Neutral Citation Number: [2016] EWHC 33 (Admin)

Case No: CO/5790/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2016

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE CRANSTON

- -

Between :

THE QUEEN **On the application of DENBY COLLINS** **(A protected party by his father and litigation friend Peter Collins)**	**Claimant**
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Paul Bowen Q.C. and **Malcolm Birdling** (instructed by**Hickman & Rose**) for the **Claimant**
Clare Montgomery Q.C. and **Tom Little** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 17 November, 7 December 2015

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Approved Judgment

Sir Brian Leveson P :

1. This application involves the so-called householder's defence, contained within 76(5A) of the Criminal Justice and Immigration Act 2008 ("the 2008 Act"); the provision was inserted by s. 43 of the Crime and Courts Act 2013 and came into force on 25 April 2013. In its final amended form, the application seeks a declaration addressed to the Secretary of State for Justice ("Secretary of State") to the effect that this provision is incompatible with Article 2 of the European Convention on Human Rights ("ECHR").

2. In summary, in the early hours of the morning on 15 December 2013, Denby Collins (then 39 years of age) was in the home of B (who has been anonymised so as not to prejudice any prosecution that might flow depending on the resolution of this claim) when he was restrained at least in part by means of a headlock; as a result of this restraint, he has suffered serious personal injury from which he is not expected to recover. There was a police investigation following which the Crown Prosecution Service (CPS) decided not to prosecute B; this decision was upheld following a Review by a specialist prosecutor at the Appeals and Review Unit. Initially, Mr Collins (by his father and litigation friend) sought both to challenge the decision of the Director of Public Prosecutions (DPP) on the basis that the CPS had wrongly directed itself as to the appropriate test and the Secretary of State under the Human Rights Act 1998. The claim against the DPP has been abandoned but the construction placed on the legislation by the CPS is used to support the allegation of incompatibility.

3. Although the issue before the court turns on the proper construction of s. 76(5A) of the 2008 Act and its interrelation with the law of self defence, the factual matrix within which the issue is being analysed is important not least because it is necessary to ensure that the court is not being asked to decide what is or may be a hypothetical question. In that regard, it must also be underlined that the family of Mr Collins do not accept the accuracy of the factual conclusions reached following the police investigation but it is those facts which it is accepted must form the basis of the arguments advanced on the application.

The Facts

4. In addition to B, overnight at his home were his wife C, three of his children D, E and F (who was 13 years old) and three friends (G, H and I). As he was entitled to in his own home, B had consumed a considerable quantity of alcohol (as, is accepted, had D, G and H). Into this property, at around 3.00 am, entered Denby Collins: he did so through the unlocked front door and went upstairs where he was confronted by D who chased him downstairs into the living room where B had fallen asleep while watching television. B, who is 51 years of age, a builder weighing approximately 15½ stones, struggled with Mr Collins and forced him in a headlock to the floor. Mr Collins resisted and others helped B. He was asked who he was and what he was doing; when he did reply, he said he was Fred West and that he was there to see the Queen. B noticed that he had his wife's car keys in his hand and the police later recovered her mobile phone from his pocket.

5. B asserted (as did the other witnesses) that he was restraining Mr Collins until the police came but there is no doubt that emotions were high. C called the police at

03:18:10; she was in a distressed state asking the police to hurry as her husband had found "some bloke" in the house and "he's trying to fucking kill him". At some stage, B is heard to say "I'll fucking kill you" and shouting to tell the police to get there now "… or else I'll break his fucking neck". The CPS reviewer observed that everyone sounded "very panicked and distressed". He also later recognised that these statements could amount to evidence that B had "gone over the top in the force he used", but for reasons which he identifies, he concludes that "on close examination, I think it would be wrong to interpret them in this way". He summarises that the comments were:

> "… unlikely to be regarded by a jury as measured statements of intent, but rather are likely to be viewed as highly emotional outbursts which, if anything, can be interpreted as an emotional plea from them to receive urgent police assistance."

6. It appears that Mr Collins was placed in a neck lock and held face down such that the period of restraint was "some six minutes in duration". The first officers on the scene noted a comment by D that Mr Collins was a "fucking junky, he's got needles on him and he is fucking burgling my mum's house, he was fighting us". Having placed handcuffs on him, the officer then noticed that Mr Collins was not moving, his face was purple in complexion and he was not breathing. An officer formed the impression that his condition was either due to positional asphyxia or because he had taken something. One of those present said "He was screaming and shouting at us a second ago; he's putting it on".

7. An ambulance was called and paramedics managed to restore breathing. Although no medical evidence has been obtained, the reviewing lawyer approached the case on the basis that by restraining Mr Collins in a headlock, B had caused him to lose consciousness and was therefore responsible for his being comatose. Neither did he obtain evidence as to the degree of force which would have been necessary to cause unconsciousness and consequent brain damage. He proceeded on the basis:

> "that [B] applied 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 them to be. Consequently, the force used might have been considerable, yet still reasonable."

8. In that regard, Paul Bowen Q.C. on behalf of Mr Collins points to concerns about the way in which the investigation was undertaken, the differences between various accounts and the contradictions between those accounts and the 999 audio recordings. On the other hand, one of the dominant features of the evidence of those who provided statements was to the effect that Mr Collins was 'very strong', 'putting up a good fight', struggling 'like mad', 'going crazy' and 'really fired up'. In relation to Mr Collins' character, some potential corroboration for that assessment comes from an earlier incident on 13 April 2013 (referring to his mental health issues) when it was noted that it took four police officers to detain him as he became 'very violent' and was 'extremely strong'.

