SUMMARIES AND EXTRACTS

I. The European Court of Human Rights

BENNETT v UNITED KINGDOM

(Inquests into police shooting; effectiveness of investigation)

Application No.5527/08

December 7, 2010

(2011) 52 E.H.R.R. SE7

ADMISSIBILITY DECISION

THE FACTS

1 The applicant, Mr Ernest Bennett, is a British national who was born in1938 and lives in London. He is represented before the Court by Mr I. Khan, a lawyer practising in London.

2 The application concerns the shooting by a police officer of the applicant's son, Derek Bennett (Mr Bennett), born in 1971.

I. The circumstances of the case

3 The facts of the case, as submitted by the applicant, may be summarised as follows.

A. Mr Bennett's death

4 Mr Bennett lived with his parents in Brixton. He had mental-health problems and in early July 2001 there was some question of his being admitted (possibly even voluntarily) for treatment to a psychiatric institution. On July 16, 2001, at approximately 15.23, Mr Bennett was shot dead on the first-floor walkway of a block of residential flats in Brixton, London, in the following circumstances.

5 On that day two police officers, officers A and B, received a message from a member of the public about a heavily-built black man, with dreadlocks and dark clothes, carrying a handgun in the area. They immediately headed for the area.

6 They saw Mr Bennett from their vehicle as he was walking away from them and up a pedestrian ramp to the flats. He matched the description they had been given. They got out of their vehicle and followed him up the ramp to the first floor walkway, where officer B shouted in a very loud voice: "Stop, armed police." Initially, Mr Bennett carried on walking. Officer B repeated his challenge more loudly and Mr Bennett stopped and turned towards the officers. Officer B again shouted at him to show him his hands. Mr Bennett took hold of a man who was

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passing by, held him around the neck and pointed what appeared to be a firearm at his neck.

7 Officer A drew his firearm. At this point Mr Bennett pushed the passer-by aside or the man escaped (this was not clarified in the domestic proceedings). Officer A said in evidence later that he was afraid Mr Bennett had discarded the man in order to shoot him and said:

> "I thought my life was in imminent danger. I shot twice because he was moving so violently I could not be confident that I would have hit him with the first shot … he was moving so fast … I felt it was absolutely necessary to stop him there."

Mr Bennett ran away but did not drop his firearm and went behind a pillar, from which officer A described him as looking out in a crouched position. Officer A shot again and his evidence was that he feared again that he would himself be shot. Mr Bennett then turned and ran again this time into the recess of a nearby doorway. Officer A's evidence was that he approached Mr Bennett from round a pillar and saw Mr Bennett moving frantically at the doorway and he feared he was trying to gain entry and he believed Mr Bennett had not dropped his firearm. Officer A's evidence was that he saw Mr Bennett's arms come round to chest height and he feared Mr Bennett was going to shoot and officer A fired again. It was then that an object fell from Mr Bennett's hand. It was, in fact, a cigarette lighter shaped like a gun. Mr Bennett collapsed. An ambulance was called while officer B gave first aid. Mr Bennett was taken to hospital where he was pronounced dead at 16.26.

8 In sum, officer A fired at Derek Bennett on three separate occasions: he discharged a total of six rounds, four of which hit Mr Bennett in the back and side (one of which was fatal) and two of which missed him. It was later found to be impossible to say in which order the shots had been fired—namely, when the fatal shot was fired in the sequence of shots. In all, 30 seconds separated the sighting of Mr Bennett and the firing of the shots.

9 A post-mortem was conducted on July 18, 2001 and Mr Bennett was found to have four firearms wounds to the back of the chest.

10 Following the shooting, the police referred the matter under s.71 of the Police Act 1996 (as amended) to the Police Complaints Authority (PCA, the forerunner to the Independent Police Complaints Commission (IPCC)). An initial investigating officer was appointed to complete immediate policing and investigative matters including securing evidence at the scene. Once Northumbria Police were appointed by the PCA to investigate, the PCA approved the appointment of a senior investigating office (SIO) from that police force to investigate, inter alia, the circumstances of the fatal shooting as well as other matters such as the notification of the deceased family after the shooting and a leak to the press. Extensive enquiries were made including approximately 350 statements, over 50 material exhibits and three substantial expert reports by independent police and firearms experts, all of which was analysed in the SIO's *Report on the Investigation*. This evidence and the SIO's report were submitted to the inquest.

B. The inquest

11 The inquest into Mr Bennett's death was heard over 13 days, concluding on December 2, 2004. The coroner heard evidence, inter alia, from officers A and B,

Superintendent Plowright (from the same unit as officers A and B, who had debriefed those officers approximately one hour after the shooting), PC Brooks (who had come on the scene after the shooting but who made notes 16 days later), the pathologist as well as several ballistics and firearms experts.

12 Following lengthy submissions from representatives and almost all of the evidence having been concluded, the coroner gave a written ruling on December 8, 2004 giving reasons for her decision that a verdict of "unlawful killing" would not be left to the jury, but leaving to the jury the verdicts of "lawful killing" and an "open verdict".

13 In the course of that ruling the coroner recalled this Court's judgment in the *Jordan* case to the effect that an inquest could discharge a state's investigative obligation under art.2 of the Convention (*Jordan v United Kingdom* (2003) 37 E.H.R.R. 2 (extracts)). She observed that the safeguards of art.6 were not in place at an inquest, that evidence before her might not be admissible in a criminal trial and that this produced unfairness in leaving to a jury a verdict of unlawful killing: unfairness for the deceased's family if a prosecution did not follow and unfairness for the individual against whom the verdict was given. In paras 43–44 of her ruling she continued:

> "43. All this leads to what in my view may be seen as a most unsatisfactory situation. A jury carrying out a relatively broad inquiry are required to carve out a part of the evidence and make a determination on criminal liability. That is extremely difficult for them and can lead to unfairness for all concerned.
> 44. In the past, a Coroner would not have been able to put such considerations into the balance when deciding on verdicts … . Since the case of [inter alia, *R. (on the application of Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; [2004] 2 A.C. 182], that situation has changed. As a result, if I was of the view that it was a borderline case, I would be able to take all these matters into account in deciding whether the conclusion should go to a jury. This might be called a 'good sense' approach, but I prefer to call it a balancing exercise."

