THE ANTHONY GRAINGER INQUIRY

FAMILY'S NOTE ON THE LAW ON THE TEST FOR SELF-DEFENCE

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1. For convenience, this note repeats the submissions the family make regarding the test for self-defence at an inquiry, in their closing submissions at paragraphs 12 and 380-411.

2. The family invite the Chairman to apply a flexible standard of proof, including, where he deems it appropriate, initially adopting the civil standard of proof to findings of fact, but indicating where appropriate that he is sure of that finding. This approach was taken by Sir William Gage in the Baha Mousa Inquiry, and has been applied in a number of other inquiries[1]. The Court of Appeal appeared to approve that approach in *R (Keyu) v. Foreign Secretary* [2015] QB 57, at §110-111.

3. It is submitted that the Chairman ought to ask the following questions in respect of the fatal shooting:

   a. At the time he fired, did Q9 believe he needed to use force because he or his colleagues were under imminent threat of being shot by Anthony?

   b. Did Q9 have reasonable grounds for that belief?

   c. Was it reasonable to shoot Anthony in the circumstances as Q9 honestly and reasonably believed them to be?

[1] Ruling on Standard of Proof 7 May 2010, §28; the Litvinenko Inquiry report, Sir Robert Owen, §2.20 and Appendix 1, §122-123; and see the more detailed summary in Beer et al, Public Inquiries.

d. Was the shooting lawful or unlawful?

4. The shooting would be unlawful if, on the civil standard of proof, one or more of questions a, b and c are answered negatively.

5. The reasons why we submit that this is the correct approach are as follows.

Questions (a) and (b)

6. The test for self-defence (which encompasses the defence of another) has two limbs. Essentially, firstly, did Q9 believe there was a threat of imminent attack? Secondly, was Q9's use of force reasonable?

7. As to the first limb, there are two different approaches to self-defence in domestic law. The first is that which is applied in criminal law. The test for that context is set out in s.76 of the Criminal Justice and Immigration Act 2008. In particular:

> "(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.
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> (4) If D claims to have held a particular belief as regards the existence of any circumstances –
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> (a) The reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
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> (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…"

8. The test in civil law is different. In that context, as Lord Neuberger explained in *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962:

> "85 … where a defendant was not actually under the threat of imminent attack, self-defence can only be an answer to a claim in battery if he reasonably, as well as honestly, believed that he was under such a threat."

9. Thus, in civil law, the defendant must have reasonable grounds for his belief. If the defendant has an honest but mistaken belief that there was an imminent threat, and the belief was unreasonable, his defence fails.

10. In *Ashley*, the House of Lords explained why there is a different limb 1 test as between civil law and criminal law. The explanation was that the ends served by the two systems are different. In criminal law, since punitive sanctions may be imposed, the presumption of innocence must apply. The law must ensure a person is not punished for a crime they did not commit, and in that sense criminal law is focused on the defendant. By contrast, in civil law there are no punitive sanctions. The function of civil law is to identify and protect the rights of the rights of every relevant party. It must strike a balance between the defendant's right to act in self-defence, with the claimant's right not to be unjustifiably shot. That is why the test in civil law is less generous to the defendant: *Ashley,* §17-18. See also §3, 53, 76 and 85-88.

11. The reasons set out by the House of Lords in *Ashley* as to why the "honest and reasonable" test should apply in civil law, apply equally, or even more strongly, at an inquiry such as this. The functions of the inquiry are very different to those of the criminal trial. No punitive sanction will be imposed on Q9 as a result of the inquiry. To the contrary, s.2(1) IA 2005 states that the inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability. Q9 faces even less prospect of sanction at an inquiry than within a civil claim.

12. The functions of the inquiry are far closer to the functions of civil proceedings as described in *Ashley*. The inquiry's terms of reference include to inquire generally into the circumstances in which Anthony came by his death and to make such recommendations as may seem appropriate.

This is not, unlike the criminal law, focused on Q9. Its functions are broader, and were described by Lord Bingham in *Amin*[2]*:*

> "to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

13. Maintaining public confidence in the state's monopoly of the use of force is one of the functions of the article 2 inquiry. In order to do so, the bar must not be set too low[3].

14. Thus, the rights of Q9 to defend himself or others must be balanced against the right of the deceased not to be subjected to physical harm by the intentional actions of another, and the wider interests of maintaining public confidence and learning lessons.

15. To achieve that balance, the family submit that the Chairman ought to determine whether Q9's belief was based on reasonable grounds: (for analogous reasons to those given in *Ashley* at §17-18 and §76). If it was not, the chairman ought that question were not answered, that would overlook the interests of the victim (as in *Ashley*, at §86) and the wider public.

