice and Immigration Act 2008; the political impetus for this legislation being the threat of prosecution that “heroes” - as opposed to “vigilantes” - were faced with in particular circumstances. It did nothing, however, to clarify the law that already existed, and the uncertainty with regards to the permissible degree of force remained the same. The following common law principles were included in the section:

- the use of reasonable force is determined by the defendant’s perception of the circumstances (s.-76(3)), whether or not that perception was mistaken (s. 76(4));
- this perception cannot depend on voluntary intoxication (s.-76(5));
- the degree of force used will not be reasonable if disproportionate in the circumstances (s.-76(6));
- the possibility that the defendant could have retreated is to be taken into account but does not give rise to a positive duty (s.-76(6A) is inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.-148);
- the defendant may not be able to weigh the measure of the response to a nicety (s. 76(7)(a)); and
- an honest and instinctive reaction is evidence of a reasonable response (s. 76(7)(b)).

Although there is nothing in s.76 to this effect, cases such as *Chisam*²⁸ suggest that the need for force should relate to an imminent threat. Furthermore, in contrast with s.76(6A), Fiona Leverick argues that the defendant should be required to retreat, but ‘only if an opportunity to do so actually exists.’²⁹ At common law, the Court of Appeal, in *Bird*,³⁰ had ruled that reference to a duty, as in *Julien*,³¹ was too onerous as this would conflict with the rule that a pre-emptive strike may be justified by the circumstances,³² although Andrew Ashworth believes that ‘it would be possible and desirable to have a law which imposed a general obligation to avoid conflict but, where this was not practical, authorized a pre-emptive strike.’³³

In response to the position of householders faced with trespassers in their homes, the Crime and Courts Act 2013 amended s.76 of the Criminal Justice and Immigration Act 2008. As a consequence, s.43 of the 2013 Act effectively means that disproportionate force may be reasonable, provided that it is not (under 5A) ‘grossly disproportionate in those circumstances.’³⁴ *Collins*³⁵ confirmed that s.76(3) maintained the common law requirement that the degree of force used must be objectively reasonable in the circumstances as the defendant subjectively believed

²⁸ *R v Chisam* (1963) 47 Cr App R 130.

²⁹ F Leverick, *Killing in Self-Defence* (Oxford: OUP, 2006), p.71.

³⁰ *R v Bird* [1985] 1 WLR 816 (CA).

³¹ *R v Julien* [1969] 1 WLR 839 (CA).

³² *Beckford v R* [1988] AC 130 (PC).

³³ A Ashworth and J Horder, *Principles of Criminal Law* (Oxford: OUP, 2013), p.125.

³⁴ Section 43(2) requires the following insertion in s.76 of the 2008 Act: ‘Before subsection (6) (force not regarded as reasonable if it was disproportionate) insert– ‘(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.’

³⁵ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33

them to be. With regards to the objective element,³⁶ the court held that disproportionate, but not grossly disproportionate, harm may be reasonable. This depends on the idea that proportionality and reasonableness are not synonyms and leads to two questions: what is the relationship between proportionality and reasonableness; and should there be a different test in householder cases?

The common law authority for the subjective element - *Gladstone Williams*³⁷ - has received positive judicial treatment, although there have been questions concerning the appropriateness of relying on the defendant's genuine, but mistaken, belief.³⁸ Thus, a defendant cannot rely on voluntary intoxication,³⁹ or insane delusions.⁴⁰ Leverick has suggested that a "good reasons" standard might make us more careful about our beliefs, but that those of us who make mistakes believe that we are acting reasonably.⁴¹ It should also be noted that in *Harvey*,⁴² the Court of Appeal approved a subjective test that took account of the danger in the circumstances; a direction that the defendant need only believe that the trespassers are burglars would appear insufficient.⁴³ Mr Collins was found to have car keys and a mobile phone from the house on his person,⁴⁴ and the witness statements suggested that he "was 'very strong', 'putting up a good fight', struggling 'like mad', 'going crazy' and 'really fired up'".⁴⁵ As Ashworth indicates, the 'acquittal of the householder in a case where physical violence has not been offered by the burglar may suggest that English law does not respect the right to life in art.2.'⁴⁶