14 The coroner's ruling went on to examine whether there was sufficient evidence to leave the option of an unlawful killing verdict to the jury. As regards the evidence from PC Brooks, the coroner noted:

> "58. PC Brooks was an 8019 colleague of Officer A who arrived on the walkway shortly after the shooting. In a statement made about a fortnight later he recalls Officer A saying 'he grabbed a member of the public and held a gun to his throat, I've shot him as he's run away'. Officer A said he could not recall this. … In my view, even if [officer] A spoke these words, it does not necessarily contradict his account, and cannot amount to evidence that he deliberately fired at Mr Bennett whilst he was running away. The comment was not contemporaneously recorded or shown to Officer A. It is not set in context of any kind, and it might well be ruled as inadmissible in any criminal trial. This of course is not a criminal trial, but the jury ought not to be asked to consider a verdict of unlawful killing based only on evidence that would not be admissible in such a trial."

15 The coroner's ruling concluded that:

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> "I am in no doubt that there was insufficient evidence to invite the jury to consider a verdict of unlawful killing. If I had decided that the case was borderline, then I may well have exercised my discretion to withhold it from the jury, because of the difficulties that I have outlined above. I must stress however that the evidence does not reach the threshold, and I therefore have no discretion to exercise."

16 The coroner ruled therefore that she had therefore decided to leave to the jury an open verdict and a lawful killing verdict.

17 At the beginning of her summing up to the jury, the coroner noted:

> "Well, this is not a case of homicide or suicide or natural causes or industrial disease, and I am only going to offer one substantive conclusion for you to consider. But I should tell you, you do not have to follow any suggestion that I make; you can use any form of words you wish, although it should be relatively brief in paragraph 4 [of the inquisition form] and not judgmental. The conclusion that is available to you on the evidence in this case is one of lawful killing. This has a special meaning in the [inquest], and so, in order to help you, I have prepared a handout setting out the relevant law."

18 The handout was given to the jury and, insofar as material, it reads:

> "A lawful killing occurs if the evidence shows that it is probable (that is, more likely than not) that the deceased died by the deliberate application of force against him and that the person causing the injuries used reasonable force in self-defence or defence of another, or to prevent a crime or to assist in the lawful arrest, even if that force was by its nature or the manner of its application likely to be fatal."

19 The coroner went on to direct the jury on what was involved in self-defence and defence of another. In so doing, she responded to the applicant's counsel that:

> "We are not concerned with whether this death was in breach of Article 2. That is not my role or the jury's. The jury are concerned to know whether this killing was a lawful killing. That is the direction we are looking at. Whether it might have been in breach of Article 2 or not is another matter entirely."

20 In determining whether it was self-defence or defence of another, the coroner held that the first question was whether the individual believed, or may have honestly believed, that it was necessary to defend himself or another, having regard to the circumstances which he honestly believed to exist (subjective test), although the reasonableness (objective) of the belief was somewhat relevant because, if the belief on the facts was unreasonable, it might be difficult to decide that it was honestly held. The second question, which arose if the first question was answered favourably to the individual, was whether the force used was reasonable having regard to the circumstances which were believed to exist (objective test). The High Court and Court of Appeal later found this direction to be consistent with English law.

21 The coroner continued as follows:

> "If you decide that there is insufficient evidence to return a substantive conclusion, then you may return an open conclusion. The definition of this

> conclusion means that the evidence does not further or fully disclose the means whereby the cause of death arose. In other words, there is not sufficient evidence for you to return any substantive conclusion.
> As you can appreciate, an open verdict is an unsatisfactory outcome of any Inquest, particularly one of this length, so only use this conclusion if you genuinely find that the evidence is insufficient to record a substantive verdict. In such a situation that is a failure of the evidence, not of yours, but do not use an open verdict because you cannot establish a peripheral point about the death, related perhaps to precise timings or positions. Do not use an open verdict because you disagree amongst yourselves. You must all agree on your verdict. And most especially, do not use an open verdict as a mark of censure or disapproval. Your duty, as I say, is to find the facts and a conclusion from the evidence, and this must transcend any feelings that you have in the matter."

22 In the absence of the jury, the coroner later addressed the parties:

> "Did anyone have any more thoughts about what I think I am going to have to say to [the jury]? Much as none of us want to see an open verdict, I think I am obliged to tell them that, so I have put here:
>
> > 'If you felt that A was acting in self-defence in relation to some of the shots but not all, you would have to record an open verdict.'"

23 Accordingly, during the coroner's later summing up, she noted:

> "Members of the jury, when applying the law on lawful killing in self-defence, you need to bear in mind that only one of these shots was the fatal shot, the second one that I have described. There is no evidence, sadly, as to the order of the shots, because, even once the fatal wound was inflicted, he could have been moving quite vigorously for a matter of minutes. That means that, if you decide that Officer A was acting in self-defence for some of the shots and not others, you would have to return an open verdict."

24 Several days of the inquest were spent on evidence of officer A's training and that training as well as the *Association of Chief Police Officers (ACPO) Manual* were referred to at length in the coroner's summing up.

