UNDERSTANDING THE 'HOUSEHOLDER DEFENCE' – PROPORTIONALITY AND REASONABILITY IN DEFENSIVE FORCE

In *Collins v Secretary of State* [2016] EWHC 33 (Admin), the High Court refused to declare that Criminal Justice and Immigration Act 2008, s. 76(5A) – the so called 'householder's defence' – was incompatible with the right to life enshrined in Article 2 of the ECHR in that it failed to protect the lives of attackers sufficiently. Section 76(5A) was inserted into the 2008 Act by Crime and Courts Act 2013, s. 43 and came into force in April 2013.

The facts in *Collins* are relatively unimportant since the challenge to the CPS's decision not to prosecute on those facts was dropped. However, in deciding not to prosecute, the CPS proceeded on the basis that under the 'householder defence' provisions, a householder 'would be acquitted of any offence of violence unless the prosecution proved that the degree of force used was grossly disproportionate' and that accordingly, the use of 'merely' disproportionate force would be lawful. In ruling on this application, the High Court was required to consider whether the law was as assumed by the CPS, and independently, whether it was compatible with the right to life enshrined in Article 2 of the ECHR.

The High Court swiftly rejected the CPS's interpretation of section 76(5A). It noted that section 76(3) retains the common law standard for force that is permissible in self-defence, which remains a degree of force that was 'reasonable in the circumstances as the defendant believed them to be'. Accordingly, '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 applicable test, the court said, is not whether the force used was proportionate, disproportionate or grossly disproportionate – it is whether it was reasonable. Section 76(5A), being drafted in the negative, excludes grossly disproportionate force from being reasonable in householder cases, but says nothing about whether force that is not grossly disproportionate is reasonable. That depends on various factors, including the proportionality of the force to the envisaged threat.

Accordingly, it summarised the law relating to the householder defence thus:

> '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.' [para. 33]

A defence is only available if the householder acted reasonably.

The 'headline message' of the law remains unchanged: '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.' The European Court of Human Rights has

consistently found that this reasonableness standard is compatible with Article 2(2)'s requirement of absolute necessity in state actor cases including *Bennett v United Kingdom* (2011) 52 EHRR SE7, *Bubbins v United Kingdom* (2005) 41 EHRR 24, and *McCann v United Kingdom* (1996) 21 EHRR 97. On that basis, the High Court in *Collins* concluded that even as qualified by section 76(5A), the 'the test of reasonableness in the circumstances in private party householder cases… would not… breach… the Article 2(1) positive obligation' by insufficiently protecting the lives of attackers against householders. It therefore declined to grant the declaration of incompatibility sought.

This ruling turns on a distinction between reasonable force on the one hand, and force that is either not disproportionate (in non-householder cases) or not grossly disproportionate (in householder cases) on the other. This distinction is perfectly defensible and flows from statute. However, the manner in which the court illustrated this distinction calls for closer scrutiny.

The main concern is with the example the court used to show that force could be reasonable despite being (in householder cases) disproportionate. It suggested in para. 23 that where a householder could have retreated from a threat but did not, the failure to retreat, and therefore the 'use of force', might be disproportionate, while potentially remaining reasonable. The striking problem with this example is that section 76(5A) relates to the evaluation of the '*degree* of force used' and not to the '*use* of force' alone. This is no mere quibble – the phrase 'degree of force used' is defined in section 76(10)(c) as 'the type and amount of force used'. A failure to retreat has no effect on either the type, or the amount of force used.

Section 76(6A) makes it clear that retreat is a separate factor, independently relevant to the overall reasonableness of the force deployed. It says that the 'possibility that D could have retreated is… a factor to be taken into account... in deciding the question [*of reasonableness*]'. Hence the assertion regarding retreat in para. 23 is either incorrect, or irrelevant to the standard specified in section 76(5A).

These concerns with the court's example are not fatal to the court's ultimate interpretation of section 76(5A), but clearly, a better example is needed. The example would also have to be compatible with the court's assertion in para. 25 that under the scheme of section 76, even proportionate force may be unreasonable. No such example appears in the court's judgement, but it is possible to construct one. Imagine that V is trying to steal bread from D in a public park and D stops V by knocking her unconscious. Assuming that there was no less forceful way to stop V, a jury may nevertheless conclude, having regard to its type and amount, that the degree of force D used was disproportionate (albeit not grossly disproportionate). Since this is not a householder case, section 76(6) would oblige the court to conclude that the degree of force used by D was unreasonable, because it was disproportionate. But what if instead V had entered D's home as a trespasser to steal the bread? This would then be a householder case, and section 76(5A) would apply. Since the degree of force used is not grossly disproportionate, section 76(5A) would not mandate the conclusion that the degree of force used by D was unreasonable. A jury might still conclude that it was unreasonable for D to have used this degree of force, if, say, D had a more parsimonious way to neutralise the threat – he could have pushed V out of the house and shut the door. Equally, it could conclude that D's response was reasonable. We can modify this example to show that a defensive response may be unreasonable even where the degree of force used is not

disproportionate (let alone grossly disproportionate), when a more parsimonious effective option is available.

This example suggests that the overall reasonability of a defensive response depends, in addition to the proportionality concerns addressed in sections 76(5A) and 76(6), on factors like the possibility of retreat (section 76(6A)) and the availability of more parsimonious responses. So, in non-householder cases, when the most parsimonious defensive option is disproportionate to the threat faced, adopting it is unreasonable because of section 76(6). In householder cases, provided that D adopted the most parsimonious response available, her response would not automatically be unreasonable even if the degree of force used was disproportionate to the threat. But even so, as per section 76(5A), it would automatically be unreasonable if this response involved a *grossly* disproportionate degree of force.

This interpretation of the law is compatible with the observation in para. 27 of *Collins* that proportionate force is not necessarily reasonable force. Arguably, it is also compatible with the court's only discussion of parsimoniousness in the use of defensive force:

> '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...' [para. 62]

It is submitted that the phrase 'more than' should be read as qualifying the adjective 'proportionate'. This would be consistent with the court's observation in the very next paragraph that 'the test of reasonableness… in private party householder cases… is shorn of strict proportionality'. It would also offer logical consistency. On this reading, para. 62 says that a response that was more than the proportionate response might, if it was the minimum response available, still be reasonable.

Although there is indirect evidence to support this reading of the judgment in *Collins*, a clearer example emanating from the judgment itself, to show how proportionate force can be unreasonable, and vice versa would have been infinitely preferable. According to some reports, the applicants are considering an appeal against the High Court's ruling. It is hoped that some clarification may then emerge.