In *Collins*,⁴⁷ the court approved of the dicta of Lord Morris in *Palmer*,⁴⁸ regarding the objective aspect of the test, namely that a defendant cannot 'weigh to a nicety the exact measure' of his response and that, if a defendant had 'only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.'⁴⁹ Sir Brian Leveson P held that the standard is one of reasonableness,⁵⁰ although it was suggested that the relevant section 'automatically excludes a degree of force which is grossly disproportionate from being reasonable in householder cases.'⁵¹ Cranston J explained that a degree of force might be used 'which is objectively disproportionate but which is reasonable.'⁵² In deciding not to prosecute, the Crown Prosecution Service determined that the householder had used "as much force as a man of his age, weight and fitness level could in order to try and control [Mr Collins] in the circumstances as [B] perceived

³⁶ *R v Owino* [1996] 2 Cr App R 128 (CA).

³⁷ *R v Gladstone Williams* (1984) 78 Cr App R 276 (CA).

³⁸ J Rogers, 'Culpability in Self-Defence and Crime Prevention' in GR Sullivan and I Dennis, *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Oxford: Hart Publishing, 2012).

³⁹ *R v Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr App R 16.

⁴⁰ *R v Oye* [2013] EWCA Crim 1725, [2014] 1 All ER 902.

⁴¹ See fn. 24, 193.

⁴² *R v Harvey* [2009] EWCA Crim 469, [2009] All ER (D) 125 (Apr) (CA).

⁴³ *R v Yaman* [2012] EWCA Crim 1075, [2012] Crim LR 896 (CA).

⁴⁴ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 [4] (Sir Brian Leveson P)

⁴⁵ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 [8]

⁴⁶ See fn. 28, 118.

⁴⁷ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33

⁴⁸ *Palmer v R* [1971] All ER 1077 (PC)

⁴⁹ *Palmer v R* [1971] All ER 1077 (PC) [1078] (Lord Morris)

⁵⁰ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33[18]

⁵¹ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 [19] (Sir Brian Leveson P)

⁵² *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 [72]

them to be. Consequently the force used might have been considerable, yet still reasonable.”⁵³

In what sense can the force be objectively disproportionate yet reasonable? Elsewhere in the criminal law, proportionality has been described as a ‘vague’ concept, but one that may nonetheless compare to one step up in a ladder of offences against the person.⁵⁴ The person acting in self-defence may not be able to weigh his or her response exactly, but does killing someone in circumstances which only suggest actual bodily harm is necessary mean that the defender has acted honestly and instinctively? As Ashworth notes, ‘Forfeiture of life to protect a person from some minor hurt, loss, or damage would promote the value of honour above respect for life and limb.’⁵⁵ Further, Catherine Elliott has argued that “reasonableness” is synonymous with proportionality and that in accordance with the rule of law the statute should not be interpreted literally,⁵⁶ as in *Collins*.⁵⁷

In *Davis*,⁵⁸ the Criminal Law Act 1967, s.3(1),⁵⁹ was relied on by counsel for the respondent, but Nicol J held that the officer’s evidence was clear and that the firearm was discharged ‘to defend himself.’⁶⁰ The officer discharged his firearm in the belief that “‘a gun was pointing at [him].’”⁶¹ In terms of a defendant’s honest, but mistaken, belief in this context, it was held in *Martin (Anthony)*⁶² that evidence of a defendant’s physical attributes may be admissible. By analogy, a trained firearms officer would not be expected to perceive the danger of any given set of circumstances in the same way as a householder faced with an equivalent threat. Leverick has pointed out that, where state actors are concerned, “the European Court has consistently held that ... any mistaken belief of fact must be held ‘for good reasons’.”⁶³ However, Ashworth considers that *Bubbins v United Kingdom*⁶⁴ softened this requirement by stressing the genuine belief of the police officer at the time of shooting.⁶⁵ Nicol J held that there was not only an honest, but a reasonable,⁶⁶ belief on the part of the officer that Mr Davis was pointing a gun at him,⁶⁷ which meant that ‘the shooting itself did not amount to a breach of art.2.’⁶⁸

⁵³ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 [7].