25 At the end of the summing-up to the jury, the coroner discussed the verdict options: she did not explicitly refer to the "open verdict" option, but referred to the "lawful verdict" as the only "substantive" option open:

> "The conclusion, as I said, is a brief summary of the death in a few words [that is a direction of how the jury should fill in the inquisition form], and there is only one substantive conclusion that I consider is available to you on the evidence. Nevertheless, subject to what I am about to say, no precise form of words are required so long as they are brief and non-judgmental. You may use you own words ….
> I have told you that I can offer only one substantive conclusion to you, that of lawful killing. That has a special meaning in the Coroner's Court, and that is why I have given you a handout to explain that meaning [the handout detailing the approach on self-defence]. I have deliberately not given you

> guidance about a conclusion of unlawful killing. That is because I have ruled, as a matter of law, that unlawful killing is a conclusion that is not available to you."

26 On December 14, 2004 the jury retired to consider their verdict. That afternoon the jury put a question to the coroner (as to whether they had to examine self-defence at any point or throughout the entire incident). The coroner clarified:

> "Of course, question 1, on the balance of probability, did the person who caused the death believe or may he honestly have believed that it was necessary to defend himself or another. The answer is: it is throughout the entirety of the incident. And the reason for that is because we do not know which shot was the fatal shot. We do not know the order in which these shots were inflicted.
>
> You may remember I said to you yesterday: if you felt that Officer A was acting in self-defence for some of the shots but not all, you would have to record an open verdict, and that is because, as I say, we have this difficulty, we do not know which was the fatal shot. So, in order to return a verdict of lawful killing, you must be satisfied, on the balance of probability, that Officer A was acting in self-defence throughout the entirety of the incident."

27 The jury retired and the next morning returned, by a majority (nine to two), a verdict of lawful killing. The inquisition form noted as follows as regards the, "time, place and circumstances at or in which the injury was sustained":

> "The time was 15.23pm. The place was Western Balcony, Marston House, Angell Town Estate, Brixton London. The circumstances: The deceased, [Mr] Bennett, was shot by an armed policeman who acted on information concerning a male suspect carrying a firearm when challenged by the police [Mr] Bennett used what is now known to be an imitation firearm to threaten a hostage resulting in shots being fired, one of which caused the death of Derek Bennett."

C. Judicial review proceedings

1. The High Court

28 Leave to apply for judicial review was granted to the applicant on two points: whether the coroner's direction on self-defence was adequate given art.2 of the Convention since it referred to "reasonableness" and not "absolute necessity" and whether the coroner had correctly applied the test laid down in *R. v Galbraith* [1981] 1 W.L.R. 1039; [1981] 2 All E.R. 1060 in refusing to leave the "unlawful killing" verdict to the jury. On February 3, 2006 the High Court gave judgment dismissing the applicant's claim.

29 As to the direction on self-defence, the High Court noted the two-limb definition of self-defence or defence of another given by the coroner and accepted it as a correct direction under English law. The High Court noted the approval of this test by the European Court (*McCann v United Kingdom* (1996) 21 E.H.R.R. 97 at [134]–[200]; and *Bubbins v United Kingdom* (2005) 41 E.H.R.R. 24 at [138]–[140] (extracts)) and further that the *ACPO Manual*, before the jury, had been drafted to reflect art.2 and obliged police officers to use firearms only if "absolutely necessary" so that a trained officer had to bear this in mind at all times when engaged in

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activities which might necessitate the use of firearms. It was clear to the High Court that the European Court had considered the domestic definition of self-defence and had not suggested that there was any incompatibility with art.2. The High Court continued:

> "In truth, if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably. Thus, the reasonableness test does not in truth differ from the Article 2 test as applied in *McCann*. There is no support for the submission that the court has, with hindsight, to decide whether there was in fact absolute necessity. That would be to ignore reality and to produce what the Court in *McCann* indicated was an inappropriate fetter upon the actions of the police which would be detrimental not only to their own lives but to the lives of others. …
> Accordingly, I reject the submission that the Convention requires that a different test be applied in the case of state agents such as police officers to that applicable in general to the issue of self-defence."

30 As to the second issue, the applicant argued that a verdict of unlawful killing should have been left to the jury given several pieces of evidence which, taken together, were capable of causing the jury to disbelieve officer A's account that Mr Bennett was facing towards him on each of the three separate occasions when officer A fired. The applicant referred, inter alia, to the forensic evidence, evidence by the pathologist and ballistics expert; to the testimony of PC Brooks; and to the evidence of Chief Superintendent Plowright (who testified that officer A told him that Mr Bennett "turned and ran away" and that officer A then advanced to a position, "past or adjacent to [the passer-by], stopped and fired two shots, I think"). Officers A and B and the Commissioner of Police of the Metropolis relied, inter alia, on the opinion evidence of the Special Advisor to the ACPO to the effect that in any firearms training, there were often bullet marks at the back of targets.

31 The High Court noted that the jury would have had to have been satisfied to the criminal standard of proof that officer A did not act in self-defence or in defence of another in order to prevent crime to return a verdict of unlawful killing. It remarked that, while inquests were not to identify individual responsibility, in cases concerning a lethal shooting by a police officer, an inquest jury verdict of unlawful killing was unhelpfully reported as a finding of responsibility for murder. The High Court noted that it:

> "[W]as bound to say that I seriously wonder whether the time has not come to abolish the verdict of unlawful killing altogether."

