Neutral Citation Number: [2014] EWHC 3343 (Admin)

Case No: CO/833/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2014

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(THE RT HON SIR BRIAN LEVESON)
THE HON MR JUSTICE BURNETT
HIS HONOUR JUDGE PETER THORNTON Q.C.
(CHIEF CORONER)

- -

Between :

THE QUEEN **(ON THE APPLICATION OF PAMELA DUGGAN)**	**Claimant**
- and -	
HER MAJESTY'S ASSISTANT DEPUTY CORONER FOR THE NORTHERN DISTRICT OF GREATER LONDON	**Defendant**
-and-	
(1) COMMISSIONER OF POLICE FOR THE METROPOLIS **(2) NATIONAL CRIME AGENCY (formerly SERIOUS ORGANISED CRIME AGENCY)** **(3) S.C.& O.19 OFFICERS** **(4) Z51** **(5) INDEPENDENT POLICE COMPLAINTS COMMISSION** **(6) DS ANDREW BELFIELD** **(7) DC STEVE FAULKNER**	**Interested Parties**

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- -

Michael Mansfield Q.C., Leslie Thomas Q.C. and Adam Straw
(instructed by **Birnberg Peirce, London**) for the Claimant
Ashley Underwood Q.C. (instructed by **Judi Kemish**)
for the Assistant Deputy Coroner
Hugo Keith Q.C. (instructed by the **Director of Legal Services, Metropolitan Police**)

for the Commissioner of Police for the Metropolis
Samantha Leek Q.C. (instructed by **Simon Armstrong of the N.C.A. Legal Department**)
for the National Crime Agency
Ian Stern Q.C. and David Patience (instructed by **Slater Gordon, London**)
for S.C.& O.19 Officers
Jonathan Glasson Q.C. (instructed by **Legal Services I.P.C.C.**)
for the I.P.C.C.
Z51, DS Andrew Belfield and DC Steve Faulkner did not appear and were not represented.

Hearing dates: 9-10 July 2014

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Approved Judgment

Sir Brian Leveson P:

Introduction

1. This is the judgment of the Court to which all members have contributed.

2. On 4 August 2011, Mark Wayne Duggan was shot dead by a police officer, known at the inquest as V53. At the conclusion of the inquest into his death the jury answered a series of questions left to them by the Recorder of Winchester, His Honour Judge Cutler C.B.E., sitting as Assistant Deputy Coroner for the Northern District of Greater London ["the Coroner"] and recorded their conclusion that he was 'lawfully killed'. In answering the questions the jury indicated they were sure that at the moment he was shot, Mr Duggan did not have a gun in his hand although he had done so very shortly beforehand. A verdict of unlawful killing had been left to them. That they rejected. The verdict of lawful killing signified that the jury were satisfied on the balance of probabilities that the police officer acted in lawful self-defence, applying the law of self-defence as understood in criminal rather than civil courts. This claim for judicial review challenges the finding of lawful killing.

3. The grounds upon which the claim is brought are fourfold, expressed in these terms:

   i) The Coroner ought to have directed the jury that if they were sure Mr Duggan did not have a gun at the moment he was shot, they could not return a conclusion of lawful killing. That was necessary to avoid inconsistent conclusions, and to avoid a conclusion for which there was not sufficient evidence.

   ii) A mistaken belief in the existence of an imminent threat cannot found a conclusion of lawful killing at an inquest unless it was also a reasonable mistake. That is the first part of the civil, but not criminal, test for self-defence in English law. The claimant submits that the jurisprudence of the European Court of Human Rights ["The Strasbourg Court"] requires the reasonableness criterion to be included; alternatively it is submitted that this court should decide that the domestic civil law test is the appropriate one for a conclusion of lawful killing at an inquest, albeit not for unlawful killing.

   iii) In any event, the Coroner misdirected the jury on the meaning of lawful killing because he failed to make it clear that they should be satisfied on the balance of probabilities that V53 mistakenly believed in an imminent threat, rather than that he may have believed in that threat.

   iv) Lethal force by a state agent is only lawful if it is 'absolutely necessary' in all the circumstances – it is not enough that the force was 'reasonable'. On the facts of this case the difference between the two tests was sufficiently great to result in a breach of the procedural obligation under Article 2.

   Mitting J refused permission to apply on the first and fourth grounds but granted permission on the second and third. Mr Michael Mansfield Q.C., for the claimant, renews the application in relation to the grounds where leave was refused. He also submits that grounds (ii) to (iv) should be considered cumulatively when deciding whether there was a breach of the procedural obligation under Article 2 Convention

for the Protection of Human Rights and Fundamental Freedoms as reflected in English law by the Human Rights Act 1998 ["the ECHR"].

4. It is important to underline that the claimant, Mr Duggan's mother, does not challenge the rejection by the jury of a conclusion of unlawful killing. That carries two significant implications. First, it is common ground that the Coroner's direction on unlawful killing satisfied the domestic law of murder but also, subject to a reservation as to whether an objective element should be incorporated into the first limb of the direction on self defence (which it is acknowledged did not fall for decision in this appeal), the requirements of the ECHR. Second, it is not in issue that there was evidence upon which the jury were entitled to reject a finding of unlawful killing.

5. Putting the matter another way, the claimant does not challenge the jury's conclusion that they were not sure that the killing was not in lawful self defence. The double negative is of importance, even though cumbersome. Rather, the challenge is limited to the positive conclusion, reached on the balance of probabilities, of lawful killing: Mr Mansfield submits that this conclusion should be quashed. He does not argue that there should be a further inquest and, having reflected on section 35(1) of the Senior Courts Act 1981 as amended by section 141 of the Tribunals, Courts and Enforcement Act 2007 (which permits the court to substitute its own decision but only if, without the error, there would have been only one decision which the inquest could have reached), does not submit that an open conclusion or verdict should be substituted. The effect of quashing the conclusion of lawful killing would, in reality, have the same effect.

6. As we shall elaborate, the operation which culminated in Mr Duggan's death was intelligence led. It was based upon information that Mr Duggan was transporting a firearm across London. The minicab in which he was being driven was stopped in Ferry Lane, London by armed police officers. It was 18:12.43 on 4 August 2011. Within 10 seconds (and on the evidence it may have been as few as four seconds), he had been fatally injured. He was shot twice by V53. A police officer, W42, was also hit by one of those bullets but it lodged in his radio. Mr Duggan's death was a spark, the end result of which was substantial public disorder across the country. As the law requires, the investigation into the circumstances of his death has been rigorous. The inquest lasted between 16 September 2013 and 9 January 2014, taking evidence from 93 witnesses with statements of a further 21 non-contentious witnesses being read.

7. Transcripts of all the evidence (including at least part of the witness statements), along with the many exhibits were available to the jury during the inquest and whilst they were in retirement. They were treated to a thorough analysis of the facts in the Coroner's summing up. No criticism is made of the conduct of the inquest either as to its procedure or the evidence that was placed before it. During the course of the hearing, it did not appear to be suggested that the factual inquiry was not conducted in full compliance with the procedural obligations under Article 2 ECHR. It has since been said that the claimant contends that there are or may be grounds for so arguing: no such point was taken before us.