⁵⁴ A Ashworth, “A Change of Normative Position: Determining the Contours of Culpability in Criminal Law” (2008) 11 New Crim L Rev 232, 252.

⁵⁵ See fn. 28, 118.

⁵⁶ C Elliott, “Interpreting the contours of self-defence within the boundaries of the rule of law, the common law and human rights” (2015) 79 J Crim L 330, 334.

⁵⁷ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33

⁵⁸ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38

⁵⁹ See fn. 22.

⁶⁰ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [39].

⁶¹ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [18].

⁶² *R v Martin (Anthony)* [2001] EWCA 2245; [2003] QB 1.

⁶³ See fn. 24, 190.

⁶⁴ (2005) 41 EHRR 24.

⁶⁵ See fn. 28, 127.

⁶⁶ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [30]: ‘For the purposes of a civil claim, the position is different. There will only be a defence if the defendant honestly and reasonably believed he was in imminent danger.’

⁶⁷ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [63].

⁶⁸ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [153]. Note, the planning and conduct of the operation was equally held not to have breached art.2, at [154].

In terms of the reasonableness of the officer's force, it was held that 'his single shot at Mr. Davis could not possibly be said to be a disproportionate response.'⁶⁹ Nicol J recognised that the defendant 'cannot be expected to fine tune their reaction with absolute precision.'⁷⁰ The officers had been briefed that "they could only open fire 'when absolutely necessary'."⁷¹

It is difficult to reconcile the idea that, in practice, firearms officers may only be using strictly proportionate force, whilst householders can use disproportionate force, even against non-criminal trespassers.⁷² Elliott rightly argues that the special householder test contravenes the principle of equality before the law.⁷³ This is compounded by the idea that the belief in the need for force has to have "good reasons" where firearms officers, but not householders, are concerned. It is suggested that the significant factor in assessing reasonableness, or proportionality, should be the danger in the circumstances, and not the status of the defendant.

The use of force by state actors and Article 2 ECHR: the decision in *Davis*

At the heart of the claim in *Davis* is the argument that the police officer used force which had not been absolutely necessary in the circumstances and that the domestic law of self-defence allows the use of force which does not meet the test of absolute necessity laid down in art 2. Article 2(2) provides that the deprivation of life shall not be regarded as inflicted in contravention of art.2 when it results from the use of force, which is no more than absolutely necessary in defence of any person from unlawful violence and in order to effect a lawful arrest.⁷⁴ Thus, for this exception to apply there should exist the most exceptional circumstances, and in *McCann v United Kingdom*,⁷⁵ the European Court stated that the term indicated that a stricter and more compelling test of necessity must be employed than, for example, deciding whether an interference with freedom of speech is necessary in a democratic society under art.10(2).⁷⁶

Significantly, the Court in *McCann* believed that the test in the relevant domestic law of self-defence – that the force used was reasonably justifiable⁷⁷ – was not inconsistent with the test of absolute necessity employed in art.2(2). Although, in the Court's view, the tests looked different on paper, the application of the domestic test did not reveal any inconsistency with the art.2 test and required suitably strong justification for force that takes a person's life.⁷⁸ Thus, although it has been argued that domestic law is inconsistent with art.2 and that the European Court in *McCann*

⁶⁹ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [40].

⁷⁰ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [40].

⁷¹ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [97].

⁷² Crime and Courts Act 2013, s. 43(2).

⁷³ See fn. 51, 332.

⁷⁴ The other instances- to prevent the escape of a person lawfully detained; or in action lawfully taken for the purpose of quelling a riot or insurrection – were not relevant in this case.

⁷⁵ (1995) 21 EHRR 97

⁷⁶ *McCann v United Kingdom* (1995) 21 EHRR 97 at [149]

⁷⁷ In *McCann*, the Court was concerned with the compatibility of art.2 of the Gibraltar Constitution, which required the force to be 'reasonably justifiable' as opposed to absolutely necessary.