9. In any event, the lawyer conducting the review on behalf of the CPS (which, as I have said is no longer challenged) concluded on the facts that it was highly likely that a jury would assess the lawfulness of the force used against the following factual basis:

> "i. that [Mr Collins] was an intruder;
>
> ii. that the occupants of the house believed that he could have been a burglar, or that he could have been there to commit another crime;
>
> iii. that his strange behaviour caused those present a considerable amount of concern, alarm and fear;
>
> iv. that [B] restrained [Mr Collins] by putting him in a headlock face down on the floor and that [the police records] and recorded timings of the 999 calls, indicate that the period of restraint was approximately six minutes;
>
> v. that the police were called as soon as possible after [Mr Collins] was confronted and restrained and that it was [B] that suggested that the police be called;
>
> vi. that during the struggle on the floor [B] threatened to kill [Mr Collins] and that C told the police that [B] was trying/going to kill [him];
>
> vii. that contrary to the accounts provided, at least two people present expressed concern about [Mr Collins'] welfare whilst he was being restrained, and that the first expression of concern was voiced around 2 minutes before the police arrived."

10. Against that background, the lawyer concluded that a jury was likely to find that B honestly believed that it was necessary to use force until the police arrived and also that at least one of the purposes for which B used force was to defend himself, it being "beyond any doubt" that he believed Mr Collins to be a trespasser, and that the 'householder' provisions within s. 76 of the 2008 applied. He went on:

> "This means that [B] would be acquitted of any offence of violence unless the prosecution proved that the degree of force used was grossly disproportionate. The use of disproportionate force would not be unlawful."

11. Analysing the circumstances, he concluded that the method of restraint would be viewed as proportionate and that it would be "very difficult" to prove that the continuation of his restraint up until the police arrived would be viewed as being grossly disproportionate. He went on:

> "It is difficult for a person in circumstances such as these to measure precisely what level of force is required, and to reiterate, if that person does no more than seems honestly and instinctively to be necessary that is itself potent evidence that the force used was proportionate. In my view a jury, looking at the facts as [B] perceived them to be, are unlikely to conclude

> that the continuation of this method of restraint was grossly disproportionate."

12. Although Mr Collins' family do not accept the factual analysis set out within the very comprehensive review (being 164 paragraphs and 41 pages in length), as the claimant has abandoned his application for judicial review of the decision not to prosecute, the conclusion is unchallenged and must be taken to be justifiable. The argument proceeds on the premise (positively argued by Mr Bowen) that the legal analysis contained within the review is accurate, so that the case is put on the basis that the "householder defence" provision is incompatible with Article 2 of the ECHR. It is to these arguments to which I now turn.

The Law

13. The common law relating to self defence required consideration of two elements. The first was a subjective element, namely whether the defendant genuinely believed that it was necessary to use force to defend himself; the second was an element which is partly objective (whether the nature and degree of force used was reasonable in the circumstances) and partly subjective (on the basis that what was reasonable had to be tested against the circumstances as the defendant genuinely, even if mistakenly, believed them to be): see *R v Oye* [2014] 1 Cr App R 11, [2013] EWCA Crim 1725 (at [38-9]) citing *Palmer v R* [1971] AC 814. However, a defendant could not rely on a mistaken belief induced by voluntary intoxication: see *R v O'Grady* [1987] QB 995, reaffirmed by the Court of Appeal in *R v Hatton* [2006] 1 Cr App R 247. Once there was sufficient evidence to raise the defence, the burden of disproving it (to the criminal standard, i.e. so that the jury were sure that one or more of the elements are not established) rested on the prosecution.

14. The operation of the second limb of the defence was the subject of statutory elaboration (or, as Mr Paul Bowen Q.C. for the claimant contends, amendment) in s. 76 of the 2008 Act later amended by s. 148(1)-(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and s. 43(1)(5) of the Crime and Courts 2013: this part of the Act is headed 'Reasonable force for the purposes of self defence etc'. In the form now in force (and in force at the date of the events that generated this challenge), the relevant parts provide:

> (1) This section applies where in proceedings for an offence—
>
> (a) an issue arises as to whether a person charged with the offence ("D") is entitled to rely on a defence within subsection (2), and
>
> (b) the question arises whether the degree of force used by D against a person ("V") was reasonable in the circumstances.
>
> (2) The defences are—
>
> (a) the common law defence of self-defence; …

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(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 for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(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.

(6)In a case other than 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 disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a obligation to retreat.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

> (8) Subsections (6A) and (7) are not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).
>
> (8A) For the purposes of this section "a householder case" is a case where—
>
> (a) the defence concerned is the common law defence of self-defence,
>
> (b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),
>
> (c) D is not a trespasser at the time the force is used, and
>
> (d) at that time D believed V to be in, or entering, the building or part as a trespasser.
>
> …
>
> (9) This section, except so far as making different provision for householder cases, is intended to clarify the operation of the existing defences mentioned in subsection (2).
>
> (10)In this section—
>
> (a) *"legitimate purpose"* means—
>
> (i) the purpose of self-defence under the common law,
> …
>
> (b) references to self-defence include acting in defence of another person; and
>
> (c) references to the degree of force used are to the type and amount of force used."

15. As has been highlighted, s. 76(5A) contains what is described as the householder provision which qualifies the second limb of the common law defence of self-defence. The precise nature of the qualification and the extent to which it affects the common law is disputed between the parties and is said by the DPP to be crucial to determining the principal point in the case, namely the compatibility of the statutory provision with Article 2 of the ECHR, as part of a framework of criminal law that deters offences against the person.