32 It went on to note, inter alia, the criteria laid down for deciding if a verdict of unlawful killing should be left to an inquest jury (*R. v Gallbraith* and *R. v HM Coroner for Inner London South District Ex p. Douglas-Williams* [1999] 1 All E.R. 344). It examined whether there was sufficient evidence which could justify a verdict of unlawful killing and accepted that there was some evidence to support the contention that Mr Bennett had been shot in the back. The High Court found the coroner was wrong in suggesting that the jury were determining criminal liability and noted:

> "That, in my judgment, was wrong. The Coroner is concerned, and concerned only, with the verdict in the inquest before her. The Coroner is not concerned to consider whether a criminal conviction might ensue, or indeed whether the verdict of the Coroner's jury was akin to a verdict showing criminal liability. It is, as I have said, an unsatisfactory feature of the system that we operate that there should be scope for the difference in the verdicts, because it may seem to the lay person that the Coroner's verdict is indeed establishing criminal liability. It is not. It is merely indicating that, in the view of the jury on the material put before them at the inquest, the death of the deceased has resulted from an unlawful killing. Whether anyone in the circumstances should be prosecuted in respect of that is a matter not for the jury. The use of such a verdict as an equivalent to a committal for trial and a trial resulting from it has long since been abolished, and it should not be regarded as such. Accordingly, the Coroner was referring to matters which were not material to the consideration whether a jury should have left to them the opportunity of reaching a verdict of unlawful killing."

33 Since the coroner found that it was not a borderline case, she had not taken those erroneous considerations into account.

34 The High Court itself considered that it was indeed a borderline case: although the coroner excluded consideration of PC Brooks' evidence as it would be inadmissible in a criminal trial, the High Court considered PC Brooks' evidence as being relevant to and admissible for the inquest regardless of its admissibility or use in any later criminal proceedings. In assessing therefore, with PC Brooks' evidence, the evidentiary basis for any jury verdict of unlawful killing, the High Court reiterated that, if the jury were to return a verdict of unlawful killing, it would have had to be sure beyond reasonable doubt that for each shot the officer did not honestly believe that his life was being threatened or that he reacted unreasonably to the threat he perceived. The High Court found that the evidence of this could "properly be described as tenuous" so that a verdict of unlawful killing would properly be regarded as one which was unsafe and, thus, was not an option to be left to the jury.

35 The High Court went further: even if a verdict of unlawful killing had been left to the jury, it was impossible that the jury would have adopted that conclusion. The judge rejected the applicant's submission that the coroner, in directing the jury as she did, did not in reality leave any alternative to the "lawful killing" verdict. The High Court examined the coroner's directions and, although criticising those in some respects, found that:

> "It seems to me that that direction could not possibly have left any doubt in the jury's minds as to what they were obliged to do. If, but only if, they were persuaded, on the balance of probabilities, that throughout the incident when he fired all the shots, Officer A was acting in self-defence, could they bring in a verdict of lawful killing. If they were not so satisfied, then the only verdict that would have been proper for them to bring in was an open verdict."

36 In those circumstances, it was clear to the High Court that the jury was simply not persuaded, on the balance of probabilities, that this was anything other than a lawful killing. It was therefore quite impossible to believe that the jury could have been persuaded that it was clear beyond any reasonable doubt that this was an

unlawful killing. It was simply logically impossible. Thus, the jury's verdict, having regard to the manner in which they were directed, showed that they rejected the suggestion that officer A had killed the deceased unlawfully. Accordingly, the High Court found that, even if the coroner had erred in not leaving unlawful killing to the jury (which the High Court did not accept, see [32] above), no purpose would have been served by quashing the verdict or by sending the case back for reconsideration since the inquest jury had, by implication, clearly rejected the unlawful killing option.

2. The Court of Appeal

37 On December 14, 2006 a single judge of the Court of Appeal granted leave to appeal to the Court of Appeal on the question of whether the coroner ought to have left an unlawful killing verdict to the jury. On May 22, 2007 a hearing took place before the full Court of Appeal (Waller, Keene and Dyson L.JJ.). On June 26, 2007 judgment was handed down by Waller L.J. dismissing the applicant's appeal (the other two judges concurred).

38 As to the argument that the coroner was wrong in not incorporating the language of art.2 ("absolutely necessity") into the direction on self-defence, the Court of Appeal noted that the applicant did not challenge the correctness of the Strasbourg jurisprudence (that the existing test under English law was art.2 compliant) nor the High Court's analysis of that Convention jurisprudence. Rather the applicant argued that, since the current *ACPO Manual* used the language "absolutely necessary", it was a misdirection not to direct the jury to consider whether officer A's claim to have acted in self defence was reasonable in the light of the requirement continually to reassess whether "it was absolutely necessary" to fire.

39 The Court of Appeal found:

> "This argument is not in reality an Article 2 argument at all. It is not because Article 2 uses the language 'absolutely necessary' that there might be some requirement to draw the jury's attention to what is stated in the ACPO manual. If the standard direction relating to self defence complies with Article 2 as it does … Article 2 cannot at the same time require a different use of language. However as to whether a police officer honestly believed a particular state of facts and as to whether he acted reasonably by reference to the facts as he honestly believed them to be, the fact the officer was trained and understood the ACPO manual would be material.
>
> But the short answer to the criticism made of the Coroner in this regard is that many days were spent on the evidence as to the training Officers A and B had had, and the training and ACPO manual were referred to at length in the Coroner's summing up. The jury cannot have been under any illusion as to the context in which they were considering the questions put to them. Furthermore, hardly surprisingly, no point was taken by [the applicant] either when shown the written direction that Coroner proposed to give on self defence or after the summing up had been completed, that some further direction should be given by reference to the ACPO manual or the training given."