⁷⁸ *McCann v United Kingdom* (1995) 21 EHRR 97 at [154]. This has been confirmed recently in *Armani Da Silva v United Kingdom*, Application No.5878/08; decision of 30 March 2016, considered later in the article.

suggested that an honest belief must be based on objective reasons,⁷⁹ it is now accepted that the domestic tests are not inconsistent with the test of absolute necessity in art.2(2).⁸⁰ This was accepted by his Lordship in the present case when he stated that the European Court had accepted that as far as this aspect of art.2 was concerned, the test was the same as English law, in the necessity to show that the person who used the force honestly and on reasonable grounds believed that he was in imminent danger.⁸¹

It is clear however, that the test has a subjective element, and in the present case his Lordship stressed that the exceptions in art.2(2) required, in part, consideration from the perspective of the state agent who actually used the force. Consequently, such force will be treated as absolutely necessary if he honestly and on reasonable grounds believed that he was in imminent danger, even if that belief turns out to have been mistaken.⁸² Thus, his Lordship quoted from the Court's judgment in *McCann*, where it noted that to hold otherwise would be to impose an impossible burden on the state and its law enforcement personnel in the execution of their duty to protect their lives and those of others.⁸³

It must also be noted that the European Court has tended to draw a distinction between the actual use of force by the state agent, and the planning of any operation preceding the use of force; the Court giving greater discretion to the former, and being more willing to interfere if an error occurs because of a failure to carry out a proper investigation into the facts, or to plan the operation with due care.⁸⁴ Despite this distinction, the Strasbourg Court has been sensitive to the needs of law enforcement personnel to operate effectively, and in *Bubbins v United Kingdom*,⁸⁵ although it found that various steps could have been taken, or taken differently, it found that none of them would have been likely to have made a difference, stressing that the incident was relatively brief and was fraught with risk and that during that time operational decisions had to be made as the situation evolved and more information became available.⁸⁶ In *Bubbins*, it was also stressed that it was relevant that a law enforcement operation had been carried out which was regulated by domestic law and containing a

⁷⁹ See F Leverick, 'Is English Self-defence Law Incompatible with Article 2 of the ECHR?' [2002] Crim LR 347.

⁸⁰ *Bubbins v United Kingdom* (2005) 41 EHRR 24. In *R (Bennett) v Inner South London Coroner* [2006] HRLR 22, the UK High Court confirmed that the test of self-defence was substantially the same as the necessity test under art.2(2). The decision was upheld by the Court of Appeal: *The Times*, 13 August 2007.

⁸¹ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [143], citing *Bennett v United Kingdom* (2011) 52 EHRR SE 7, where the Court referred, at [20] to the necessity of showing an honest and reasonable belief.

⁸² *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 at [142]

⁸³ *McCann v United Kingdom* (1996) 21 EHRR 97 at [200]. See also *Armani da Silva v United Kingdom*, note 57 above, at [245]

⁸⁴ *McCann v United Kingdom* (1996) 21 EHRR 97 at [213]. Thus, in *McCann*, the Court found that although the SAS members had used no more force than was necessary in the circumstances, there had been a violation of the right to life through the careless planning of the operation by the security authorities; as the authorities had fed misinformation to the soldiers, and that crucial assumptions had been made which turned out to be untrue.

⁸⁵ (2005) 41 EHRR 24

⁸⁶ (2005) 41 EHRR 24 at [149]

system of safeguards to prevent the arbitrary use of unlawful force.⁸⁷ His Lordship thus stressed that although the European Court may be critical of some aspects of the operation, it will not find a violation if it is satisfied that, in general, the operation was conducted in a manner which was reasonable in the circumstances.⁸⁸