16. I start, therefore, with the true meaning of s. 76(5A) of the 2008 Act, as amended. Mr Bowen argues that the provision alters the common law so that, in householder cases, the test of what is unreasonable in the circumstances (as the defendant believed them to be) is whether the degree of force was grossly disproportionate. Thus, a householder who uses disproportionate, but not grossly disproportionate force, can avail himself of the defence or, in the context of the analysis in this case, there will be

no reasonable prospect of conviction unless there is material to the appropriate evidential standard upon which the jury can conclude that the force used was grossly disproportionate. In that regard, Mr Bowen submits that the CPS reviewing lawyer was correct to proceed on the premise that the use of disproportionate force would not be unlawful.

17. Ms Clare Montgomery Q.C. (for the Secretary of State) rejects this analysis of the legislation. She argues that, on its true construction, the effect of s. 76(3) and (5A) does not preclude a householder being regarded as having acted unreasonably where the degree of force used was disproportionate. In reality, s. 76(5A) says nothing about the bearing of the proportionality of the degree of force used by a householder in the circumstances (as he believed them to be) on its reasonableness, except for excluding the possibility of a grossly disproportionate degree of force being reasonable.

18. For my part, I have no doubt that Ms Montgomery is correct. It is clear from the section that s. 76(3) adopts and preserves the second limb of self-defence at common law. As it has been for many years, the central question (and the standard) remains whether the degree of force that a defendant used was "reasonable in the circumstances as the defendant believed them to be". The standard remains that which is reasonable: the other provisions (and, in particular, s. 76(5A) and (6) of the 2008 Act) provide the context in which the question of what is reasonable must be approached. The test in the statute is not whether the force used was proportionate, disproportionate or grossly disproportionate.

19. The operation of s. 76(5A) automatically excludes a degree of force which is grossly disproportionate from being reasonable in householder cases. If the degree of force was not grossly disproportionate, s. 76(5A) does not prevent that degree of force from being considered reasonable within the meaning of the second self-defence limb. On the other hand, it does not direct that any degree of force less than grossly disproportionate is reasonable. Whether it was or was not reasonable will depend on the particular facts and circumstances of the case.

20. Thus, s. 76(5A), read together with s. 76(3) and the common law on self-defence, requires two separate questions to be put to the jury in a householder case. Presuming that the defendant genuinely believed that it was necessary to use force to defend himself, these are:

    i) Was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer is "yes", he cannot avail himself of self-defence. If "no", then;

    ii) Was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he has a defence. If it was unreasonable, he does not.

21. Ms Montgomery submitted that where a defendant has gone completely over the top, such actions would be grossly disproportionate, unless there was some material or reason that pointed against that conclusion. For my part, I consider that such an approach could well be useful for a jury tasked with the responsibility of understanding what is meant by the concept of gross disproportionality.

22. On the plain words of s. 76, a jury should consider these two questions disjunctively. The answer to the first question does not provide the answer to the second question. Thus, in the context of this case, in my view, the CPS lawyer reviewing whether to prosecute B erred in interpreting s.76 as meaning that B would be acquitted of any offence of violence unless the prosecution proved that the degree of force used was grossly disproportionate, the use of only disproportionate force being lawful. That was not an appropriate test against which to assess B's restraint of Mr Collins for the purpose of considering whether the facts justified the institution of proceedings in accordance with the test set out in the Code for Crown Prosecutors (namely, whether there is sufficient evidence to provide a realistic prospect of conviction and whether a prosecution is required in the public interest). I repeat that the challenge to that decision initially brought against the CPS was abandoned.

23. The effect, and no doubt purpose, of s. 76(5A) is to allow for a discretionary area of judgment in householder cases, with a different emphasis to that which applies in other cases. The obvious example concerns the extent to which it is appropriate to take into account the duty to retreat (which, by s. 76(6A) remains a factor to be taken into account). In a householder case, the failure to do so and, thus, the use of force, may be disproportionate but still reasonable although in a non-householder case, that would be unreasonable by virtue of s. 76(6). In that regard, it is important to note that Article 8 of the ECHR specifically provides for protection of the home and s. 76(5A) may do little more than provide emphasis to this requirement.

24. What is clear, therefore, is that s. 76(5A) provides emphasis to the full ambit of the *Palmer* direction now the subject of statutory endorsement in s. 76(7). That is to say, in deciding whether the degree of force was reasonable, it is necessary to take into account the fact that a person acting in self-defence may 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 constitutes potent evidence that the force was reasonable.

25. Admittedly, depending on the meaning attached to the word proportionate, in almost all cases if the degree of force is proportionate it will also be reasonable but that cannot be to equate the two. In the same way that s. 76(5A) is drafted in the negative (allowing but not requiring the fact finder to conclude that force which is disproportionate still has to be reasonable) so s. 76(6) permits a finding that force which is proportionate is not reasonable. Both these provisions underline and acknowledge the critical second limb standard of self defence to be that which is reasonable in the circumstances of the case.

