

E7 (An Officer of the Metropolitan Police) v Sir Christopher Holland (in his capacity as Chairman of the Azelle Rodney Inquiry) v The Commissioner of the Police of the Metropolis, Susan Alexander, The Independent Police Complaints Commission, Her Majesty's Revenue & Customs

Case No: CO/10435/2013

High Court of Justice Queen's Bench Division Divisional Court

27 February 2014

[2014] EWHC 452 (Admin)

2014 WL 726619

Before: The President of the Queen's Bench Division (Sir Brian Leveson) Mr Justice Irwin

Date: Thursday 27th February 2014

Representation

Samantha Leek QC and Georgina Wolfe instructed by Slater & Gordon , London for E7.

Ashley Underwood QC instructed by Judi Kemish for Sir Christopher Holland.

Anne Studd QC and Alan Payne instructed by Director of Legal Services for the Commissioner of Police of the Metropolis.

Leslie Thomas and Adam Straw instructed by Hickman Rose , London for Susan Alexander.

Shane Coltery instructed by HMRC Solicitors' Office for HMRC.

Judgment

Sir Brian Leveson P:

1 The use of fatal force by police officers rightly requires the most detailed and rigorous examination. In this case, on 30 April 2005, during the course of what is described as a 'hard stop' of a vehicle in which Azelle Rodney was travelling and which was believed by the police to contain men armed with automatic weapons intent upon robbery of Colombian drug dealers, he was shot and killed by a specialist firearms officer (known throughout as E7). Focussing on the right to life and the obligations of the State pursuant to Article 2 of the European Convention on Human Rights , the examination must be prepared to consider every perspective. Those perspectives include a full recognition of the enormous challenges facing the police along with the urgency and almost instantaneous decision making required of the highly trained officers involved. It is they who have to become involved pro-actively in the prevention of crime and the protection of society while ensuring, to such extent as is humanly possible, that their colleagues, also in harm's way, are similarly protected.

2 Following the death of Azelle Rodney, the Independent Police Complaints Commission ("IPCC") conducted an investigation. Thereafter, the Crown Prosecution Service ("CPS") determined not to prosecute the officer who had fired the fatal shots. In place of an inquest, on 10 June 2010, the Lord Chancellor established a public inquiry to be conducted by Sir Christopher Holland pursuant to the provisions of the [Inquiries Act 2005](#) . The Inquiry undertook intensive preparatory work, heard evidence over some 10 weeks with detailed submissions from all

interested parties thereafter. It reported on 5 July 2013: references in square brackets are to paragraphs in the Report.

3 Sir Christopher's conclusions did not coincide with the view taken of the shooting by the IPCC and the CPS. They are conveniently brought together in his Executive Summary of the Report in these terms:

“30. The report concludes that E7's accounts of what he saw are not to be accepted. Prior to firing he did not believe that the man who turned out to be Azelle Rodney had picked up a gun and was about to use it. Further, on the basis of what he was able to see, he could not rationally have believed that. Moreover, according to eye witness and other evidence, Azelle Rodney had not in fact made the movements described. Even had E7 enjoyed a clear view of Azelle Rodney he would have had no reason to believe that he had picked up a gun.

31. On the basis of UK civil law, and of the law applied by the European Court of Human Rights, the report asks whether E7 believed, for good reason, that Azelle Rodney presented a threat to his life or that of his colleagues such that it was proportionate to open fire on him with a lethal weapon. The answer is that he did not.

32. The report then poses an alternative question. That is framed on the basis of UK criminal law, and assumes that, contrary to the Chairman's actual findings, E7 believed that Azelle Rodney had picked up an automatic weapon. Would it have been proportionate to fire the shots that killed Azelle Rodney? The answer would be no. That is because, even if it was proportionate to open fire at all, there would have been no basis for firing the fatal fifth to eighth shots.”

4 E7 challenges these findings and argues that no person, properly directing himself as to the relevant law could reasonably have reached these conclusions: in short, it is submitted by Samantha Leek QC. that they are irrational. Permission to apply for judicial review was refused by Wyn Williams J: the application has been renewed to the full court and, given the entirely appropriate public interest, has been heard by a Divisional Court. Initially listed for two days, full argument has been advanced on behalf of E7 and, in relation to the second ground, also by Anne Studd QC for the Metropolitan Police Commissioner, Ashley Underwood QC on behalf of Sir Christopher Holland, and Leslie Thomas for the family of Azelle Rodney. This is the judgment of the court to which we have both contributed.