40 As to whether, even if unlawful killing might have been left to the jury, that was a verdict which they could ever have adopted and the applicant's related submission that the coroner's directions essentially "bulldozed" the jury into a lawful killing

verdict, the Court of Appeal again reviewed the ruling and directions of the coroner as well as the findings of the High Court and concluded:

> "The jury must have been quite clear as to what they were obliged to do. Ultimately they … brought in a verdict of lawful killing i.e. they were satisfied on a balance of probabilities that throughout the incident, when firing each shot, Officer A honestly believed his life or that of a third party was threatened, and that his reaction was reasonable in the situation he honestly believed to exist.
> I agree with the [High Court] that that being the jury's view, it is quite impossible to conceive that the jury could have been persuaded, if a verdict of unlawful killing had also been left to them, that it was clear beyond reasonable doubt that in relation to each shot Officer A in fact did not believe he or a third party was threatened, or that he acted unreasonably to the threat he believed to exist."

41 While that conclusion meant that the argument about failing to leave the "unlawful killing" verdict to the jury was moot, the Court of Appeal went on to consider the "*Galbraith* point" since it was the issue on which leave to appeal had been granted. Noting the abovecited *Galbraith* judgment as well as that of Leveson J. in *R. (on the application of Sharman) v HM Coroner for Inner North London* [2005] EWHC 857 (Admin); [2005] A.C.D. 96, the Court of Appeal indicated that the essence of what Lord Woolf was saying in *Galbraith* was that coroners should approach their decision as to what verdicts to leave on the basis that the facts are for the jury, but that they were entitled to consider the question whether it was safe to leave a particular verdict on the evidence to the jury namely, to consider whether a verdict, if reached, would be perverse or unsafe and to refuse to leave such a verdict to the jury.

42 The Court of Appeal therefore agreed with the High Court that the question was an evidential one and that certain considerations (whether an inquest was a satisfactory form of process in identifying whether criminal conduct had taken place or whether evidence might or might not have been admissible at a criminal trial) were irrelevant. The Court of Appeal reviewed the evidence heard by the coroner and agreed with the High Court that:

> "[A]ny suggestion that Officer A was not giving truthful evidence in describing his fear for his own safety had support of only the most tenuous nature."

The coroner was right to consider that a verdict of unlawful killing could not have been safely left to the jury.

43 The Court of Appeal also noted certain "incontrovertible points" supporting that conclusion. Only 30 seconds separated the sighting of the Mr Bennett and the shots; the experts on both sides explained how the entry wounds could be in the back or side even if Mr Bennett was facing officer A when he fired; all shots were fired while Mr Bennett had what was honestly thought to be a gun; Mr Bennett had held what was thought to be a gun to the neck of a passer-by; Mr Bennett had given no indication that he was not intending to use what was thought to be a gun; and, if a verdict of unlawful killing were to be brought in, the jury would have had to be satisfied beyond reasonable doubt in relation to each shot that officer A had not honestly believed he was under threat or that officer A had reacted unreasonably to that honestly held view. It concluded that to:

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"[B]ring in a verdict of unlawful killing would have been perverse, and the reality is that the jury's actual verdict confirms that view."

D. *Other proceedings*

44 The SIO evidence and *Report on the Investigation* were also submitted to the Crown Prosecution Service (CPS) who, by letter dated March 25, 2003, explained in some detail why there was insufficient evidence for a realistic prospect of conviction against any person. Following the rejection of the judicial review proceedings, the CPS confirmed that it would not be changing its decision not to prosecute.

45 Having reviewed this evidence and report in the context of police disciplinary proceedings, the PCA indicated by letter dated January 6, 2003 that it was satisfied with the conduct of that investigation. By letter dated March 23, 2005, the Directorate of Professional Standards of the Police Complaints Commission (which replaced the PCA) recommended that neither of the officers should face misconduct hearings (although the officers involved in the shooting were to receive advice about the use of computerised checks of the police national computer). By letter dated July 2, 2007 the IPCC accepted that recommendation.

46 In July 2004 the family of Mr Bennett (including the applicant) brought civil proceedings for damages in a county court arguing that the police had acted negligently in shooting Mr Bennett. On March 25, 2009 the parties agreed to discontinue those proceedings, although it is not known whether this was on the basis of a settlement.

II. Relevant domestic law and practice

A. *Inquests*

47 Section 8(1) of the Coroners Act 1988 (the 1988 Act) requires a coroner to hold an inquest in circumstances where there are grounds to suspect that the person: (a) has died a violent or an unnatural death; or (b) has died a sudden death of which the cause is unknown.

48 As to the scope of an inquest, s.11(5)(b) of the 1988 Act outlines the content of the inquisition form (a document completed by the inquest jury at the end of the evidence). It must set out, so far as such particulars have been proved: (i) who the deceased was; and (ii) how, when and where the deceased came by his death. Rule 36 of the Coroners Rules 1984 requires that proceedings be directed solely to ascertaining: (a) who the deceased was; (b) how when and where he came by his death; and (c) the particulars required by the Registration Act to be registered concerning the death, r.36(2) specifically noting that neither the coroner nor the jury shall express any opinions on any other matters.

49 Rule 42 provides that no verdict shall appear to determine any question of criminal or civil liability on the part of a named person. Accordingly, inquests in England are able to return verdicts of unlawful killing (without publicly naming the person responsible) because such a conclusion describes the immediate and operative cause of death.

50 Domestic case law has consistently emphasised that an inquest is an inquisitorial fact-finding exercise and not a method of apportioning guilt. Bingham L.J. declared

in *R. v HM Coroner for North Humberside and Scunthorpe Ex p. Jamieson* [1995] Q.B. 1; [1994] 3 W.L.R. 82:

> "It is not the function of a coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. This principle is expressed in Rule 42 of the 1984 Rules."