26. Mr Bowen argues that this interpretation is at odds with the explanation provided of the second limb of self-defence in *R v Keane, R v McGrath* [2010] EWCA Crim 2514, in which Hughes LJ (as he then was) said (at [5.3]):

> "Once it has thus been decided on what factual basis the defendant's actions are to be judged, either because they are the things that actually happened and he knew them or because he genuinely believed in them even if they did not occur, then the remaining and critical question for the jury is: <u>was his response reasonable, or proportionate (which means the same thing)? Was it reasonable (or proportionate) in all the circumstances?</u> Unlike the earlier stages which may involve the belief of

> the defendant being the governing factor, the reasonableness of his response on the assumed basis of fact is a test solely for the jury and not for him." (Emphasis added)

27. Hughes LJ was not, of course, seeking to comment on statutory provisions not then even contemplated. In considering the question posed for the jury in those cases and the focus of these remarks, the context is important. In *Keane*, after an altercation at a petrol station, the defendant punched the victim, causing him to fall and strike his head on the concrete which produced severe head injuries. *McGrath* concerned a young woman's fatal stabbing of her boyfriend after he became aggressive and attacked her. Neither of these circumstances disclose the possibility of the defendant's degree of force being proportionate but nevertheless unreasonable. In these circumstances, it was entirely appropriate for the sake of simplicity in directing the jury to equate the two concepts and not surprising that the Crown Court Bench Book does so (although that may now require revision so as to avoid confusion). As Hughes LJ was at pains to stress (at [2]), however, the general observations he made, including on reasonableness,

> "… are geared to the type of case which [the Court of Appeal was then considering]. They are not intended to provide a comprehensive survey of the whole of the law of self-defence any more than the summing-up in any individual case should be intended to do so".

28. As demonstrating that the force used in this case was disproportionate, Mr Bowen relied on *R (on the application of Webster) v Crown Prosecution Service* [2014] EWHC 2516 (Admin) in which the Divisional Court ordered reconsideration of a decision not to commence a prosecution for unlawful act manslaughter against two bouncers who had caused the death of the deceased. Pointing to similarities to this case, Mr Bowen noted that one of the bouncers had restrained the deceased by use of a headlock for a period of eight minutes while awaiting the arrival of the police. It was held that the decision of the reviewing CPS lawyer did not properly consider whether the use of force was reasonable in the circumstances of the case: see [35]-[36]. In doing so, Elias LJ drew attention to the fact that there was insufficient consideration of a police sergeant's witness statement that headlocks were "inherently very dangerous" and the length of time in which the deceased was held in that position, building his analysis around whether the degree of force was proportionate.

29. *Webster* is authority only for the proposition that consideration ought to have been given to the evidence of the police sergeant when making the charging decision. Furthermore, far from undermining the conclusion that I have reached, this decision underlines that what is reasonable (or, in context, proportionate) for a bouncer whose job is to restrain those who create disturbance in a public setting will not necessarily be the same for a householder who does not have that expertise, imputed knowledge or experience. Both what is reasonable and what is proportionate (the words not, depending on context, being synonyms) depends on the facts and circumstances. In any event, we were informed that, following reconsideration of this case, a similar decision had been reached which was upheld on review and then not subjected to further challenge.

30. It is also worth noting that the common law (preserved by s. 76 of the 2008 Act) requires an approach which it is at least arguable is unduly restrictive for householders. There is much to be said for the proposition that those who go about in public (or anywhere outside their own homes) must take responsibility for their level of intoxication: thus by s. 76(5) of the 2008 Act, a defendant cannot rely on any mistaken belief attributable to intoxication that was voluntarily induced. Why that should be so in the defendant's own home in circumstances where he is not anticipating any interaction with a trespasser is, perhaps, a more open question but that remains part of the test even in a householder case.

31. Before leaving this analysis of the domestic jurisprudence, it is appropriate to deal with other arguments that Mr Bowen advanced. First, he sought to relate the interpretation of the concept of disproportionality in public law to this legislation. In public law, however, the concept sets the standard against which to judge the lawfulness of executive (or legislative) action and draws boundaries reflecting constitutional considerations; as Ms Montgomery submitted, it could not realistically be suggested that a jury should be directed in the language proposed by Lord Wilson in *R (T) v Manchester Police* [2015] AC 49 (at [114]). Neither is the meaning of the phrase 'grossly disproportionate' to be derived from the concept of allegedly excessive criminal sentences: what was said to be "rare and unique occasions" and "very exceptional cases" in *R (Harkins) v Secretary of State for the Home Department* [2015] 1 WLR 2975 (at [44]) only serves to predict the small number of cases that would surmount the threshold. The meaning of disproportionality and gross disproportionality must be taken from the context in which the language is used.

32. The same is so in relation to Mr Bowen's comparison with s. 329 of the Criminal Justice Act 2003 which provides that, in defence of a civil action for trespass brought by a claimant convicted in the UK of an imprisonable offence committed at the same time as the alleged trespass, it is a defence for the defendant to demonstrate (among other things) that "in all the circumstances, his act was not grossly disproportionate". Mr Bowen relies on *Adorian v The Commissioner of Police* [2009] 1 WLR 1864 but the judgment only decided that there was evidence that the actions of the arresting officers (i.e. state agents) were grossly disproportionate. Again, as Ms Montgomery contends, the concept (which the court had no difficulty understanding) is no more than a statutory example of Parliament providing that those who become involved in a physical altercation with someone who is committing a criminal offence are to be accorded a greater degree of latitude in relation to the degree of force used than would obtain when there is no question of criminality on the part of the victim. The provision takes this argument no further.

33. To summarise, on a proper construction of s. 76(5A), its true meaning and effect is:

    i) Whether the degree of force used in any case is reasonable is to be considered by reference to the circumstances as the defendant believed them to be (the common law and s. 76(3));

    ii) A householder is not regarded as having acted reasonably in the circumstances if the degree of force used was grossly disproportionate (s. 76(5A));

    iii) A degree of force that went completely over the top *prima facie* would be grossly disproportionate;

iv) However, a householder may or may not be regarded as having acted reasonably in the circumstances if the degree of force used was disproportionate.