The High Court also rejected the argument that for the purposes of the art.2 claim it was not necessary in this case to prove a causal link between the failures in planning and control of the operation on January 29, 2009.⁸⁹ Dismissing this argument, his Lordship held that such an argument only applied with respect to the *Osman* duty,⁹⁰ which was imposed where the authorities knew or ought to have known of a real and immediate threat to life.⁹¹ Accordingly, his Lordship held that the materiality of any negligence on the part of the police *was* relevant to the art.2 claim.⁹² Applying those principles to the facts, his Lordship found that the officer reasonably and honestly believed that he was about to be shot, and there had been no material finding of negligence in respect of the planning and conduct of the operation.⁹³

The use of fatal force by state actors and the decision in *Da Silva v United Kingdom*

The recent high profile Grand Chamber decision in *Armani Da Silva v United Kingdom*⁹⁴ has excited judicial and public debate surrounding the use of fatal force by state actors and the need to control the arbitrary use of such powers. In this case, the Grand Chamber found that the shooting of a Brazilian tourist in 2005 did not involve a violation of the state's art.2 obligations. Jean Charles de Menezes, a Brazilian national, was shot dead by two special firearms officers after he was mistakenly identified as a suicide bomber, the shooting taking place two weeks after the London bombings and the day after unexploded bombs had been found on the London underground and on a London bus. Two terrorist suspects lived at the same address as de Menezes, and believing that he was one of them, he was followed by surveillance officers. The firearm specialists were deployed to help the surveillance team in stopping the suspects from leaving the address, but were not deployed in time. When

⁸⁷ For commentary on this case, see N Martin 'Bubbins v United Kingdom: civil remedies and the right to life' (2006) 69 MLR 242. See also *Huohvanainen v Finland* (App. No.57389/00), judgment of 13 March 2007, the European Court held that there had been no violation of Article 2 when the applicant's brother had been shot dead by the police; and *Ramsahai and Others v Netherlands* (App. No. 52391/99), where the Court found no violation where a young man had been shot dead by an officer after being told to stop brandishing a gun.

⁸⁸ *Andronicou and Constatinou v Cyprus* (1997) 25 EHRR 491 at [183.]

⁸⁹ Relying on *Sarjatson v Chief Constable of Humberside Police* [2014] QB 411

⁹⁰ *Osman v United Kingdom* (1998) 29 EHRR 245

⁹¹ *(Davis) v Commissioner of the Police of the Metropolis* [2016] EWHC 38 [148], citing *Guiliani and Gaggio v Italy* (2012) 54 EHRR 10

⁹² *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 at [151]-[152]. His Lordship also rejected the claim that the claimant himself was a victim of a breach of the *Osman* duty: that duty, in his Lordship's view, was intended to cater for the situation where the force in question was inflicted by a third party, not by a state agent, or at least not by an agent for whom the state is responsible..

⁹³ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 at [153]-[154]. Further, he concluded that in the present case the training was rigorous, the control structure detailed and robust and that the officer had been reminded in briefings of the limited circumstances in which he was entitled to fire.

⁹⁴ (App. No.5878/08).

they arrived at the underground station they followed him on to the train, pinned him down and shot him several times in the head. The case was brought by the victim's cousin who complained that the state had not fulfilled its duty to ensure the accountability of its agents for his death, because the ensuing investigation had not led to the prosecution of any individual officer.

Although that case was primarily concerned with the state's procedural obligations – the failure to bring effective criminal proceedings against the officers - the Grand Chamber endorsed the domestic law of self-defence. Finding that the test in England and Wales was not significantly different from the standard applied under the Convention it held:

‘In both instances the focus was on whether there existed an honest and genuine belief that the use of force was necessary and the reasonableness of that belief was relevant to the determination of whether it was honestly and genuinely held. In any case, all the independent authorities considering the actions of the two SFOs responsible for the shooting had carefully examined the reasonableness of their belief that Jean Charles de Menezes had been a suicide bomber who could detonate a bomb at any second.’⁹⁵

This was accepted by his Lordship in *Davis*, when he stated that the European Court had accepted that as far as this aspect of art.2 was concerned, the test was the same as English law, in the necessity to show that the person who used the force honestly and on reasonable grounds believed that he was in imminent danger.⁹⁶ Thus, in *Armani Da Silva* the Grand Chamber accepted that UK domestic law in this area was Convention compliant despite the difference in the wording of the domestic provisions in comparison to art.2:

‘...the focus of the test for self-defence in England and Wales is on whether subjective reasonableness of that belief (or the existence of subjective good reasons for it) is principally relevant to the question of whether it was in fact honestly and genuinely held. Once that question has been addressed, the domestic authorities have to ask whether the force used was “absolutely necessary”. This question is essentially one of proportionality, which requires the authorities to again address the question of reasonableness: that is, whether the degree of force used was reasonable, having regard to what the person honestly and genuinely believed...So formulated, it cannot be said that the test applied in England and Wales is significantly different from the standard applied by the Court. ..Bearing in mind that the Court has previously declined to find fault with a domestic legal framework purely on account of a difference in wording which can be overcome by the interpretation of the domestic courts...it cannot be said that the definition of self-defence in

⁹⁵ *Armani Da Silva v United Kingdom* (App. No.5878/08) at [251]

⁹⁶ *Davis v Commissioner of the Police of the Metropolis* [2016] EWHC 38 at [143], citing *Bennett v United Kingdom* (2011) 52 EHRR SE 7, where the Court referred, at [20] to the necessity of showing an honest and reasonable belief.

England and Wales falls short of the standard required by Article 2 of the Convention.⁹⁷

The decision in *Da Silva* with respect to the procedural aspects of art.2 is also important with respect to the UK's overall compliance with the framework obligation under art.2, which in combination with the substantive limitations on the use of fatal force ensures that an individual's life is protected from arbitrary and unnecessary interference. In this case, the Grand Chamber held that the evidential test employed by the CPS in deciding whether to prosecute – whether there was sufficient evidence against any individual officer to prosecute – was within the state's margin of appreciation and that the test was not arbitrary, having been the subject of frequent reviews, public consultations and political scrutiny.⁹⁸ The Grand Chamber's flexible approach on these issues, including its rejection of the argument that only criminal prosecution for homicide would meet the requirements of art.2, suggest that had the substantive issue of whether absolutely necessary force was used been live in the proceedings, it would have offered a similar margin of appreciation to the authorities in those circumstances.

The law of self-defence, article 2 and the use of force by private householders: the decision in *Collins*

The human right's claim in *Collins* concerned the state's framework obligation under art.2(1) to ensure that its legal and administrative framework provides adequate protection to the right to life, and in this case whether the domestic law on the use of force by householders effectively deterred offences against the person in such cases. The Strasbourg Court has established that this duty involves having in place appropriate laws imposing criminal liability for acts which threaten the right to life and proper procedures to ensure that persons are deterred from committing such acts and are sanctioned for breaches of such laws, thus ensuring that such risks do not materialise.⁹⁹ This 'framework obligation' can then be used to judge the compatibility of s.76 with art.2, and to decide whether the criminal law of England and Wales effectively deterred offences against the person in householder cases.

In the present case his Lordship noted that in *Makaratzis v Greece*,¹⁰⁰ the Court had held (in the context of judging the acts of state officials) that unregulated and arbitrary action by state agents is incompatible with effective respect for human rights, and that police operations must be regulated within a system of adequate and effective safeguards against arbitrariness and abuse of force.¹⁰¹ Thus, a legal and administrative framework should define the limited circumstances in which law enforcement

⁹⁷ *Armani Da Silva v United Kingdom* (App. No.5878/08) at [253]

⁹⁸ *Armani Da Silva v United Kingdom* (App. No.5878/08) at [271]. Further, the Grand Chamber held that the Convention did not require the test to be lowered in cases where deaths had occurred at the hands of state agents at [272]

⁹⁹ See A Mowbray, *The Development of Positive Obligations under the European Convention by the European Court of Human Rights* (Hart 2004), chapter 2. See *Makaratzis v Greece* (2005) 41 EHRR 49 at [77], where it was stated that such laws had to be backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'