The Facts

5 Azelle Rodney was the rear seat passenger in a VW Golf motor car travelling along Hale Lane, Mill Hill, with two other men. The Metropolitan Police had received intelligence (assessed as reliable) that the men in the car were in possession of automatic weapons capable of firing 1,000 rounds a minute. E7 (along with the other officers deployed to stop the car and detain the occupants) was fully aware of the intelligence and the car was brought to a stop by being boxed in by three police vehicles which were in front, behind and to the offside of the Golf. E7 was in the front of the offside vehicle (“Bravo”) from where he fired eight shots six of which struck Azelle Rodney and inflicted injuries: the last four were each fatal. Three firearms (albeit not automatic weapons) were subsequently found in the Golf. E7 throughout justified firing his weapon on the basis that he honestly believed that Azelle Rodney had picked up and was preparing to fire a machine gun. Sir Christopher's conclusions turn on his assessment of that contention.

6 A detailed analysis of the evidence of E7 is provided in the Report. For the purposes of this application, it is sufficient to begin with the short conclusion in the Executive Summary which is in these terms:

“28. Prior to giving his oral evidence at the Inquiry E7 had given a number of written accounts, all of which were consistent with each other. He said that, once the Bravo car had finally come alongside the Golf he had seen Azelle Rodney make a number of movements, including reaching down so as to present the top of his head to E7, and coming back up with his shoulders hunched. According to these accounts those

movements made E7 believe that Azelle Rodney had picked up a gun, which could well have been a machine gun capable of firing 18 rounds a second. He said that he paused and then, believing that Azelle Rodney was going to open fire, he fired. These written accounts then go on to say that Azelle Rodney appeared to be unaffected by the first burst of fire, remaining upright. The accounts continue that E7 paused after the first burst of fire, believed that Azelle Rodney still constituted a threat, and so he fired again. Azelle Rodney is then said to have disappeared from E7's view, so he ceased fire and got out of Bravo.

29. The expert evidence was called before E7 gave his oral evidence. He then gave a different account, which was to the effect that the movements he had previously described occurred, at least in part, prior to the Bravo coming to a halt. He accepted that reconstruction photographs showing a very restricted view into the Golf fairly represented what he could have seen before the Bravo car stopped."

7 The expert evidence took a number of different strands. First, the police vehicles were all fitted with incident data recorders and one of the firearms officers had activated a video camera which picked up movements of the police vehicles and the gunshots. The timing of relevant events could thus be synchronised. Secondly, the ballistics expert and pathologist synchronised movements made by Azelle Rodney with those timings and the shots. Finally, although of rather more limited value, with the aid of replica cars, photographs sought to reconstruct the views that E7 had of Azelle Rodney prior to the shooting.

8 Using the expert evidence, Sir Christopher concluded that of the eight shots fired, there were six in the first tranche (the first being 0.06 seconds after Bravo had stopped alongside the Golf and all fired within 1.11 seconds). There was then a delay of 0.72 seconds followed by a seventh shot and then, after a further 0.21 seconds, an eighth. He accepted the evidence of Anthony Miller, a forensic scientist specialising in firearms which he summarised in these terms (at [19.16.2]):

"Six rounds hit Azelle Rodney so as to penetrate; all remained in the body. One such (to the right arm, wound (a)) had a horizontal trajectory; the remaining rounds penetrated by way of downward trajectories. He infers that upon receiving wound (a), Azelle Rodney twisted so as to be hit in the back (wound (b)), and fell towards the offside, receiving wounds (c) in the process. He was eventually positioned with the top of his head directed towards the offside so as to receive wounds (d). Mr Miller noted from E12's video that the shooting was in two tranches, one long, one short. It is his opinion that the first tranche consisted of six rounds, leaving two rounds for the second tranche and, self-evidently, wounds (d). Of the six round first tranche, four are accounted for by bodily penetration. As to the remaining rounds, one did not penetrate the rear offside door (he found the round within it); and one penetrated the rear nearside window so as to shower glass on E3 and then disappear (it was not found). It is not clear as to what inflicted wound (e) – it could be that it resulted from a 'nicking' by this non recovered latter round."

9 He added that he could detect no conflict between these views and those of the forensic pathologist, Professor Crane. Further, the findings and opinion of a forensic scientist, whose expertise was in the interpretation of bloodstain patterns and who examined the interior of the car in which Azelle Rodney had been travelling, were also consistent with Mr Miller's conclusions.

10 Sir Christopher concluded that E7 "could not have seen and thus did not see anything suggestive of an imminent armed response by Azelle Rodney" although he recognised that the trauma of his experience and the prolonged subsequent stressful history might have affected his present perception so that E7 could honestly protest his belief that Azelle Rodney was about to make an armed response ([19.44]). He went on to say that the burst of fire was a response "seemingly as a pre-emptive measure" ([19.46]).