34. This represents no more than a refinement to the common law on self-defence. Thus, I do not accept that the construction placed on s. 76(5A) by the editors of Archbold, 2016 at para. 19-48a (to the effect that force in a householder case is only to be regarded as unreasonable if it was grossly disproportionate) represents an accurate statement of law. The position is better expressed by the editors of Blackstone, 2016 at para A3.63 which makes it clear:

> "The new provision merely affects the interpretation of '(un)reasonable in the circumstances' so that force is not by law automatically unreasonable in householder cases simply because it is disproportionate provided it is not grossly disproportionate."

35. This construction of s. 76(5A) now falls to be assessed against Article 2 of the ECHR.

Article 2 ECHR: Positive Framework Obligation

36. Article 2 of the ECHR guarantees the right to life in the following terms:

> "1. Everyone's right to life shall be protected by law…"

It also extends to life-threatening although not (in the event) lethal force: see *Makaratzis v Greece* (*supra*), at [49], citing *Ihan v Turkey* (2002) 34 EHRR 36, at [75]. Thus, the present application does engage article 2.

37. The provision enjoins contracting States not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction: see *L.C.B. v United Kingdom* (1998) 27 EHRR 212. The different types of positive obligation were explained by Lord Hope DPSC in *Smith v Ministry of Defence* [2013] UKSC 41; [2014]AC 52, at [68]:

> "The positive duties on the state operate at various levels, as one idea is handed down to another. There is a lower-level, but still general, duty on a state to take appropriate measures to secure the health and well-being of prisoners or people who are in some form of detention. This in its turn gives rise, at a still lower level, to two general obligations: *Savage*, para 36; *Rabone v Pennine Care NHS Trust* (INQUEST and others intervening) [2012] UKSC 2, para 12, per Lord Dyson; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 89. The first is a systemic duty, to put in place a legislative and administrative framework which will make for the effective prevention of the risk to their health and well-being or, as it was put in *Öneryildiz*, para 89, effective deterrence against threats to the right to life... The second… is to ensure that, where there is a real and immediate risk to life, preventative operational measures of

> whatever kind are adopted to safeguard the lives of those involved so far as this is practicable."

38. The European Court of Human Rights (ECtHR) has formulated what may be called the "framework obligation" in *Makaratzis v Greece* (*supra*) in the following manner (at [57]):

> "This involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions."

39. Wholly unsurprisingly, but of importance for present purposes, the ECtHR considers a state's criminal law to be a crucial part of its framework to deter offences against the person. Therefore, according to that court (in *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7 at [93] citing *Osman v UK* (2000) 29 EHRR 245, at [90]), the general framework obligation gives rise to a specific duty on a state to put in place, as part of the framework:

> "… effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions".

40. The Court in *Angelova and Iliev* (at [92]) immediately preceded this statement by setting apart purely private situations, with the effect of emphasising that a state's obligation in this context does not extend beyond providing an effective legal administrative framework:

> "The Court observes at the outset that the applicants did not contend that the authorities of the respondent State were responsible for the death of their relative; nor did they imply that the authorities knew or ought to have known that he was at risk of physical violence at the hands of third parties and failed to take appropriate measures to safeguard him against such a risk. The present case should therefore be distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324; *Shanaghan v. the United Kingdom*, no. 37715/97, § 90, 4 May 2001; *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV; *Nachova and Others*, cited above; and *Ognyanova and Choban v. Bulgaria*, no. 46317/99, 23 February 2006), or in which the factual circumstances imposed an obligation on the authorities to protect an individual's life, for example where they had assumed responsibility for his welfare (see *Paul and Audrey Edwards v. United Kingdom*, no. 46477/99, ECHR 2002-II) or where they knew or ought to have known that his life was at risk (see *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII)."

41. The ECtHR has not yet had the occasion to go further into what the Article 2(1) framework obligation requires of a State's substantive criminal law. However, what it entails may be deduced from the judgments of the ECtHR and domestic courts in the context of other Article 2(1) framework obligations.

42. In this regard, the leading ECtHR decision concerning the framework obligation in the context of police action is of the Grand Chamber in *Makaratzis v Greece* (*supra*). The facts were that, having driven through red traffic lights and then failed to stop for the police, the applicant was pursued by police officers in cars and on motorcycles. After he had broken through five roadblocks, the police officers started firing at his car, continuing to do so when he stopped at a petrol station. Following his arrest, he was found to have sustained several injuries, including bullet wounds. The Court considered the matter under Article 2 and, in doing so, set out what the Article 2(1) framework obligation entailed in the circumstances of the case:

> "58. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force (see, mutatis mutandis, *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 56, 8 June 2004; see also Human Rights Committee, General Comment no. 6, Article 6, 16th Session (1982), § 3), and even against avoidable accident.
>
> 59. In view of the foregoing, in keeping with the importance of Article 2 in a democratic society, the Court must subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, p. 46, § 150). In the latter connection, police officers should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect (see, for example, the "United Nations Force and Firearms Principles" – paragraphs 30-32 above)." (Emphasis added)

43. This must be read aside the Court stating that the framework obligation "must be interpreted in a way which does not impose an impossible burden on the authorities": see [69]. In the circumstances of the case, allowance was to be made for "the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources". In the event, there were no provisions of Greek law laying down when the police could use firearms beyond "when absolutely necessary and when all less extreme methods have been exhausted"; neither were there any police guidelines on the matter. In the

circumstances there was a breach of the Article 2(1) obligation to put in place an adequate legislative and administrative framework, expressed (at [71]) in these terms:

> "[T]he Greek authorities had not, at the relevant time, done all that could reasonably be expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required."