8. The questions left to the jury had not been agreed in advance but were fashioned by the Coroner after full argument and a comprehensive ruling. The jury were provided with the prescribed particulars of the name of the deceased, the medical cause of death (gunshot wound to the chest), and where and when he died. They went on to

answer five questions before dealing with their conclusions. The term 'verdict' has been superseded by 'conclusion'.

9. In answer to Question One, the jury unanimously found that between midday on 3 August and 18.00 on 4 August 2011 the Metropolitan Police and the Serious Organised Crime Agency had not done the best they realistically could to gather and react to intelligence about the possibility of Mr Duggan collecting a gun from a man named Hutchinson Foster. They elaborated that finding by indicating that there was a lack of current intelligence on Hutchinson Foster with no emphasis on exhausting all avenues which could have affected reaction and subsequent actions. It was also indicated that the police had been provided with insufficient information on intelligence gathering activity after 21.00 on 3 August before further intelligence came in on 4 August. In answer to Question Two, the jury unanimously found that the taxi in which Mr Duggan was travelling was stopped in a location and in a way which minimised to the greatest extent possible recourse to lethal force. In answer to Question Three the jury unanimously found that Mr Duggan had a gun with him in the minicab immediately before it was stopped by police.

10. That gun was found on an area of grass close to where Mr Duggan was shot. Question Four and the jury's answer were:

> "Question 4
>
> How did the gun get to the grass area where it was later found?
>
> 8:2
>
> The jury, in a majority of 9:1, concluded that Mark Duggan threw the firearm onto the grass.
>
> Of the 9, 8 have concluded that it is more likely than not, that Mark Duggan threw the firearm as soon as the minicab came to a stop and prior to any officers being on the pavement.
>
> 1 concluded that Mark Duggan threw the firearm whilst on the pavement and in the process of evading the police.
>
> 1 juror was not convinced of any supposition that Mark Duggan threw the firearm from the vehicle or from the pavement because no witnesses gave evidence to this effect."

11. Question Five asked:

> "When Mr Duggan received the fatal shot did he have the gun in his hand?"

The jury were provided with three possible answers to that question: (a) We are sure that he did not have a gun in his hand. (If that were their answer, they were directed to go on to consider conclusions of unlawful killing, lawful killing or an open conclusion) (b) We believe it more likely than not that he did have a gun in his hand. (If that were their answer they were directed to go on to consider lawful killing and an open conclusion) (c) We believe it more likely than not that he did not have a

gun in his hand. (If that were their answer they were directed to go on to consider lawful killing and an open conclusion).

12. Eight of the jurors were sure he did not have a gun at the time that he received the fatal shot; one thought he probably did and one thought he probably did not.

13. The three conclusions mentioned in question five were therefore left to the jury by the Coroner: (a) Unlawful killing; (b) Lawful killing; or (c) an open conclusion. By a majority of 8:2, the jury concluded that the killing was lawful, that is to say that it was more likely than not that Mr Duggan's death was the result of the use of lawful force. None was satisfied that the killing was unlawful. In accordance with longstanding authority, the Coroner had directed the jury that to return a verdict of unlawful killing they would have to be satisfied to the criminal standard of proof, that is so as to be 'sure'. Two jurors recorded an open conclusion, that is to say that they were not satisfied so as to be sure that Mr Duggan was unlawfully killed and were not satisfied that it was more likely than not that he was killed lawfully.

The Background Facts

14. For some considerable time, the police had targeted the activities of a gang known as Tottenham Man Dem, the senior members of which were either known or believed to have a propensity for extreme violence. Guns and ammunition had previously been recovered in earlier attempts to contain or prevent criminal activity. Intelligence was available to the effect that Mr Duggan (who had very little by way of criminal record) was a long-standing senior member of the gang who, some two weeks earlier, had been storing a Beretta handgun at his girlfriend's address. It was known that guns were sometimes carried in socks.

15. On the day of the fatal incident, there was further intelligence that a firearm was being moved across London and, more specifically, that Mr Duggan was carrying it in a minicab which was then under surveillance. This was the background to the decision to stop the minicab and recover the firearm.

16. The minicab was stopped using three police cars. The first (Alpha) cut in front of it forcing it to stop; the second (Bravo) came alongside the driver's side and the third (Charlie) pulled up behind it. Eleven firearms officers (being the Third Interested Parties) were in these three vehicles all of whom were given ciphers for the purposes of the inquest. A number left their cars. V53 (in the front passenger seat of the Charlie) was one of the first, if not the first, officer to do so. He challenged Mr Duggan and within seconds of alighting from the car had shot him twice, one of those shots being fatal.

17. The evidence suggested that Mr Duggan had been sitting behind the driver in the back of the minicab and that he moved across the back seat before sliding open its door and then jumping out. V53's evidence was that Mr Duggan was holding a gun, contained in a sock which he was pointing in his direction. His evidence can be summarised by saying that he was 100% sure that Mr Duggan had a gun and that there was no room for mistake: his focus was "just glued on the gun and what that gun is going to do to me". He described how the first round had impacted on Mr Duggan causing "like a flinching movement" such that "the gun has now moved and is pointing in my direction. He was "absolutely" clear that Mr Duggan "had that gun in his hand while

[he] fired both shots". He agreed that if there was no gun in Mr Duggan's hand, he would have had no justification to shoot him saying: "I would have no justification but secondly, sir, I wouldn't have fired". He was emphatic throughout his evidence:

> "It is 804 days since this happened and I'm 100% convinced he was in possession of a gun on shot one and shot two."

18. Other officers on the scene gave evidence of what they perceived. Thus, W70 said that he saw a gun shaped object in Mr Duggan's hand (which he described as a self loading pistol). He came to the conclusion that because of Mr Duggan's movements, he posed a threat such that had he been pointing his gun at him at that time, he believed he would have fired. R68 said that Mr Duggan appeared to be pulling something out of the waistband of his trousers but he did not see a gun. V59 gave similar evidence and R68 said that Mr Duggan's right arm was across his body inside his jacket towards the left hand side of his waistband at the relevant time and that he appeared to be pulling something out of his trousers.

19. W42 saw Mr Duggan framed in the doorway of the minicab, with his right hand tucked inside his jacket out of view, prompting him to shout "Show me your hands". When Mr Duggan turned and W42 was standing behind him, W42 saw his right elbow move outwards prompting him to shout "He's reaching, he's reaching". V53 fired a shot at Mr Duggan when his colleague W42 was in the line of fire behind him; the bullet penetrated Mr Duggan and also struck W42. There was evidence that firearms officers are trained to avoid the risk that a fellow officer might be struck by a round they had fired (which it was argued supported the inference that V53 would not have fired unless he honestly believed that Mr Duggan posed an imminent risk to life).