¹⁰⁰ (2005) 49 EHRR 41

¹⁰¹ *Makaratzis v Greece* (2005) 41 EHRR 49 at [58]

officials may use force and firearms.¹⁰² However, his Lordship stressed that the framework obligation must be interpreted in a way which does not impose an impossible burden on authorities, allowance being made, therefore, to the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices that must be made in terms of priorities and resources.¹⁰³ This reflects the cautious approach taken by the Court in various aspects of the state's positive obligations under art.2,¹⁰⁴ and this hands-off approach has been employed in subsequent cases, both in the domestic courts and by the Strasbourg Court.¹⁰⁵

Despite this cautious approach, his Lordship noted that operation control is fundamental, and must ensure that the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to life;¹⁰⁶ although his Lordship stressed that the emphasis in respect of the framework is on reasonable safeguards, not on the regulation of such detail as to minimise to the greatest extent possible any risk to life or risk of ill-treatment.¹⁰⁷ His Lordship also noted that the framework obligation is flexible, requiring different standards from context to context,¹⁰⁸ and that where the act of force has been carried out by a non-State actor, the strict proportionality test used in art.2(2) cases was not appropriate.¹⁰⁹

His Lordship then considered the extent to which the margin of appreciation would be available to the state when judging its framework duty, noting that in *MC v Bulgaria*,¹¹⁰ the Strasbourg Court stressed that in respect of the means to ensure adequate protection to individuals against, in this case rape, States undoubtedly enjoy a wide margin of appreciation and that perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account. His Lordship also noted that there was no evidence of a convergence between ECHR states as to the law on self-defence, and in particular, in householder cases; adding that in the absence of such the definition of self-defence in such cases may well lie within states' margin of appreciation.¹¹¹

His Lordship noted that the essential, simple, question was: does the criminal law effectively deter offences against the person in householder cases? Having accepted that s.76(5A) excluded the use of force which was grossly disproportionate, read in the light of s.76(6) which in non-householder cases excluded disproportionate force, his Lordship held that the effect of s.76(5A) was not to give householders a *carte blanche* in the degree of force they used against intruders in self-defence, and that a jury ultimately had to decide whether the householder's actions were reasonable in the

¹⁰² *Makaretzis v Greece* (2005) 41 EHRR 49 at [59]

¹⁰³ *Makaretzis v Greece* (2005) 41 EHRR 49 at [69]; in *Makaretzis*, therefore, the Court found a breach of Article 2 because Greek law laid down no guidelines beyond insisting that police could use firearms only where absolutely necessary and when all less extreme methods.

¹⁰⁴ *Osman v United Kingdom* (2000) 29 EHRR 245.

¹⁰⁵ *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225; confirmed in *Van Colle v United Kingdom* (2013) 56 EHRR 33

¹⁰⁶ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [60]

¹⁰⁷ *R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272 at [42]

¹⁰⁸ At [48], citing laws LJ in *D and V v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646 at [45]

¹⁰⁹ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [49]-[52]

¹¹⁰ (2005) 40 EHRR 20

¹¹¹ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [57]

circumstances as he believed them to be.¹¹² A jury might consider the actions of a householder in self-defence to be more than what might objectively be described as the minimum proportionate response, but nevertheless reasonable given the particular and extenuating circumstances of the case. That did not weaken the capacity of domestic criminal law to deter offences against the person in householder cases: a householder would only be able to avail himself of the defence if the degree of force used was reasonable in the circumstances as he believed them to be.¹¹³ Consequently, although his Lordship stated that it was not irrelevant that the householder's art.2 and 8 (private and home life) rights were engaged, he stressed that the Strasbourg Court had consistently held that the reasonableness limb of self-defence as applied in state actor cases was compatible with the requirement of "absolute necessity" in art.2(2).¹¹⁴ In those circumstances, therefore, there were reasonable safeguards against the commission of offences against the person in householder cases, and the criminal law on self-defence in householder cases fulfilled the framework obligation under art.2(1).