44. The Court also made it clear that operational control was properly the subject of investigation. This proposition was expressed in these terms (at [60]):

> "Against this background, the Court must examine in the present case not only whether the use of potentially lethal force against the applicant was legitimate but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life." (Emphasis added)

45. However, this should not be taken as a statement of the standard to which legislative and administrative frameworks are to be held. This proposition was analysed in a convincing manner by Richards LJ in *R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272, which concerned the restraint of individuals by state agents on aircraft, when he said:

> "41 … in paragraph 60 of the judgment the Court is not dealing with the content of the framework duty but is turning to consider, against the background of the framework duty, the way in which the *particular operation* under consideration was regulated and organised. It is not saying that the framework itself must "minimise to the greatest extent possible" any risk arising in respect of the situations in which force may foreseeably be used. The "background" to which it refers is the requirement that policing operations must be sufficiently regulated "within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident"… and that "a legal and administrative framework should define the limited circumstances in which law enforcement officials may use force and firearms"… That is the point picked up in paragraph 71, where the Court refers to the failure of the Greek authorities to do "all that can reasonably be expected" of them to afford the level of safeguards required. In my judgment those passages, rather than paragraph 60, are the best indicators of the test to be applied when considering the general question whether the framework is sufficient to comply with Articles 2 and 3, as distinct from the question whether a particular operation has been planned and organised in a way that complies with those articles…
>
> 42. The language of "minimise [risk] to the greatest extent possible" is to be found in other cases, in the context of Article 3 as well as Article 2. In each case, however, it is used in relation to the conduct of a particular operation, not in relation to the legislative and administrative framework…"

46. Such a conclusion is supported by the way the ECtHR dealt with framework obligation in *Putintseva v Russia* (33498/04), 10 May 2012, unreported, at [64]-[67] and *Saoud v France* (9375/02) 9 October 2007, unreported, at [103]. Richards LJ therefore concluded in *FI* that for the context of state agents restraining individuals on an aircraft:

> "The emphasis in respect of the framework is on reasonable safeguards, not on regulation of such detail as to minimise to the greatest extent possible any risk to life or risk of ill-treatment."

47. This echoes the manner in which Lord Bingham described the framework obligation in *R (Middleton) v West Somerset Coroner)* [2004] 2 AC 182 when he said, at [2], that contracting States were required to:

> "…establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life."

48. It may also be helpful to consider what the framework obligation requires of states from context to context in the terms suggested by Laws LJ in *D and V v Commissioner of Police of the Metropolis; Koraou v Chief Constable of Greater Manchester Police* [2015] EWCA Civ 646 (at [45]) in relation to Article 3:

> "There is perhaps a sliding scale: from deliberate torture by State officials to the consequences of negligence by non-State agents. The energy required of the State to combat or redress these ills is no doubt variable, but the same protective principle is always at the root of it. The margin of appreciation enjoyed by the State as to the means of compliance with Article 3 widens at the bottom of the scale but narrows at the top. At what may, without belittling the victim, be called the lower end of the scale where injury happens through the negligence of non-State agents, the State's provision of a judicial system of civil remedies will often suffice: the individual State's legal traditions will govern the means of compliance in the particular case. Serious violent crime by non-State agents is of a different order: higher up the scale. In these cases, which certainly include *DSD/NBV*, a proper criminal investigation by the State is required."

49. Finally, it is important to note that a state's legal and administrative framework that fulfils the Article 2(1) positive obligation does not fall to be examined against Article 2(2) of the ECHR. Its terms are as follows:

> "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 or to prevent the escape of a person lawfully detained;

> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

50. This is often referred to as the requirement of strict proportionality. In *Makaratzis* (*supra*), the ECtHR, in coming to the conclusion that the Greek authorities had not at the relevant time done all that could be reasonably expected to afford to citizens against whom potentially lethal force was used the required level of safeguards in hot pursuit police operations (at [56]-[72]), did not scrutinise the legislative and administrative framework at issue against Article 2(2).

51. *Makaratzis* was a case concerned with a framework obligation where the lethal force was deployed by state agents. The fact that Article 2(2) does not apply logically (and *a fortiori*) extends to where the framework obligation is engaged by force deployed exclusively by private parties, as well as instances of private parties and state agents acting in concert. In *Angelova and Iliev v Bulgaria* (*supra*), the applicants, the mother and brother of a young man of Roma origin who died after being attacked by seven teenagers in April 1996, relied on Article 2 (as well as Articles 3, 6, 13 and 14) of the ECHR to complain that the authorities had failed to carry out a prompt, effective and impartial investigation and that Bulgarian criminal law did not adequately provide for racially motivated offences. The ECtHR at [93], without making any reference to Article 2(2), reiterated what the core Article 2(1) framework obligation test required in the context of criminal law:

> "… by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports 1998-III, p. 1403, § 36), Article 2 § 1 of the Convention imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman*, cited above, § 115)."

52. It then went on to lay down how the specifics of what this test requires where the effectiveness of a police investigation, such as in the case at hand, is at issue (at [94]-[98]). In its analysis of the facts against the Article 2(1) framework obligation test, the ECtHR criticised the preliminary investigation for becoming protracted without providing a convincing explanation (at [101]-[102]), but found that lack of penalty-enhancing provisions for racist murder or serious bodily injury were responsible in the present case for hampering or constraining the authorities from conducting an investigation into the death of the applicants' relative and applying effectively the domestic legislation (at [104]). The ECtHR therefore concluded, entirely in keeping with the exclusive application of the Article 2(1) test of effective criminal law and law-enforcement machinery, that in the particular circumstances of the case the authorities failed in their obligation to investigate effectively the death of the applicants' relative promptly, expeditiously and with the required vigour, considering the racial motives of the attack and the need to maintain confidence of minorities in the ability of the authorities to protect them from the threat of racist violence (at [105]). effectively