20. Nobody gave evidence of seeing the gun being thrown by anyone. That gun was a Bruni pistol, a substantial and heavy weapon. It was found about 7.5 metres from the minicab door and five metres from where Mr Duggan fell. Its muzzle was in a sock. The gun was forensically linked to Hutchinson Foster and to a box that was still in the minicab, which also had Mr Duggan's fingerprint on it. There was medical evidence which indicated that he could not have thrown it after he was shot. The medical evidence also suggested that at the time he was shot in the chest (the fatal shot) Mr Duggan was leaning forward at an angle of at least 30 degrees. The other shot hit Mr Duggan's arm but the forensic evidence was unable to establish in which order the shots were fired. On one view, the forensic science evidence adduced at the inquest cast substantial doubt on the account given by V53.

21. The question whether a police officer had been responsible for placing the gun on the grass was explored at the inquest, but rejected by the jury.

22. Witness B lived in a flat which was on the ninth floor of a nearby building. In his evidence at the inquest he explained that he heard the screech of tyres and immediately went to his window to see what was going on. He described seeing Mr Duggan run from the minicab in the direction of Tottenham Hale station before being confronted by a police office from Alpha car. He then ran in the opposite direction towards Blackhorse Lane and was confronted by V53 and other officers. Witness B said there was a mobile phone or BlackBerry in Mr Duggan's right hand, which was still in his hand when he fell. He described what he saw as an "execution". There was

no reason why Mr Duggan was shot. He agreed that he had heard officers shouting something which may have been "put it down" or "get down".

23. Witness B's evidence to the inquest was controversial not least because there was evidence that he had also spoken in different terms to a BBC journalist, Witness C, on two occasions after the incident and before the inquest. The journalist gave evidence of what Witness B had told him, and Witness B was questioned about what Witness C had recorded in contemporaneous notes at the time of those conversations.

24. In notes of the conversation which took place on 12 April 2012 Witness B was recorded as saying he heard the words "put it down, put it down" being shouted and also noticed the BlackBerry. There was a split-second between the shouting and the shots being fired. He used the expression that it was "an execution" and also said that he did not trust the police because he had been stopped and searched "all the time". In notes of the second conversation on 18 April 2012, Witness B told Witness C that Mr Duggan had the BlackBerry in his right hand, did not reach in his pocket and did not run away. The notes continue:

> "Phone always in hand. Initially thought gun. Shiny. But read N/Papers then thought it was Blackberry. If had gun he would have aimed it at them."

25. No BlackBerry or phone was found nearby. The evidence was that a mobile phone was found in one of the pockets of the jacket that Mr Duggan was wearing.

Ground One: the verdict of Lawful Killing

26. The claimant's argument, advanced by Mr Leslie Thomas QC on her behalf, that lawful killing was not open to the jury as a conclusion relies upon three interlinked propositions. First, that it is inconsistent with the finding that at the time he was shot, Mr Duggan did not have a gun in his hand; secondly, that the finding was irrational and thirdly that there was no evidence to support the conclusion. In those circumstances it is suggested that the Coroner should have instructed the jury that if they found that Mr Duggan did not have a gun in his hand when he was shot, they could not conclude that he was lawfully killed. Like Mitting J, we consider that this ground is unarguable.

27. Whilst the claimant is entirely correct to point to the emphatic evidence given by V53 and his own view that absent the presence of a gun he would have had no justification in shooting, that was not the only evidence which the jury had before them. They were entitled to reject his core factual account whilst at the same time accepting that he had an honest belief that Mr Duggan was armed. The fact that the jury rejected V53's account admitted of two contrasting possibilities; either that V53 was mistaken or he was lying. The Coroner gave the jury a modified *Lucas* direction (*R v. Lucas* [1981] Q.B. 720) derived from the practice in criminal trials to warn against impermissibly moving from a finding that someone has lied directly to a conclusion that he is guilty of an offence. As jurors are told in criminal trials throughout the country, people lie for all sorts of reasons, including to bolster a good case. Even if V53 was lying (by which we mean deliberately telling an untruth) the conclusion for which the claimant contends does not follow.

28. In our judgment, the short summary of the facts we have set out demonstrates that there was a considerable body of evidence to suggest that a range of people (including Witness B, particularly as was said to have been recounted to Witness C) took the movements made by Mr Duggan, or there being something in his hand, as indicating a threat. Add to that the immediate circumstances that intelligence suggested that Mr Duggan was in possession of a gun in the minicab and that the gang he was believed to belong to had a history of extreme violence. It is not difficult to understand how the jury could come to its conclusion that, during a period which may have been as short as four seconds, V53 honestly believed that he was in danger of being shot.

29. We have noted that the claimant accepts that the jury was entitled on the evidence to reject the conclusion of unlawful killing. They were entitled not to be sure of the absence of an honest belief of an imminent threat. That would follow if they concluded that there may have been such a belief. If the evidence was such that it could support a conclusion that there may have been such a belief, it is difficult to understand how the same evidence could not support a conclusion that there probably was such a belief. It would depend upon the jury's view of the weight to be attached to individual pieces of evidence. The Coroner was bound to leave lawful killing to the jury if the evidence could support it. The finding that the gun was not in Mr Duggan's hand when he was shot did not alter the fact that it was open to conclude that the killing was lawful.

Ground 2: the nature of the test for Lawful Killing

30. In order to determine the validity of the suggestion that, in both Strasbourg and domestic law terms, the inquest was required to determine the question whether the killing was lawful on the basis of whether V53's mistaken belief was also 'reasonable', it will be convenient to trace the development of four aspects of the material law:

    a) Self-defence for the purposes of both criminal and civil law in England and Wales;

    b) The meaning of unlawful killing and lawful killing as conclusions at an inquest;

    c) The content of the Article 2 procedural obligation;

    d) The Strasbourg jurisprudence on the meaning of justifiable killing by state agents in the face of perceived threats, together with its view of the law of self-defence in England and Wales.

The Law of Self-Defence in England and Wales

31. The law of self-defence in England and Wales is different in the criminal law from the civil law. In the first place, when a defendant in criminal proceedings is being prosecuted for an assault or homicide, it is for the prosecution to prove that the act was not done in lawful self-defence. In the civil law the burden of proving self-defence lies upon the defendant. In the second place, in a criminal court, the prosecution must disprove self-defence to the criminal standard of proof. To establish self-defence in the civil court the defendant must prove it to the civil standard of

proof. In the third place there is a difference in the ingredients of self-defence between the two jurisdictions.

32. Self-defence has always comprised two limbs. The second is the same in both jurisdictions and (subject to the discrete issue that arises under the fourth ground of appeal) has not been the subject of argument in this claim. That second limb requires the force used in reaction to any perceived threat to be reasonable in all the circumstances. The first limb is directed towards the question whether the defendant in criminal proceedings had an honest belief at the time he inflicted injury that it was necessary to use force to defend himself. The difference in treatment between the two jurisdictions of this limb of the test for self-defence arises when the belief turns out to be mistaken. The jury's conclusion in this case provides an example of such mistaken belief. A further striking example is found in *R (Sharman) v. H.M. Coroner for Inner North London* [2005] EWHC 857 Admin where a well-meaning member of the public reported that a man was carrying a sawn-off shotgun in a blue plastic bag. The man, Henry Stanley, was shot by a police officer. The item in the bag turned out to be a table leg. For the purposes of the criminal law the court is concerned with the perception of the defendant alone. The first limb of the test is described as subjective. However, the civil law of tort holds that the defendant must not only honestly believe that he is under threat and that there is a need to respond, but also that the belief be reasonable. It follows that for the purposes of the law of tort the first limb of the test has an objective element.