Conclusions

With respect to the art.2 claims, both decisions reflect the largely cautious approach of the Strasbourg Court in judging the state's framework obligation under art.2(1) and the absolute necessity of the state actor's actions under art.2(2). In particular, in *Collins*, the court made it clear that in cases involving private individuals the duty of the state under art.2(1) is more circumscribed and that the framework obligation is limited by the reluctance of the Court to impose impossible burdens on the state. In addition it is accepted that the margin of appreciation should be employed in these cases so to allow the courts to accommodate cultural perceptions, local circumstances and traditional approaches when judging the law and its application in particular circumstances. In this respect, the domestic courts have noted the lack of common European standards on the law relating to self-defence and its use by home owners, thereby encouraging deference to the institutional competency of both the law makers and the interpreters of such laws.

The wide interpretation given by European and domestic courts to the need for 'absolutely necessary' force under art.2(2) does nothing to remedy the interpretation of reasonable force in domestic law. The statutory provision provided for by the Criminal Justice and Immigration Act 2008 did nothing to clarify the degree of permissible harm, and the exception made for householders under the Crime and Courts Act 2013 only obscured the issue. A margin of appreciation is necessary inasmuch as the domestic law in relation to private individuals and state actors cannot be easily reconciled. However, a sound reason for the permissible degree of force to vary according to the status of the defendant, rather than the danger of the circumstances, has yet to be given. Until these are forthcoming, no principled assessment of the adequacy of these right-to-life safeguards can be made.

With respect to *Davis*, the decision again reflects the deference shown by the Strasbourg Court to state actors when employing lethal force in particular circumstances, and to a lesser extent, in the planning of such operations. In such

¹¹² *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [61]

¹¹³ *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 at [62]

¹¹⁴ *McCann v United Kingdom* (1996) 21 E.H.R.R. 97; *Bubbins v United Kingdom* (2005) 41 E.H.R.R. 24; and *Bennett v United Kingdom* (App. No.5527/08), judgment of 7 December 2010.

cases, it is unlikely that the courts will question the actions of state authorities to use such force, despite art.2(2) insisting that any such force has to be no more than *absolutely necessary*. In these cases, therefore, challenge to such actions is severely circumscribed by deference and by the acceptance of institutional competency, and in the recent case of *Armani da Silva v United Kingdom*,¹¹⁵ the Grand Chamber noted that it was particularly significant that the Court has never found that a person purporting to act in self-defence honestly believed that the use of force was necessary but proceeded to find a violation of art.2 on the ground that the belief was not perceived, for good reasons, to be valid at the time.¹¹⁶

This approach protects such bodies in the performance of their duty to ensure public and their own safety, but at the same time dilutes in practice the state's obligation to prevent arbitrary and unnecessary deaths and other harm. More generally, the decisions confirm that both the domestic courts and the Strasbourg Court are satisfied that the statutory and common law tests applied in domestic law are consistent with the obligations imposed under both art.2(1) and the requirement of absolutely necessary force under art.2(2). Consequently, the domestic courts are satisfied that domestic laws on self-defence - including those relating to the use of force by house holders - provide adequate safeguards in protecting individuals from arbitrary use of lethal or potentially lethal force.

Underlining these issues is the idea that the domestic law is insufficiently certain from a rule of law perspective: the question of reasonableness is resolved in the jury room or through prosecutorial discretion, without the guidance of any criterion for determining proportionality. It is surely a matter of time before this uncertainty leads to the conviction of a private individual or state actor in circumstances which engage art.7 of the European Convention, which prohibits retrospective criminal law.¹¹⁷ This begs the question: is the permissible degree of force sufficiently certain to allow a private individual or state actor to avoid conviction? At present, the common law complies with the standards laid down by the Convention largely because of the generous and deferential approach adopted by the Strasbourg Court in this area. However, the fact that domestic law appears to pass muster with the Court should not prevent the common law from endeavoring to ensure that the law is compatible with basic standards of international human rights law and British notions of justice and foreseeability.

¹¹⁵ *Armani Da Silva v United Kingdom* (App. No.5878/08).

¹¹⁶ *Armani Da Silva v United Kingdom* (App. No.5878/08) at [247]

¹¹⁷ Article 7 provides that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.'