53. All of this may be contrasted with the approach adopted where it is the action of state agents, rather than the legislative and administrative framework of the state, which is at issue. *Giuliani and Gaggio v Italy* (2012) EHRR 10 concerned the lethal shooting and running over of a violent protester by *carabinieri* during an authorised demonstration in the context of a G8 summit in Genoa in 2001. The background was that three *carabinieri* had been surrounded and violently attacked by a group of protesters. The ECtHR set out the general principles contained within Article 2 applicable to police action, in particular those pertaining to Article 2(2), in the following terms:

> "175. The exceptions delineated in paragraph 2 indicate that Article 2 extends to, but is not concerned exclusively with, intentional killing. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) *(see McCann and Others v. the United Kingdom,* 27 September 1995, § 148, Series A no. 324, and *Solomou and Others, cited above, § 64)*.
>
> 176. The use of the term "absolutely necessary" indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. Furthermore, in keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, §§ 147-150, and *Andronicou and Constantinou*, cited above, § 171; see also *Avşar v. Turkey*, no. 25657/94, § 391, ECHR 2001-VII, and Musayev and Others v. Russia, nos. 57941/00, 58699/00 and 60403/00, § 142, 26 July 2007)."

54. In the extreme circumstances, the ECtHR held that the use by the *carabinieri* of lethal force was absolutely necessary in defence of any person from unlawful violence within the meaning of Article 2(2)(a) of the Convention.

Margin of Appreciation

55. Ms Montgomery argues with considerable force that, in setting the terms of the defence of self-defence, states are afforded a wide margin of appreciation. In *MC v Bulgaria* (*supra*), the ECtHR considered whether Bulgarian law and practice, insofar

as only cases where victims of rape and sexual abuse had actively resisted were prosecuted, failed to provide effective protection against rape and sexual abuse contrary to Articles 3 and 8. It first held that states have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution (at [153]). It then went on to observe (at [154]):

> "In respect of the means to ensure adequate protection against rape, States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account."

56. The Court then repeated its orthodoxy that wide margins of appreciation find their limit in an evolving convergence between Contracting States (at [155]):

> "The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI)."

57. Although *MC v Bulgaria* is an Article 3 case, it would appear that the same reasoning would apply to the framework obligation under Article 2(1). In the present application, there has been no evidence adduced to suggest that there is a convergence between ECHR states as to the law on self-defence, and in particular, the law on self-defence in relation to householders. If there has, in fact, been no convergence, then the definition of self-defence in relation to householders may well lie within states' margin of appreciation, with all the domestic separation of powers and institutional competency principles that apply within the margin: see Lord Hoffmann at [36] and Lord Mance at [130] in *In re G (Adoption: Unmarried Couples)* [2009] AC 173 and Lord Neuberger PSC at [75] and Lord Mance at [164] in *R (on the application of Nicklinson) v Ministry of Justice* [2015] 1 AC 657. However, without hearing evidence from the parties on the convergence, or indeed lack thereof, of Convention state laws on self-defence where the defendant is a householder, I am unwilling to decide the case on this basis.

Article 2 ECHR: application

58. For the present purpose, what results from the above is one simple question: does the criminal law of England and Wales effectively deter offences against the person in householder cases?

59. The starting point must be the deterrent effect of the catalogue of offences against the person for which a householder using force against an intruder may be liable. Murder, manslaughter, and non-fatal offences against the person apply without distinction in terms of the substantive definition of the offence in householder cases.

60. In both householder and non-householder cases, the defendant may seek to establish a defence of self-defence. In both cases, the basic elements of the test are the same: whether the defendant genuinely believed that it was necessary to use force to defend himself; and whether the nature and degree of force used was reasonable in the circumstances as the defendant genuinely, even if mistakenly, believed them to be. In relation to the second limb, in both cases s. 76(7) puts on a statutory basis the *Palmer* direction that (a) a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and (b) evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

61. In this context, s. 76(5A) serves to exclude a householder's grossly disproportionate use of force from being reasonable. When read with s. 76(6), which provides that in non-householder cases all disproportionate force is excluded from being reasonable, s. 76(5A) can be seen to offer a discretionary area of judgment to the jury as to whether if the force was disproportionate, it was nevertheless reasonable in the circumstances. The effect of s. 76(5A) is not to give householders *carte blanche* in the degree of force they use against intruders in self-defence. A jury must ultimately determine whether the householder's action was reasonable in the circumstances as he believed them to be.

62. There may be instances when a jury may 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. This does not weaken the capacity of the criminal law of England and Wales to deter offences against the person in householder cases. The headline message is and remains clear: a householder will only be able to avail himself of the defence if the degree of force he used was reasonable in the circumstances as he believed them to be. In that context, it is not irrelevant that Article 2 and Article 8 rights of the householder are also engaged.

63. It is important to note that in this regard, the ECtHR has consistently held that the reasonableness limb of self-defence (in the circumstances as the defendant believed them to be) as applied in state actor cases is compatible with the Article 2(2) requirement of "absolute necessity": see *McCann v United Kingdom* (1996) 21 EHRR 97 at [134]-[200], *Bubbins v United Kingdom* (2005) 41 EHRR 24 at [138]-[140], *Bennett v United Kingdom* (2011) 52 EHRR SE7 at [67]-[83]. On any view, therefore, the test of reasonableness in the circumstances in private party householder cases, even after the minor qualification of s. 76(5A), would not cause a breach of the Article 2(1) positive obligation, which is shorn of strict proportionality.