33. In *Ashley v. Chief Constable of Sussex Police* [2008] 1 A.C. 962 the House of Lords rejected an attempt to bring the criminal and civil law into alignment in this respect by removing the objective element from the civil law test. In his short concurring opinion, Lord Bingham of Cornhill encapsulated the reasoning in one paragraph:

> "3 As to the first issue, the test for self-defence as a defence in a civil action is well established and well understood. There is no reason in principle why it should be the same test as obtains in a criminal trial, since the ends of justice which the two rules respectively exist to serve are different. There is nothing to suggest that the civil test as currently applied causes dissatisfaction or injustice and no case is made for changing it, even if that were an appropriate judicial exercise. I would not wish to inject any note of uncertainty into the current understanding of this rule."

34. The analysis of the history of the law of self-defence in the Court of Appeal in the same case ([2007] 1 W.L.R. 398) shows that historically the two tests had been aligned and that it was the civil test that was applied in both jurisdictions (see paragraph 45 of the judgment of Sir Anthony Clarke MR). There will be cases where an honest but mistaken belief may have an unreasonable foundation but the most profound differences between the approaches in the criminal and civil courts are in the burden and standard of proof.

35. In *R v. Gladstone Williams* [1987] 3 All ER 411; (1984) 78 Cr App R 276 (but decided in 1983) Lord Lane CJ observed that the issue whether the tests were different had "been the subject of debate for more years than one likes to think and the subject of more learned academic articles than one would care to read in an evening."

However, it was in that case that the difference was affirmed. The Court of Appeal considered itself bound so to conclude by earlier authority in the Court of Appeal and House of Lords (*R v. Kimber* [1983] 1 W.L.R. 1118 and *D.P.P. v. Morgan* [1976] A.C. 182) arising from a sexual assault case and a rape case respectively. Lord Lane's short summary of the position was:

> "The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt is concerned, is neither here nor there. It is irrelevant…If the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; … that is so whether the mistake was, on an objective view, a reasonable mistake or not…
>
> In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected."

36. In the result, for the purposes of the criminal law the necessity to respond to an imminent attack must be judged on the assumption that the facts were as the defendant believed them to be, whether or not mistaken, and if mistaken, whether or not the mistake was objectively reasonable. That position has now been confirmed in statute: see section 76 of the Criminal Justice and Immigration Act 2008, in particular subsection (4):

> "If D claims to have held a particular belief as regards the existence of any circumstances –
>
> (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
>
> (b) if it is determined that D did genuinely hold it, D is entitled to rely on it … whether or not
>
> (i) it was mistaken, or
>
> (ii) (if it was mistaken) the mistake was a reasonable one to have made."

Unlawful and Lawful Killing as Conclusions at an Inquest

37. Section 4(3) of the Coroners Act 1887 ["the 1887 Act"] required the naming of a person found at an inquest to have committed murder or manslaughter. The inquisition operated as an indictment. The person concerned was committed on the inquisition to the next sitting of the Assizes. This statutory provision reflected an ancient function of a coroner's inquest to secure the criminal trial of those considered responsible for homicide. The 1887 Act effected no change in practice. It was a consolidating provision. The Infanticide Act 1922 extended the function to those found to have committed infanticide. However, in the light of developments in criminal investigation and the prosecution of offenders this power was very soon seen to be anomalous. Its abolition was first formally recommended by the 1935 Departmental Committee on Coroners chaired by Lord Wright, but was not acted upon. The next substantial report into the workings of the coronial system was chaired by Norman Brodrick QC (1971 Cmnd 4810). It also recommended its abolition. In 1977 legislation was passed which achieved that end: Criminal Law Act 1977, section 56(1).

38. The history of the verdict of unlawful killing is more fully explored in the judgment of this court in *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2012] EWHC 2755 (Admin) between paragraphs 27 and 48. The issue was whether the conclusion was confined to cases of murder, manslaughter and infanticide or should be available in cases of causing death by careless driving. The court rejected the contention that it should be available outside the three original categories for which the inquisition had acted as an indictment.

39. At paragraph 31 of the judgment, it was noted that before an inquisition could name someone as guilty of a homicide and commit him for trial, the jury at the inquest would need to be satisfied to the criminal standard of proof.

40. Whilst after many centuries, the formal role played by the inquest in criminal proceedings came to an end, changes to the rules which governed the conduct of inquests were immediately introduced to preserve the verdict or conclusion of unlawful killing. An amendment introduced in 1977 to the Coroners Rules 1953 provided that "killed unlawfully" should be a conclusion available at an inquest, even though the power to commit for trial was abolished: see rule 9 of the Coroners (Amendment) Rules 1977. Rule 7 prohibited the naming of a person found to be guilty of homicide. Rule 15 of the Coroners (Amendment) Rules 1980 substituted as an available conclusion "killing was lawful" for the earlier "justifiable or excusable homicide". This was a change in form, not substance. The Coroners Rules 1984 ["the 1984 Rules"] identified both "killed unlawfully" and "killed lawfully" as conclusions available at an inquest: see Rule 60 and form 22. Rule 42 prohibited any verdict which appeared to determine criminal liability on the part of a named person, or which appeared to determine civil liability. Thus an inquisition was prohibited from naming the person considered by the Coroner or jury to be guilty of homicide, even if it was obvious as in many cases it will be. The inquisition could not be framed in a way which appeared to determine civil liability. This latter feature had been carried forward from earlier rules. Both features survive into the current statutory regime: see section 10(2) of the Coroners and Justice Act 2009 ["the 2009 Act"].

41. Section 11(6) of the Coroners Act 1988 ["the 1988 Act"] confirmed that in a case where a person died as a result of murder, manslaughter or infanticide

> "the purpose of the proceedings shall not include the finding of any person guilty … and accordingly a coroner's inquisition shall in no case charge a person with any of those offences."

42. The question of the standard of proof to support a verdict of unlawful killing was considered by this court in *R v. West London Coroner, ex parte Gray* [1988] Q.B. 467 and later in the Court of Appeal in *R v. Wolverhampton Coroner ex parte McCurbin* [1990] 1 W.L.R. 719. Before returning the verdict the coroner or jury, as the case may be, must be satisfied to the criminal standard of proof.