B. Verdicts available to an inquest jury

51 The test for leaving a verdict of unlawful killing to a jury was laid down in *R. v Galbraith* and applied to an inquest jury in *R. v HM Coroner for Inner London South District Ex p. Douglas-Williams* [1999] 1 All E.R. 344. The relevant part of *Galbraith* reads as follows:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury … There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

52 In the *Douglas-Williams* case, Lord Woolf C.J. decided that that test was appropriate for a coroner and clarified the extent of the discretion of a coroner not to leave to the jury what is, on the evidence, a possible verdict:

> "There is no prosecutor in relation to an inquest and while an inquest is a court, the Coroner's role is more inquisitorial, even when sitting with a jury than that of a judge. A prosecutor has a considerable discretion as to what charges he prefers and the trial takes place on those charges. There are no charges at an inquest and a Coroner must decide the scope of inquiry which is appropriate and the witnesses to be summoned. He therefore must at least indirectly have a greater say as to what verdict the jury should consider than a judge at an adversarial trial … The strength of the evidence is not the only consideration and in relation to wider issues the Coroner has a broader discretion. If it appears there are circumstances which in a particular situation mean in the judgment of the Coroner, acting reasonably and fairly, it is not in the interest of justice that a particular verdict should be left to the jury he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence

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as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the Coroner's conclusion he can not be criticised if he does not leave a particular verdict."

C. Judicial review of inquests

53 There is no right of appeal from an inquest and the High Court's role is limited to review: this may be by way of judicial review or statutory review (ss.13(1) and (2) of the 1988 Act). This statutory right applies where, on an application by or under the authority of the Attorney General, the High Court is satisfied as respects a coroner either:

> "(a) [T]hat he refuses or neglects to hold an inquest which ought to be held; or
> (b) where an inquest has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts of evidence or otherwise) it is necessary or desirable in the interests of justice that another inquest should be held.
> The High Court may –
> order an inquest or, as the case may be, another inquest to be held into the death."

54 The abovecited language of Lord Woolf in *Galbraith* was quoted by Leveson J. (High Court) in a case also concerning the killing of a man by police officers in the mistaken belief that he was armed (*R. (on the application of Sharman) v HM Coroner for Inner North London* [2005] EWHC 857 (Admin); [2005] A.C.D. 96). An inquest into the death took place in 2002. The verdict of that inquest was quashed by the High Court in April 2003. There was a second inquest before a different coroner in October 2004, which resulted in a verdict of unlawful killing. Leveson J. quashed the verdict: the coroner should not have left the verdict of unlawful killing to the jury and his summing up on that central issue had been inadequate. The Court of Appeal later refused leave to appeal (*R. (on the application of Sharman) v HM Coroner for Inner North London* [2005] EWCA Civ 967).

55 Having described the duty of the coroner to act as "a filter to avoid injustice", Leveson J. said:

> "In a difficult case, the Coroner is carrying out an evaluation exercise. He is looking at the evidence before him as a whole and saying to himself, without deciding matters which are the province of the jury, 'Is this a case where it would be safe for the jury to come to the conclusion that there had been an unlawful killing?' If he reaches the conclusion that, because the evidence is so inherently weak, vague or inconsistent with other evidence, it would not be safe for a jury to come to the verdict, then he has to withdraw the issue from the jury."

56 The ingredients of the possible verdicts were formulated as follows:

> "Thus, assuming that there was sufficient evidence for the jury to consider, the proper way to articulate the ingredients of the possible verdicts is:-

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> i) unlawful killing: a finding beyond reasonable doubt that the firearm was not discharged in the belief that one of the officers was under imminent threat of being shot. …;
> ii) lawful killing: a finding, on the balance of probabilities, that [the police officer] believed, albeit mistakenly, that he or [another] was under imminent threat of being shot …;
> iii) open verdict: a rejection of the proposition that [the police officer] may have believed that he or [another] was under imminent threat of being shot … but an inability to conclude, beyond reasonable doubt, that such was not the case."

57 Leveson J. went on:

> "I have put the matter in that way in order to formulate the test which must be considered by the Coroner in deciding whether to leave the verdict of unlawful killing. It is whether there is sufficient evidence upon which the jury could safely come to the conclusion beyond reasonable doubt that the firearm was not discharged in the belief that one of the officers was under imminent threat of being shot with a sawn-off shot gun."

D. Lawful defence

58 The test for the lawful use of force in defence of others is the statutory test under s.3 of the Criminal Law Act 1967:

> "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in affecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

59 The test for lawful self-defence is the common law test and it has two limbs namely, the defendant must honestly believe that defensive action is necessary and the defendant is entitled to use such force as is reasonable in the circumstances as he perceives them to be (see, for example, *Palmer v Queen, The* [1971] A.C. 814 at 831–832; [1971] 2 W.L.R. 831).

E. The Association of Chief Police Officers (ACPO) Manual 2001

60 Chapter 5 of the *ACPO Manual* provides, insofar as relevant, as follows:

> "1. Firearms are to be fired by AFOs [authorised firearms officers] in the course of their duty only when absolutely necessary after conventional methods have been tried and failed or must, from the nature of the circumstances, be unlikely to succeed if tried.
> 2. The ultimate responsibility for firing a weapon rests with the individual officer who is answerable ultimately to the law in the courts. Individual officers are accountable and responsible for all rounds they fire and must be in a position to justify them in the light of their legal responsibilities and powers.
> …
> 5. When it is considered necessary to open fire on a subject, police officers need to shoot to stop an immediate threat to life, research has indicated that only shots hitting the central nervous system, which is largely located in the central body mass, are likely to be effective in achieving rapid incapacitation.