16. The approach set out above was adopted by the Chairman of the Azelle Rodney Inquiry. He asked both the limb 1 question raised by criminal law,

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[2] *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, §31

[3] See also *Ramsahai v The Netherlands* [2008] 46 EHRR 43, §325; and *Enukidze and Girgvliani v. Georgia* no. 25091/07, 26 April 2011, §274: "the Court expects States to be all the more stringent when punishing their own law-enforcement officers for the commission of such serious life-endangering crimes than they are with ordinary offenders, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat the sense of impunity the offenders may consider they enjoy by virtue of their very office and to maintain public confidence in and respect for the law-enforcement system…".

and that raised by civil law[4]. His approach was not challenged when E7 applied to judicially review the Chairman's conclusion, nor was any criticism of it made by the Divisional Court[5].

17. The criminal law test is applied at an inquest[6]. But it does not follow from the coronial approach, that this inquiry should overlook the civil law limb 1 test. The reasons why the criminal test applies at an inquest are complex, and include the particular historical development of the conclusion of "unlawful killing" at inquests. This is analysed in detail by the Divisional Court in the *Duggan* case[7]. That complex of reasons does not apply to a public inquiry such as this one. The Chairman of the Azelle Rodney inquiry did not consider he was bound to follow the approach in coronial law (§19.8), and no complaint about that was made by E7 or the Divisional Court.

18. For those reasons the Chairman ought to address question (b), above.

19. In any event, when addressing question (a) above (whether Q9 honestly believed Anthony posed an imminent threat), it is submitted that the Chairman should consider whether Q9 had reasonable grounds for his belief. If Q9 did not have reasonable grounds for his belief, that would be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.[8] As it was put in *R v. Beckford* [1988] AC 130, 144: "Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held". Similarly, in *Da Silva v. United Kingdom* [2016] 63 EHRR 12, the Grand Chamber said that in deciding whether the force was justified:

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[4] §19.10. http://webarchive.nationalarchives.gov.uk/20150406091509/http://azellerodneyinquiry.independent.gov.uk/docs/The_Azelle_Rodney_Inquiry_Report_(web).pdf
[5] *E7 v. Sir Christopher Holland* [2014] EWHC 452 (Admin)
[6] *R (Duggan) v. HM Coroner for North London* [2017] EWCA Civ 142, §82.
[7] [2016] 1 W.L.R. 525, e.g. §37 to 47.
[8] *Da Silva v. United Kingdom* [2016] 63 E.H.R.R. 12, §248; *R v. Williams (Gladstone)* (1984) 78 Cr. App. R. 276; 281. S.76(4)(b)(ii) Criminal Justice and Immigration Act 2008.

> "the Court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, it was not based on subjective good reasons), it is likely that the Court would have difficulty accepting that it was honestly and genuinely held." §248. See also §244, 246, 251-256, which indicate that the domestic investigation should take this approach.

20. It is important to consider this factor because the honesty of Q9's belief and its reasonableness are at issue.

21. In question (a) we have used the words "that he or his colleagues were under threat of imminently being shot by Anthony" instead of the words used by Lord Neuberger in *Ashley:* "that he or his colleagues were under threat of imminent attack".

22. That is firstly because at the time he was shot, Anthony could only have posed an imminent threat of serious harm if he had a firearm. He was confined in the red Audi, with the door closed, boxed in.

23. The possibility that he might pick up a knife or baseball bat did not, while he was sitting in the driver's seat with the door closed, justify shooting him. If he picked up a baseball bat or knife, Q9 could have reacted to that threat. There would be time to assess whether shooting was justified in those circumstances, depending on who was close to Anthony. But the mere possibility that he might do that was insufficient to justify lethal force.

24. Nor did Anthony pose a threat by using his car to ram the police cars that justified him being shot. Of course, a car can kill, and if Anthony were driving towards an officer, at speed, who had nowhere to escape, that may justify lethal force. But that was not the situation here. Anthony could not drive forwards, as his car was touching the alpha car. No officers were behind the red Audi. Anthony might, theoretically, have reversed, before then putting the red Audi in first gear and driving forward to ram a police

car. But he could only reverse about 4-5 feet, and so would not have been able to get up enough speed to cause serious harm to the police cars.

25. More importantly, the fatal shooting was not justified by the possibility that Anthony might do that. If Anthony had begun to reverse, Q9 could have assessed whether shooting him was justified in the circumstances as they pertained at the time. The Hatton gun was intended to be used to disable the red Audi, and that may well have occurred before Anthony had been able to reverse into a position where he could cause a threat. But since Anthony had not even begun to reverse, the mere possibility that he might do so did not justify him being shot.