43. Form 2 of the Coroners (Inquests) Rules 2013 ["the 2013 Rules"] preserves lawful and unlawful killing as conclusions available at an inquest. The familiar word "verdict" has now been replaced by "conclusion" for all purposes. It also provides that the standard of proof for unlawful killing is the criminal standard, but for all other conclusions (save suicide) the balance of probabilities. A conclusion that the deceased was killed lawfully, sanctioned as it has been by successive rules, could not have been thought to determine the absence of any liability as a matter of civil law.

44. We have noted that 'lawful killing' is the modern description of the former conclusion that a death resulted from "justifiable or excusable homicide". The 1887 Act gave as an example of "justifiable homicide" that "EF in the defence of himself (and property) did kill the said CD". That reflected the position that had long been established with respect to coroners' inquests. Such a conclusion was appropriate in cases including self-defence, defence of property and unavoidable necessity.

45. It has never been the function of an inquest to concern itself with civil liability for a death. By contrast, a central feature of the inquest for centuries was to reach a conclusion on the question whether the deceased died as a result of a homicide and to commit for trial the person found to have been responsible. The continued availability of the verdict of unlawful killing after 1977, coupled with the strict injunction to avoid naming a person criminally liable for homicide, confirms that the verdict of unlawful killing remained coupled with the criminal law. That is not in dispute in these proceedings.

46. Equally, in our judgment, the conclusion of 'lawful killing' (and its differently worded predecessor) hitherto had also been understood to have been linked to crime. It had amounted to a statement that the jury believed that the deceased was probably not the victim of a homicide. We consider that this common understanding is accurately stated in the 12th edition of Jervis on Coroners (2014) at 13-46:

> "A lawful killing is one which is deliberate, and which would amount to murder … but for the presence of an additional factor which justifies it."

The same understanding was reflected in *Sharman* in the Administrative Court at paragraphs 13 and 33. It was not questioned on appeal [2005] EWCA 967. So too in *R (Bennett) v. H.M. Coroner for Inner London South* both at first instance [2006] EWHC 196 (Admin) and in the Court of Appeal [2007] EWCA Civ 617, the question whether a killing was lawful was judged by the two-limbed test found in the criminal law.

47. The question, to which we will return, is whether that approach was and remains good law.

The Article 2 Procedural Obligation

48. Article 2 ECHR guarantees the right to life. As Lord Bingham explained in *R (Middleton) v. West Somerset Coroner* [2004] 2 A.C. 182 at paragraph 1, Article 2 imposes positive obligations upon states not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will protect life to the greatest extent possible. Additionally, through its jurisprudence, the Strasbourg Court had developed a procedural obligation which requires states to initiate an effective public investigation by an independent official body into deaths for which the state may be responsible. Deaths at the hands of police or state forces require such investigations. Amongst the questions considered by the House of Lords in *Middleton* was what, if anything, Article 2 requires by way of outcome of a properly conducted official investigation into a death possibly involving a violation of Article 2 (see paragraph 4).

49. The requirements of an Article 2 compliant investigation were conveniently brought together by the Strasbourg Court in *Jordan v. United Kingdom* (2003) 37 E.H.R.R. 2. Its essential purpose is to secure the effective implementation of domestic laws and to ensure accountability of state actors for deaths for which they are responsible (paragraph 105). The state must act of its own motion, rather than wait for the family of someone killed to initiate action (paragraph 105) and the investigation must be carried out by persons independent of those responsible for the killing (paragraph 106). The investigation must be capable of leading to a determination whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. "This is a not an obligation of result, but of means" (paragraph 107). Comprehensive evidence must be secured and obtained including of the cause of death (paragraph 107). The investigation must be reasonably prompt (paragraph 108), there must be an element of public scrutiny and the next-of-kin must be involved (paragraph 109). These features have been oft repeated in the Strasbourg case law and earned the approbation of the Grand Chamber in *Ramsahai v. The Netherlands* (2007) 46 E.H.R.R. 983 at paragraphs 324 and 325.

50. *Jordan* was a case which concerned a death in Northern Ireland. It was the scope and findings of an inquest in that jurisdiction which were its focus. The Strasbourg Court drew a distinction between the inquest process in Northern Ireland and that in Gibraltar (in all material respects the same as in England and Wales). The reference to Gibraltar arose because that was where the inquest into the death of three IRA terrorists was held following their deaths on 4 March 1988. They were shot by members of the British armed forces. That case reached the Strasbourg Court as *McCann & others v. United Kingdom* 21 E.H.R.R. 97. In *Jordan* the court recognised that the Northern Ireland inquest could explore the facts, but continued,

> "129. None the less, unlike the *McCann* inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death. In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts including 'unlawful death'. As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is

> required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed. It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action …
>
> 130. Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred, and in that respect, falls short of the requirements of art. 2."

51. In paragraph 142, the Strasbourg Court concluded that the Northern Ireland inquest did not satisfy the procedural obligation because, amongst other things, it did not perform that effective role in securing a prosecution for a criminal offence which may have occurred.

52. In discussing the answer to the question about what outcome the Article 2 procedural obligation requires Lord Bingham, giving the considered opinion of the Committee in *Middleton*, contrasted the clean bill of health which the *McCann* inquest had received in Strasbourg with the shortcomings identified in the *Jordan* inquest. He concluded that ordinarily the inquest is the means by which the procedural obligation is discharged in England and Wales and added that

> "To meet the procedural requirement of Article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case." (paragraph 20)

In paragraph 31, Lord Bingham confirmed that short verdicts in the traditional form would enable the jury to express their conclusion and satisfy the procedural obligation in many cases. He cited *McCann* as an example where the jury had been left with alternatives of unlawful killing, lawful killing and an open verdict. He recognised (paragraph 32) that there would be some inquests where the traditional short form verdict would not satisfy the Article 2 procedural obligation. *Middleton* was a case in that category. The deceased had taken his own life in prison. The central factual issue was whether appropriate precautions had been taken to guard against the risk of his doing so. In such cases the jury should be able to express their view of the circumstances in which someone came by his death (paragraph 33).

53. How that was achieved was a matter for the coroner. Lord Bingham went on:

> "This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of schedule 4 to the Rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting

> the jury's answer to factual questions put by the coroner … It would be open to parties appearing or represented at an inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown." (paragraph 36)

He continued by emphasising the need to ensure that the jury's conclusion did not infringe the statutory prohibition against naming an individual considered by the jury to be criminally responsible for a death; neither should it appear to determine civil liability (paragraph 37).

54. *Middleton* was concerned with the question whether the then existing statutory superstructure surrounding an inquest, as interpreted by the courts, needed modification to ensure compliance with the Article 2 procedural obligation. Section 11(5)(ii) of the 1988 Act required a jury to state "how the deceased came by his death". That had been interpreted as meaning "by what means" he came by his death, a narrow question. At paragraph 35 Lord Bingham concluded that the only change needed was to modify "how" to mean "by what means and in what circumstances".

55. The position is now governed by section 5(2) of the 2009 Act which has given statutory force to that conclusion of the House of Lords.