> Shots which strike other parts of the body cannot be depended upon to achieve this. Research has also shown that the accuracy of shots fired under training conditions is generally greater than in operational circumstances. Police officers are therefore normally trained to fire at the largest part of the target they can see which, in most cases, will be the central body mass. Officers should reassess the need for further action after each shot to ascertain whether an ongoing threat exists."

COMPLAINTS

61 The applicant complained under art.2 that the coroner erred in refusing to incorporate the test of "absolute necessity" into her direction to the jury on lawful killing.

62 The applicant further complained under art.2 that the coroner allowed, and that the High Court gave the impression of allowing, irrelevant considerations to colour their approach to the question of whether the "unlawful killing" verdict should be left open to the jury namely, what they perceived to be the "unfairness" of any verdict of unlawful killing.

THE LAW

63 The applicant complained under art.2 about the conduct of the inquest only. In particular, he argued that there had been a violation of the procedural aspect of art.2 because the coroner did not incorporate the test of "absolute necessity" into her direction to the jury on lawful killing and, further, because she allowed, and the High Court seemed to allow, irrelevant considerations of "unfairness" of an unlawful killing verdict as regards officer A to colour their approach to art.2 of the Convention.

I. General principles

64 The Court recalls the general principles set out in the above-cited *Bubbins* judgment, which case also concerned the shooting by a police officer of a person who, it later emerged, had pointed a replica gun:

> "134. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).
> 135. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the

surrounding circumstances, including such matters as the planning and control of the actions under consideration. Any use of force must be no more than 'absolutely necessary' for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from 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. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (*McCann and Others*, cited above, p. 46, §§ 148-149). …

137. Furthermore, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others,* cited above, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see Hugh *Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 2001; *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002)."

65 The Court further recalls that it has already had occasion to conclude that the inquest procedure in England and Wales is capable of fulfilling the art.2 requirements of an effective investigation into an alleged killing by state agents. In the abovecited *Jordan* case (at [125]–[129]) and the later *Bubbins* case (at [153]), the Court noted that inquests are public hearings conducted by coroners, who are independent judicial officers, normally sitting with a jury, to determine the facts surrounding a suspicious death. Judicial review lies from procedural decisions by coroners and in respect of any mistaken directions given to the jury. There are thus strong safeguards as to the lawfulness and propriety of the proceedings. Furthermore, a coroner's jury can return a range of verdicts. In the event of a verdict of "unlawful death" the Director of Public Prosecutions is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. Although a coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances, this does not prevent examination of matters such as the planning and conduct of, for example, a police operation which results in the loss of life, having regard in particular to the fact that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about.

66 The Court would note at this point that, other than his complaints about the inquest, the applicant does not complain about the other procedures and proceedings

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which took place in the context of an investigation into Mr Bennett's death or relating to the death namely, the SIO investigation and report, the disciplinary proceedings conducted by the PCA and IPCC as well as the civil proceedings which were later discontinued. Indeed, the applicant did not submit information about these procedures to the Court, the relevant materials having been furnished by the Government to the Court following its request under r.49(3) of its Rules.

II. Application to the present case

67 The Court has therefore addressed the alleged deficiencies raised by the present applicant in the fact-finding role of the inquest with a view to ascertaining whether, individually or cumulatively, they undermined that role and, hence, the effectiveness of the investigation into the circumstances surrounding Mr Bennett's death.

68 The applicant complained, in the first place, that the definition in domestic law of self-defence and therefore the coroner's direction to the jury did not include an instruction that it would have been unlawful for officer A to have shot Mr Bennett unless he was satisfied that it was "absolutely necessary" for him to do so. While the High Court and Court of Appeal were correct in stating that the domestic "reasonableness" test effectively incorporated "absolute necessity" standards, it was argued that the jury should have been, but were not, given this important direction. He also argued that this assessment had to take account of the training of the police and the consequently heavier obligations of trained police officers under art.2 of the Convention.

69 It was not disputed that the coroner's direction followed the two-limb domestic test for determining whether an officer acted in self-defence ([20] and [29] above) or that officer A honestly believed himself to be in danger (the first limb). The applicant's complaint concerned therefore the absence of the words "absolute necessity" from the wording of the second limb of the common-law definition of self-defence (mirrored in s.3 of the Criminal Law Act 1967) and, consequently, from the directions on this test given to the inquest jury. The Court notes that this question is to be answered regardless of any later developments with the entry into force (following Mr Bennett's death) of the Human Rights Act 1998 in October 2000 (the abovecited *Bubbins* judgment at [164]).

70 The Court recalls that a similar domestic provision and complaint was considered in the abovecited *McCann* case: art.2 of the Gibraltar Constitution considered as justifiable force which was "reasonably justified". The Court found that, while the Convention standard appeared on its face to be stricter than the national one, the difference between the two standards was not "sufficiently great" for a violation of art.2(1) to be found on this ground alone (at [154]–[155]). The subsequent cases of *Jordan* and *Bubbins* concerned inquests on police shootings based on mistaken reasons. While the applicants did not challenge the relevant Northern Irish and English definitions of self-defence which encompassed force which was reasonable in the circumstances, in both cases the Court identified the essential issue under the substantive aspect of art.2 as being whether the use of force was,

> "based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken"

and it did not criticise that standard of justification applied at the relevant inquests.

71 The Court considers, for the reasons outlined in the *McCann* case, that there was no sufficiently great difference between the English definition of self-defence and the "absolute necessity" test for which art.2 provides. As well as the domestic definition itself (outlined at [20] and [58]–[59] above), the Court notes the High Court's explanation of the meaning of the reasonableness test ([29] above) and, further, that the Court of Appeal remarked that the applicant did not dispute before it that the domestic definition of the lawful defence of a person complied with art.2 of the Convention.

72 Nor does the Court consider that the application of the reasonableness test in the present case, including in the directions to the inquest jury, demonstrates any such material difference.