64. All of this adds up to there being reasonable safeguards against the commission of offences against the person in householder cases. In the circumstances, I conclude that the criminal law of England and Wales on self-defence in householder cases, taken as a whole, fulfils the framework obligation under Article 2(1).

65. Before leaving this argument, it is appropriate to address one final argument advanced by Mr Bowen in relation to parliamentary material to which he wished to refer to assist in deciding whether the framework of criminal law, of which s. 76(5A) forms a part, is in breach of the Article 2(1). In particular, he pointed to a report of the Joint

Parliamentary Committee on Human Rights ("JCHR") and speeches of a number of distinguished members of the House of Lords.

66. In this regard, Article 9 of the Bill of Rights (1689) provides: "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". This provision has been explained and subject to judicial analysis. Thus, Stanley Burton J (as he then was) reviewed the authorities in *Office of Government Commerce v Information Commissioner* [2010] QB 98 and summed up the law as follows:

> "46. These authorities demonstrate that the law of parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the courts.
>
> 47. Conflicts between Parliament and the courts are to be avoided. The above principles lead to the conclusion that the courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well founded any sanction is for Parliament to determine. The proceedings of Parliament include parliamentary questions and answers. These are not matters for the courts to consider.
>
> 48. In my judgment, the irrelevance of an opinion expressed by a parliamentary select committee to an issue that falls to be determined by the courts arises from the nature of the judicial process, the independence of the judiciary and of its decisions, and the respect that the legislative and judicial branches of government owe to each other.
>
> 49. However, it is also important to recognise the limitations of these principles. There is no reason why the courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no "questioning" arises in such a case: see para 35 above. Similarly, it is of the essence of the judicial function that the courts should determine issues of law arising from legislation and delegated legislation. Thus, there can be no suggestion of a breach of parliamentary privilege if the courts decide that legislation is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms: by enacting the Human Rights Act 1998, Parliament has expressly authorised the court to determine questions of compatibility, even though a minister may have made a

> declaration under section 19 of his view that the measure in question is compatible."

67. It is important to note the narrow reference to the question whether a decision of the court that legislation is incompatible with the ECHR breaches parliamentary privilege. That said, it may be necessary for a court to have regard to parliamentary material in the context of an ECHR claim to determine whether a breach is proportionate. In *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, Lord Nicholls explained that, in deciding whether the means employed by legislation to achieve a policy objective are appropriate and not disproportionate in their adverse effects, "sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate": see [62]-[63]. He continued that "the court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation is aimed. This may throw light on the rationale underlying the legislation". He then concluded, at [64]:

> "By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand legislation."

68. However, Lord Nicholls was at pains to circumscribe his comments: it is only to the "limited extent" of determining whether legislation was proportionate where "there may be occasion for the courts, when conducting the statutory "compatibility" exercise, to have regards to matters stated in Parliament": see [65]. There is certainly no suggestion that a court should take as authority, or even look to the view of parliamentarians on whether legislation is compatible with the ECHR. Indeed, it is a specific consequence of the Human Rights Act 1998 that it is the responsibility of the court to decide whether legislation is compatible.

69. In any event, a court certainly cannot refer to parliamentary material to question its truth or accuracy: see *Wilson* (*supra*) per Lord Nicholls (at [65]) and *Office of Government Commerce* (*supra*) at [47]. Looking to the view of parliamentarians on whether legislation is compatible with the ECHR will inevitably lead the court into assessing the validity (and accuracy) of these views which is clearly forbidden territory. Thus, notwithstanding the material which Mr Bowen sought to put before the court, I have not referred to the JCHR report or the speeches in the House of Lords in considering my conclusion that s. 76(5A), as part of a broader framework of criminal law, is compatible with Article 2(1).

Conclusion

70. Having regard to the analysis above, I am satisfied that s. 76(5A) of the 2008 Act does not extend the ambit in law of the second limb of self-defence but, properly construed, provides emphasis to the requirement to consider all the circumstances permitting a degree of force to be used on an intruder in householder cases which is reasonable in all the circumstances (whether that degree of force was disproportionate or less than disproportionate). In particular, it does not alter the test to permit, in all circumstances, the use of disproportionate force and, to that extent, the CPS reviewer

adopted the wrong test when reconsidering the facts of this case. Neither does the provision offend Article 2 of the ECHR.

71. In the circumstances, I would dismiss this application for judicial review.

Mr Justice Cranston :

72. I agree. As the President clearly explains, the plain words of s. 76(5A), read in the context of their statutory setting, their legislative purpose and the common law on self-defence mean that in householder cases the force used in self-defence is not unreasonable simply because it is disproportionate – unless, of course, it is grossly disproportionate. The circumstances are likely to be rare, but one can envisage force being used by householders in self-defence which is objectively disproportionate but which is reasonable given what they believed those circumstances to be.

73. It is for the jury to determine the issue and, in paragraph [20], the President provides for judges the direction they should give juries in householder cases to enable them to go about their task. The President also comprehensively sets out why s. 76(5A) is not incompatible with Article 2 of the European Convention on Human Rights. In short, the authorities have long held that reasonableness as a standard in the criminal law will be article 2 compliant.

74. Regarding the compatibility issue I would especially underline what the President says in relation reports of the Joint Select Committee on Human Rights. Quite apart from parliamentary privilege, this material has no role in the court's decision: under standing orders the committee's remit is to advise parliament. Alongside its advice parliamentarians also have the statements of compatibility under s. 19 of the Human Rights Act 1998, given by ministers, but based on the advice of government lawyers backed by the law officers. They may also have the contributions of their colleagues to debates or in other ways, who are experts in human rights law. But none of this has a bearing on the court's quite separate duty in determining the compatibility of legislation with human rights law.