Strasbourg and justifiable killing

56. Article 2(2) ECHR provides:

> "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest to prevent escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

57. From time to time the Strasbourg Court has used synonyms for the phrase "no more than absolutely necessary". In particular it has used the term "strictly proportionate": see paragraph 149 of the judgment in *McCann* and paragraph 94 of the Grand Chamber in *Nachova v. Bulgaria* (2006) 42 E.H.R.R. 43. The linguistic difference between these formulations and that in domestic law (such force as is reasonable in all the circumstances) is obvious. However, on two occasions, the Strasbourg Court has considered that difference and not found it to be significant in the context of the deliberate use of lethal force. The point was raised in *McCann*. The Strasbourg Court dealt with it between paragraphs 153 and 155 of its judgment:

> "153. The Court recalls that the Convention does not oblige contracting parties to incorporate its provisions into national law. Furthermore, it is not the role of the Convention institutions to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention.
>
> 154. Bearing the above in mind, it is noted that … the Gibraltar Constitution is similar to Article 2 of the Convention with the exception of the standard that justification for the use of force which results in the deprivation of life is that of "reasonably justifiable" as opposed to "absolutely necessary" in Article 2(2). Whilst the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts, there is no significant difference in substance between the two concepts.
>
> 155. In the Court's view, whatever the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2(1) could be found on this ground alone."

58. The argument that there was a significant difference between the Convention standard in this regard and the test of reasonableness in domestic law was again joined in *Bennett* but rejected both by Collins J in the Administrative Court and in the Court of Appeal. The case went to Strasbourg as *Bennett v. United Kingdom* (2011) 52 E.H.R.R SE7. The Fourth Section of the Strasbourg Court declared the application inadmissible. The complaint was that rather than crafting the direction in terms of reasonableness, the coroner should have adopted the ECHR language of "absolute necessity". The Court noted that Collins J had concluded that if an officer reasonably decides that he must use lethal force it will inevitably be because he has concluded it is absolutely necessary to do so. To use it otherwise would be unlawful. Following *McCann,* it determined that there was no material difference between the two tests: paragraphs 71 and 72.

59. In coming to that conclusion, the Court was influenced by the fact that the inquest had before it evidence of the standard to which police officers are trained, including the ACPO manual, which speaks of absolute necessity before shooting. In paragraph 74 it said:

> "Accordingly, the Court finds that, while it might be preferable for an inquest jury to be directed explicitly using the terms "absolute necessity", any difference between the Convention standard, on the one hand, and the domestic law standard and its application in the present case, on the other, could not be considered sufficiently great to undermine the fact-finding role of the inquest or give rise to a violation of art. 2 of the Convention."

60. *Bennett* is also of interest because the Strasbourg Court reviewed the criminal law of self-defence in England and Wales. In paragraph 59 it accurately identified the test as having two limbs. It had earlier quoted the direction given by the Coroner. He had directed the jury on lawful killing by reference to the criminal test (not the civil test). The Court made no adverse observations about the use of the criminal test in the context of a conclusion of lawful killing and understood *McCann* as being concerned with the identical test (paragraph 70).

61. In paragraph 200 of its judgment in *McCann* the Strasbourg Court distilled its conclusion relating to the conduct of the soldiers and encapsulated the test to be applied under Article 2(2) of the Convention. The soldiers had mistakenly believed that the members of the IRA active service unit had a bomb in a car nearby and were about to detonate it.

> "The Court accepts that the soldiers honestly believed, in the light of the information that they had been given … that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.
>
> It considers that the use of force by agents of the State in pursuit of one of the aims delineated in Article 2(2) of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and others."

The formulation in the second part of this paragraph has been repeated by the Strasbourg Court in cases since.

62. In paragraph 134 of its judgment, the Strasbourg Court summarised the domestic law. Unfortunately an error, or at least a confusion, crept into the Court's distillation of the domestic law:

> "The relevant domestic case law establishes that the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief. Given that honest and reasonable belief, it must then be determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest."

There is a reference in the footnote with citations in support of those propositions to *Gladstone Williams* drawing special attention to page 281 of the report in the Criminal Appeal Reports.

63. The first part of the test set out by the Strasbourg Court, save for the final few words, ("and an objective test as to whether he had reasonable grounds for belief"), is accurate. Page 281 of the report in *Gladstone Williams*, from which we have quoted extensively in paragraph 35 above, provides no support for an objective test in relation to belief. Indeed, it is authority to the contrary. It may be that the confusion in the Strasbourg Court's reasoning resulted from the reality acknowledged by Lord Lane that a stated belief which appeared to be unreasonable was one that it might be difficult to accept was an honest belief at all. The footnote also referred to page 462 of the report of the Court of Appeal in Northern Ireland in *R v. Thain* [1985] NILR 457 where Lord Lowry C.J. made precisely the same point and quoted extensively from *Gladstone Williams.* The third case referred to, although without identifying any particular passage, was *Lynch v. Ministry of Defence* [1983] NILR 216: this was a first instance civil action in the High Court where the civil test was applied.

64. No Strasbourg case was drawn to our attention discussing whether the *McCann* formulation, including as it does the phrase "for good reasons", is designed to introduce an objective element at this stage of consideration of the Article 2(2) test, analogous to the civil test in domestic law. Indeed in none of the cases does it appear that the issue has arisen directly whether a mistaken belief genuinely held was also a reasonable belief. Even in *McCann*, the finding of the Strasbourg Court in the first part of paragraph 200 focuses on the honest belief of the soldiers.

65. Mr Stern QC, acting on behalf of a number of the officers involved in this case, drew the court's attention to *Bubbins v. United Kingdom* (2005) 41 E.H.R.R 24 which involved the shooting in self-defence by a police officer of a man who it turned out had a replica gun. In concluding that the actions of the officer did not amount to a violation of Article 2 the Strasbourg Court, whilst reciting the formulation found in paragraph 200 of *McCann*, appears to have focussed exclusively on what it considered to be that officer's honest belief without addressing the reasons for it: see paragraphs 138 to 140. Furthermore, in both *Bubbins* at paragraph 139 and also *Dimov v. Bulgaria* app 30086/05 (6 December 2012) at paragraph 78 the Strasbourg Court expressed itself reluctant to second guess decisions made by law enforcement officers in the heat of the moment. In the latter case it observed that

> "[It] is not for the Court with detached reflection, to substitute its own opinion of the situation for that of police officers who were required to react in a tense situation in which they were facing an armed and dangerous individual, and … errors of judgement or mistaken assessments, unfortunate in retrospect, will not in themselves entail responsibility under Article 2 (see, amongst other authorities, *Andronicou and Constantinou* at 192, and *Brady*)."

In the paragraph cited from *Andronicou* 25 E.H.R.R. 491 the judgment accepted that the officers who were responsible for the lethal force in question honestly believed that it was necessary to kill. The Court then repeated that *McCann* formulation.