73 In the first place, it is evident (and it was confirmed by the Court of Appeal) that the application of the test of self-defence imposes in principle a higher standard of care on firearms-trained police officers than, for example, on untrained civilians. The coroner accordingly devoted some days of the inquest to the taking of evidence on the question of officer A's training and she referred, in her summing up, at some length to his training and to the *ACPO Manual*, which guidance had been revised to limit use of firearms to when "absolutely necessary". As noted by the Court of Appeal, the applicant's legal representatives did not take issue before the coroner with the terms of her ruling or summing up in this respect ([39] above). Secondly, the Court notes the care with which the definition of self-defence was applied, by the coroner and thereafter by the courts, to the facts of the present case and, in particular, to a situation where it could not be forensically established at what point in the sequence of shots the fatal shot was fired. The coroner (with whom the High Court and Court of Appeal agreed) underlined to the jury that, to reach a lawful killing verdict, the reasonableness test had to be met, on the balance of probability, throughout the entirety of the incident and in respect of *all* of the shots fired by officer A ([23] and [26] above). By their verdict of "lawful killing", the jury had, as the domestic courts held ([34]–[36] and [40]), clearly found that, in relation to each shot fired, officer A was acting in lawful self-defence.

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

75 The applicant's second complaint under art.2 was that the coroner should have decided to leave the unlawful killing verdict to the jury. He argued that the coroner took into account irrelevant considerations when deciding not to leave this verdict to the jury namely, the interpretation which could be given to a verdict of unlawful killing in inquest proceedings, by the deceased's family and by the person in respect of whom the verdict was given. He also argued that there was some basis for inferring that the High Court fell into the same trap since that court was itself critical of the unlawful killing verdict, going so far as to suggest abolishing that verdict. Moreover, he maintained that the option of an "open verdict" as an expression by an inquest jury of its dissatisfaction as to the lawfulness of the killing was insufficient and incompatible with art.2. Finally, disputed factual issues lay at the heart of the case so that, if there was sufficient evidence to question the credibility of officer A's account, then the matter should have been left to the jury.

76 The Court recalls that the effectiveness of the inquest procedure is not impaired when, as in the present case, a coroner decides (a decision subject to judicial review), after an exhaustive public inquest procedure during which evidence has been heard on all relevant issues, that the evidence clearly excludes an unlawful killing verdict (the abovecited *Bubbins* judgment at [163]).

77 As to whether, in deciding to withdraw that verdict from the jury, the coroner took into account irrelevant considerations as the applicant argued, the Court notes that in her ruling the coroner expressed the view that, in reaching such a verdict, an inquest jury would have to make a determination of criminal liability and that such a verdict could accordingly lead to unfairness on the part of all concerned ([13] and [14] above). Further, having examined all the evidence, including that of PC Brooks, the coroner went on to note that his evidence might well be ruled inadmissible in any criminal trial and that the jury should not be asked to consider a verdict of unlawful killing based only on evidence that would not be admissible in a criminal trial. However, there was in her view no doubt that the evidence as a whole was insufficient to invite the jury to consider a verdict of unlawful killing. Since the case was not in her view borderline, she did not have to decide whether to exercise her discretion to withhold such a verdict from the jury because of the difficulties she had found as to the admissibility of PC Brooks' evidence ([15] above).

78 The High Court held that the coroner had been in error in finding that the coroner's verdict was establishing criminal liability and that she had accordingly referred to matters (such as the admissibility of evidence in a criminal trial) which were not material to the consideration whether a jury should have left to them the opportunity of reaching a verdict of unlawful killing. However, the High Court went on to find that, since she had held that the case was not a borderline case, the coroner had not in any event taken these erroneous considerations into account ([32]–[33] above).

79 The High Court took the view that the case was a borderline one, but found that there could be no doubt that the evidence of an unlawful killing could properly be described as "tenuous" and that such a verdict could properly be regarded as one which was unsafe. The coroner had accordingly been entitled to refuse to leave the verdict of unlawful killing to the jury. The High Court went on, in any event, to find that, even if a verdict of unlawful killing had been left to the jury, it would have been impossible for them to have reached that verdict. The coroner's direction to the jury could have left no doubt in the jury's mind that only if they were persuaded, on the balance of probabilities, that in firing each of the shots, officer A was acting in self-defence, could they bring in a verdict of lawful killing; if they were not so satisfied the only verdict which would have been proper for them was an open verdict. It was clear from their verdict that the jury were not persuaded that this was other than a lawful killing and that the jury rejected the suggestion that officer A had killed the deceased unlawfully.

80 The Court of Appeal agreed with the High Court's reasoning and conclusion on the verdicts left open to the jury. In particular, the Court of Appeal agreed that, even if an unlawful killing verdict had been left to the jury, the jury could not logically have returned such a verdict ([40] above). The Court of Appeal further concluded that the coroner was correct to take the view on the evidence that a verdict of unlawful killing could not safely have been left to the jury and that any such verdict would have been perverse ([41]–[42] above).

81 In these circumstances, the Court finds that it has not been shown that, in deciding not to leave an unlawful killing verdict to the jury or in upholding that decision, the coroner or the domestic courts took into account irrelevant considerations or that the refusal to leave such a verdict to the jury materially impaired the effectiveness of the inquest.

82 Accordingly, the Court concludes that the deficiencies alleged by the present applicant as regards the inquest did not, either individually or cumulatively, undermine the effectiveness of the investigation into the circumstances surrounding Mr Bennett's death.

83 The application must therefore be rejected as manifestly ill-founded pursuant to art.35(3) and (4) of the Convention.

Held: Fourth Section, unanimously, inadmissible.