26. Indeed, Q9 did not attempt to justify killing Anthony on the basis that Anthony posed a risk of using some other type of weapon, or by the possibility that Anthony might use his car to ram police cars. Q9 justified shooting Anthony squarely on the basis that he believed Anthony was grabbing a firearm which he was going to use to shoot a police officer, and there was no other option but to shoot Anthony[9]. The question for the Chairman is whether Q9 did honestly believe that, on reasonable grounds. This is why question (a) is phrased in the way it is.

27. In *R v. Williams (Gladstone)* Lord Lane CJ suggested that if the jury in a criminal trial concluded "that the defendant believed, *or may have believed*, that he was being attacked" the prosecution fails. That is correct in a criminal trial because the prosecution must disprove self-defence beyond reasonable doubt. But at this inquiry, where the Chairman is primarily considering whether the shooting was unlawful on the civil standard (the balance of probabilities), the shooting is not lawful if Q9 merely *may have believed* he was being attacked. The Chairman would have to conclude that, on the balance of probabilities, Q9 did believe he or his colleagues were being attacked.

[9] See, e.g. 6 April/99, lines 1-5

Question (c)

28. As to the second limb of the test for self-defence, in domestic law, the ordinary question is whether the force was reasonable in the circumstances that the defendant honestly (in criminal law) or honestly and reasonably (in civil law) believed them to be.

29. However, in this case, if the force was not absolutely necessary, then it would not have been reasonable. The Manual states that firearms officers may only shoot when it is absolutely necessary to do so[10]. The AFOs were essentially briefed on 3 March 2012 that lethal force would be unlawful unless absolutely necessary[11]. If an AFO used lethal force when it was not absolutely necessary, then that would be contrary to briefing, training and policy, which implies that it was not reasonable. Moreover, Q9 said that if he had not judged it necessary to discharge the round, he would not have done it[12]. "Necessary" and "absolutely necessary" appear to mean the same thing: there was no alternative.

30. Lethal force is contrary to article 2 unless it is absolutely necessary. The article 2 procedural duty requires the investigator (here the Chairman) to apply a standard which is not materially different to the "absolutely necessary" test. That can be seen from the reasoning in the *Bennett* cases. In *Bennett v. United Kingdom* [2011] 52 EHRR SE7 the ECHR considered an inquest in which the specific direction to the jury on the law, regarding limb 2 of the self defence test, used the words 'absolute necessity' rather than 'reasonable'. The ECHR noted that the Coroner had devoted some time in evidence and in her summing up to the jury, explaining that officers are trained not to use lethal force unless it is absolutely necessary to do so[13]. In that context, the Court held that there was no material difference between the domestic 'reasonableness' test and the 'absolute necessity' test in its application to the particular case at issue. It was for

[10] For example [P&P/384] §§1.24-1.25, 1.30-1.31, §7.97; and see Mr Arundale, 27 April/129
[11] C/345-346
[12] 6 April/210/17-19
[13] *Bennett v. United Kingdom* §72-74.

this reason that the inquest was compatible with the article 2 procedural duty. It is implicit that if there is some material difference between the domestic standard and that of absolute necessity, then to apply the former would be incompatible with the procedural duty. The same conclusion is implicit in the finding in *Da Silva* (in the passages noted above).

31. Similarly, the High Court rejected a submission that the coroner's specific direction to the jury on the law should have used the words "absolute necessity" rather than "reasonable", on the basis that, in that case: "to kill when it is not absolutely necessary to do so is surely to act unreasonably"[14].

32. This indicates that the Chairman here should consider whether the lethal force was absolutely necessary. If the force was not, then it was not reasonable or lawful.

Question (d)

33. If the Chairman answers 'no' to questions (a) and/or (b), then the family submit that he ought to find that Mr Grainger's shooting was unlawful. If question (a) is answered in the affirmative, but (b) in the negative, such that Q9 probably had an honest but unreasonable belief that he was under imminent threat, then the force was unlawful. That ought to be recorded. That is consistent with the fact that the inquiry cannot impose any punishment on Q9, is inquisitorial, and involves a balance between the rights of the police with those of the victim and the public.

34. If both questions (a) and (b) are answered affirmatively, but question (c) negatively, such that it was probably not absolutely necessary and reasonable for Q9 to fire, then the shooting was unlawful.

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17 May 2017

[14] See Court of Appeal's judgment, *R (Bennett) v. HM Coroner* [2007] EWCA Civ 617, §3, 9 and 14-15.

LIST OF KEY AUTHORITIES

1. Criminal Justice and Immigration Act 2008, s.76
2. *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962
3. *Bennett v. United Kingdom* [2011] 52 EHRR SE7
4. *E7 v. Sir Christopher Holland* [2014] EWHC 452 (Admin)
5. *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, §31
6. *R (Duggan) v. HM Coroner for North London* [2017] EWCA Civ 142, §82
7. Report of Azelle Rodney Inquiry, excerpt