Discussion

66. We begin with the position in domestic law.

67. Mr Straw, who developed this part of the argument on behalf of the claimant, submits that whatever may have been the historical position relating to the verdict of justifiable homicide or lawful killing being linked to unlawful killing in the criminal sense, the parting of the ways signalled by *Gladstone Williams* and confirmed in *Ashley* has produced a blank canvass. The Court should conclude, whilst leaving unlawful killing untouched, that lawful killing as a conclusion is available only if the jury concludes there was no civil wrong. He submits that it is confusing to state that a killing is lawful when, as a matter of the law of tort, it might not be. He argues that the reasoning encapsulated by Lord Bingham in *Ashley* (see paragraph 33 above) as justifying the difference between criminal and civil law is equally applicable (in favour of the distinction) to inquests and that in neither *Sharman* nor *Bennett* was the point argued. Thus, this Court is free to depart from the conclusion contrary to this submission found in the judgments in those cases.

68. In our judgment, this argument is inconsistent with the statutory regime governing inquests.

69. Aligning a conclusion of lawful killing with the civil definition would result in the inquisition appearing to determine civil liability. That is prohibited by section (10)(2)(b) of the 2009 Act. However, the objection goes deeper. There is continuity in the statutory treatment of the two verdicts or conclusions which can be traced from the 1887 Act to the 2013 Rules which suggests that in all the statutory references to justifiable and then lawful killing, Parliament has intended such a conclusion to amount to a positive finding that the death did not result from homicide.

70. There is no dispute (nor could there be) that during the period when an inquest played its formal role in committing a person considered guilty of murder or manslaughter for trial, it was not concerned with questions of civil liability. That proposition is not affected by the fact that almost until the end of that period the two tests were thought to be the same. Although the academic debate referred to by Lord Lane in *Gladstone Williams* had been raging for years, *Morgan* was not decided until 1975 and the power of committal on the inquisition was abolished in 1977. The change of nomenclature from "justifiable or excusable homicide" to "lawful killing" made in 1980 was a change of form, not substance, which was carried forward by the 1984 Rules and is preserved in the 2013 Rules.

71. Furthermore, it would to our minds be quite extraordinary for Parliament to have intended that in a single inquest where questions of unlawful and lawful killing very frequently arise in tandem the jury should be given two different definitions of what would appear at first blush to be two sides of the same coin. It would be a recipe for confusion in the jury and mystification in any section of the public interested in its outcome.

72. We conclude that the long held understanding, reflected in *Sharman*, *Bennett* and by the editor of Jervis on Coroners, that a conclusion of lawful killing is one which would amount to the crime of murder, manslaughter or infanticide but for the presence of an additional factor which justifies it, is correct. It signifies the jury's

conclusion not only that they are not sure that a homicide was committed but also a conclusion that it probably was not. It says nothing about civil liability.

73. The argument advanced by Mr Straw on behalf of the claimant based upon Article 2 ECHR is beguilingly simple. The presence of the words "for good reasons" in the definition of justifiable killing articulated by the Strasbourg Court in paragraph 200 of *McCann,* is to be taken to have stated authoritatively that the first limb of its test contains an objective element identical to that in the civil law test in England and Wales. Therefore, for an inquest positively to assert that a killing was lawful it must apply that formulation to its reasoning in order to satisfy the Article 2 procedural obligation.

74. Mr Straw draws support for that approach from the report of the Joint Committee on Human Rights, Legislative Scrutiny, 15th Report, Session 2007-2008 which advances this interpretation of Article 2.

75. With respect to the Strasbourg Court, we do not find it easy to state with certainty what precisely was meant by the term "based on an honest belief which is perceived, for good reasons, to be valid at the time". We note that the formulation is repeated in some of the cases without a comma either side of the words "for good reasons" which would provide additional fertile ground for debate. In *McCann* it appears that the test articulated for Article 2 was thought to be consistent with the English criminal law of self-defence albeit that it followed a summary of English law which was not entirely accurate. We have noted that the decision of the Court of Appeal in *Gladstone Williams* was cited along with the decision of the Court of Appeal in Northern Ireland in *Thain* where both made clear that the reasonableness of the belief went to the question whether it was held at all. In a short dissenting opinion, but not concerning the appropriate test, Judge Ryssdal and others agreed with the conclusion in paragraph 200 but spoke only of the soldiers' honest belief. We have further noted the absence of any ruling on this matter from Strasbourg and also the reality that, in discussing potential breaches of Article 2, the focus has been on whether the state actor responsible for a death honestly believed that he faced a threat which called for the use of lethal force.

76. Discussion of this issue has tended to focus on the dichotomy familiar to lawyers between objective and subjective standards. Academics tend to dislike the dichotomy because many think it is false and that it fails to reflect the subtlety of decision making. The reality, as Lord Lane's observations illuminate, is that even when the test is subjective, elements of objectivity are bound to intrude in the mind of anyone evaluating the evidence. That would be on the basis that if, objectively, a state of mind is unreasonable, the fact finder is less likely to find, subjectively, that it existed: this does not, however, alter the fact that ultimately the test is subjective and relies only on honest belief.

77. Looking at *McCann* alone, which followed verdicts of lawful killing at an inquest, there is some ambiguity in the language used by the Strasbourg Court which is amplified by the inaccurate statement of the law in England and Wales. However, it is significant that in *Bennett*, also involving a conclusion of lawful killing, the Strasbourg Court accurately set out the criminal law of self-defence without any sign of a suggestion that it was an inappropriate test to be applied in Article 2 cases, whether in the context of unlawful or lawful killing.

78. Resting first on the language used in the cases, we are not persuaded that the Strasbourg Court would hold that the test for Article 2 purposes is, for practical purposes, the same as the English civil law test. However, even if it were there are three further reasons why we reject this part of the claimant's submissions.

79. First, as the Strasbourg Court made plain in *McCann*, the Convention does not oblige states to incorporate its provisions into national law. Neither is it appropriate to examine provisions of national law in abstract for compatibility (Paragraph 153). Even were there to be a difference, in practical terms we do not believe that the Strasbourg Court would conclude that difference was sufficient to give rise to a violation of the substantive obligation in Article 2(1). The two tests bear many similarities and only in relatively rare circumstances would the distinction lead to different outcomes.

80. Secondly, one of the central purposes of the procedural obligation under Article 2 is to explore the circumstances with a view to identifying and enabling the punishment of those criminally responsible. The claimant does not suggest any failure in that central purpose of this Article 2 inquest. No point is taken about the way in which unlawful killing was left to the jury, or their entitlement to reject it as a conclusion. Indeed, on behalf of the claimant it has repeatedly been emphasised that this case is about lawful killing, and not unlawful killing. Had the jury concluded that Mr Duggan's death was the result of unlawful killing, in accordance with well established rules of domestic law, the DPP would have been required to consider the question of prosecution. The feature which led the Strasbourg Court to find a violation of the procedural obligation in *Jordan* is absent.

81. Thirdly, in addition to the formal conclusion reached by the jury, they answered questions. The questions relating to background knowledge, intelligence and choice of location for stopping the minicab were directed to a discrete feature of the jurisprudence on Article 2, namely the quality of planning and information underpinning an operation by the police or military. It was in respect of planning that a violation of Article 2 was found in *McCann.* The procedural obligation requires an exploration of these matters. The inquest and the jury's conclusions on these matters satisfied that aspect of the procedural obligation. The principal issues in dispute at the inquest were whether Mr Duggan had a gun in the minicab; if he did how it came to be on the grass nearby; and whether he had it in his hand when he was shot by V53. The jury provided answers on all those issues.

82. In considering a complaint that there has been a violation of the procedural obligation under Article 2 (as indeed any violation of the ECHR), the Strasbourg Court is concerned with the overall circumstances of a case and does not proceed in a technical or mechanistic way. The overarching question would be whether the investigation was Convention compliant. Our conclusion is that there is nothing in the complaint relating to the definition of lawful killing which could lead to the conclusion that the procedural obligation under Article 2 was violated. We would add that even were there a deficit in this regard it could be cured without interfering with the well established meaning of a conclusion of lawful killing. The gap could be filled by asking an additional question directed towards the reasonableness of the honest belief which, on this hypothesis, the officer held.

Ground Three: the direction

83. The Coroner's direction to the jury on the criminal law of self-defence has not been the subject of criticism. His direction on lawful killing accorded with the practice followed in many other inquests including, for example, *Bennett.* That is to set out the unlawful killing direction at some length by reference to that used in criminal courts and then reduce the lawful killing direction to a short paragraph. The procedure followed by the Coroner accorded with the guidance given by Lord Bingham in *Middleton*. All counsel involved in the inquest were extremely experienced in the conduct of inquests in this area of practice and the Coroner circulated his directions in advance for comment and submission as to content. Although there were many such submissions, both written and oral, the point now taken under ground three was not among them: given the history of this direction, that is not surprising. The jury were provided with some of the directions in writing in the form on which the questions appeared and they were invited to record their conclusion.

84. The written direction on lawful killing was, in its own terms, correct and is not criticised:

> "Lawful Killing. If you conclude that it was more likely than not that the fatal shot which killed Mark Duggan was the use of lawful force – then you would return a conclusion of lawful killing."

It is its juxtaposition with the written direction on unlawful killing which, submits Mr Mansfield, could have led to confusion and the use by the jury of a test which was in fact less exacting than the balance of probabilities. The written direction was:

> "You would have to be sure that the act done was unlawful - that is that it was not done in lawful self defence, or in defence of another, or in order to prevent crime. It is not for V53 to prove that he did act lawfully - before you conclude that his act was unlawful you must be sure that it was unlawful.
>
> Any person is entitled to use reasonable force to defend himself or another from injury, attack or threat of attack. If V53 may have been defending himself or one of his colleagues go on to consider two matters:
>
> 1) Did V53 honestly believe or may he have honestly believed, even if that belief is mistaken, that at the time he fired the fatal shot, that he needed to use force to defend himself or another; if your answer is NO then he cannot have been acting in lawful self-defence and you can put that issue to one side; if your answer is YES go on to consider:
>
> 2) Was the force used reasonable in the all the circumstances?
> …
>
> The question whether the force used by V53 was reasonable is to be decided by reference to the circumstances as V53 believed them to be – but the degree of force is not to be

> regarded as reasonable in the circumstances as V53 believed them to be is it was disproportionate in those circumstances."

The Coroner gave oral directions to the same effect.

85. Mr Mansfield submits that it is the use of the word 'may' in sub-paragraph 1 of that direction, coupled with the absence of an explicit direction later that the jury should be satisfied that it was more likely than not that V53 honestly believed that he needed to defend himself or another, which causes the problem. It resulted in the jury being able to return a verdict of lawful killing "if they thought it more likely than not that V53 *may have* believed he needed to use force to defend himself or another." (skeleton paragraph 90; emphasis in the original)

86. We accept that the short direction on lawful killing might well have been amplified to state positively the need to be satisfied that V53 held the honest belief. But there can be no surprise that this formulation has been used on countless previous occasions without any objection being taken and that no attempt to qualify it was made by the claimant's team of counsel at the inquest. Anyone trying to grapple with the concept of "*probably* (or more likely than not) *may* have believed" would very likely have end up perplexed. Qualifying in that way the words "may have" (a synonym for "possibly") adds nothing to its meaning. Any analysis of the written direction should lead to the realisation that the introduction of the word "may" was designed to ensure that the correct standard of proof was applied to unlawful killing. If on the evidence there is a possibility ("may") that X had an honest belief, one cannot be sure he did not. In asking themselves the question whether it was more likely than not that the fatal shot that killed Mark Duggan was the use of lawful force it is difficult to accept that the jury could have done other than reach the conclusion on balance that V53 feared an imminent attack. "Probably may" makes no real sense and it is clear they were looking for more than a possibility.

87. It is noteworthy also that the jury were directed that the question of reasonableness concerning the force used should be decided "by reference to the circumstances as V53 believed them to be" and not "as V53 believed or may have believed them to be". That reinforces our firm conclusion that the jury could not have been confused by their task in deciding whether or not Mr Duggan's death resulted from a lawful killing.

Ground Four: reasonable use of force and absolute necessity

88. We have discussed the observations of the Strasbourg Court in both *McCann* and *Bennett* dealing with the precise argument relating to the difference between reasonable use of force on the one hand, and absolute necessity on the other, in shooting cases of this nature. That is cases involving the use of deliberate lethal force. There is, in our judgment, no distinction to be drawn between the facts of this case and those considered by the Strasbourg Court. Furthermore, the point was not the real issue at the inquest. Mitting J was right to refuse permission on this ground, as we do.

89. The claimant submitted that in addition to dealing with each of grounds two, three and four on their individual merits the Court should consider their cumulative impact on the question whether the Article 2 procedural obligation was satisfied by the inquest. In our judgment it was. It fully satisfied the requirements of the procedural

obligation as elucidated by the Strasbourg and domestic courts. The inquest secured the accountability of the police officer who shot and killed Mr Duggan. It was independent of the police and was comprehensive. It was capable of leading to a determination whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. It in fact concluded that the force used was justifiable and that the death was not the result of a crime. Comprehensive evidence was secured and obtained including on the cause of death. The inquest was held in public with the full involvement of Mr Duggan's family.

Conclusion

90. In our judgment grounds one and four in this claim are, as Mitting J concluded, unarguable. We refuse the renewed application for permission to advance those grounds. Having considered grounds two and three, upon which permission was granted, we conclude that neither has been established by the claimant. In those circumstances the claim for judicial review will be dismissed.

91. We conclude this judgment by recognising the tragedy that is the loss of Mr Duggan's life. In that context, we must emphasise what these verdicts do not mean. Although they exonerate the police on the criminal and civil standard of proof in relation to unlawful killing on the criminal test for such liability, they provide no support for the proposition that they relieve the Commissioner of Police of the Metropolis or his officers from any liability in tort. As we have sought to make clear, it was not the purpose of the inquest to determine civil liability: in civil proceedings the burden of proof and the ingredients are different and may (we do not say must or will) provide a different answer to the very difficult questions posed by this case.