11 Sir Christopher also dealt with the other eye witness evidence which he had previously analysed in detail. Without seeking further to summarise precisely what each said, he put the matter this way (at [19.42]):

"I turn to the eye witness evidence: did any such impact upon that which otherwise flowed from the expert opinions so as to contradict or modify? A point that can be made (albeit with diffidence) is that E7's early contention that Azelle Rodney was seen to "duck down" has echoes in E3's initial account ("he seemed to lean down to his right out of my view") and in Mr Gittens's initial account ("he made a ducking movement"). Do they offer crucial support, with an inference that at some stage E7 must have had the sustained view of Azelle Rodney as originally claimed? Again, I have to answer 'No'. I refer to E7's initial account: the "ducking down" was followed by upward movement into a posture suggestive of armed response – it was that which prompted firing. Neither eye witness saw anything following "ducking down" other than shooting, and Mr Gittens expressly associated "ducking down" and all that appeared to follow with the shooting, as all one movement. For the rest, these eye witnesses offer nothing in contradiction with the expert case."

12 In the event, Sir Christopher's commentary on the shooting was to underline his finding of fact that E7 fired at Azelle Rodney 0.06 of a second after the car in which he was travelling came to a stop, that is to say "firing oblivious of the actual conduct of the suspect, there being no time to see and consider such" (at [21.2]). He went on:

"I acknowledge that circumstances may confront an SFO that render it reasonably necessary to shoot at a suspect effectively so soon as he comes into sight: typically if the suspect is actually attacking him or another officer. In the event, such were not the prevailing circumstances: Azelle Rodney was not engaged in any attack justifying shooting at sight. Shooting at him could only be justified as a reasonably necessary response to the threat on the basis of observed actual conduct indicative of imminent armed response, heedless of the normally effective deterrent of visible static cover. There was no such observed actual conduct: E7's observations were inconclusive until Bravo came alongside the Golf – and then only as sufficed for an aim. Had there been observation of actual conduct, none such would in fact have been suggestive of an imminent armed response – such not being contemplated."

13 Having reached that conclusion, it was unnecessary for him to consider an alternative scenario based on E7's description of events. He did, however, do so and said (at [21.13]):

"I summarise the resultant overall position as follows. First, on the basis of my findings as to fact and my analysis of the issues for address by this Inquiry, I have to find that there was no lawful justification for shooting Azelle Rodney so as to kill him. Thus, granted that E7 had an honest belief that Azelle Rodney posed a threat to himself or to other officers, this threat was then not such as to make it reasonably necessary to shoot at him. Second, on the alternative factual basis of E7's description of the movements and posture of Azelle Rodney as seen through the Golf's rear offside window and on the alternative legal basis provided by the criminal law, I similarly have to find that there was no lawful justification for shooting so as to kill. As to opening fire on Azelle Rodney on this alternative premise, although I have some difficulty in accepting that this was reasonable for the prevention of crime in the perceived circumstances, I have to recognise and give weight to the subjective considerations embodied in Section 76(3) and (7). That said, I am wholly satisfied that firing so as to kill him (shots 5, 6, 7 and 8) was disproportionate and therefore unreasonable (Section 76(6)) and unlawful. There was little justification for shots 2, 3 and 4 and no justification for the ensuing shots."

14 Finally, relevant to this challenge, Sir Christopher was concerned about a remark recorded by E12 which is far from clear, with four experts suggesting different possibilities only one of which was to the effect that "the guy at the back held up a gun"; two other police officers similarly volunteered slightly different interpretations that the guy or boy "at the back held up a gun". Sir Christopher concluded:

"Fact finding is obviously difficult. In the event, I am satisfied on balance of probability

that the recording does feature an exchange between A1 and A10, in its turn contributing to Anna Bartle's analysis. For the rest, I discern a possibility (but no higher than that) that there was a concurrent contribution by E7, as the only person in a position to see whether Azelle Rodney held up a gun and to be concerned to notify the DI, Silver, contributing to that which was discerned by the other two experts and the two police officers. As it seems to me, once the probability has been identified and found as such, anything arising as an apparent concurrent overlay can claim no more than the 'possibility' status I accord to it."

15 Ms Leek, on behalf of E7, argues that three findings made by Sir Christopher are irrational being based on findings that are unclear, or illogical and based on misquoting evidence. The first is his conclusion that E7 did not honestly believe that Azelle Rodney had picked up and was preparing to fire a fully automatic firearm. The second is his conclusion, in the alternative, that even if he was wrong about that, that the circumstances as E7 believed them to be (with the added subjective gloss) were such that the actions of E7 up to and including the second shot were justified in law, thereafter, the further shots were unjustified and not proportionate to the essential objective of deterring Azelle Rodney. Finally, the possibility that E7 had said words to the effect that the boy/man at the back "held up a gun" was demonstrably wrong. A further challenge as to the process adopted by Sir Christopher has been abandoned.

The Law

16 [Section 2\(1\) of the Inquiries Act 2005](#) makes it clear that "an inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability" but, by [s. 2\(2\)](#), "is not inhibited in the discharge of its functions by any likelihood being inferred from facts that it determines or recommendations that it makes". The significance of any Report, however, is that it provides a public narrative which undeniably impacts not only on the position of those involved in the relevant incident or event but, additionally, on wider public interest issues.

17 It is thus important to be clear about the circumstances in which a Report can be challenged. There is no right of appeal: indeed, the Royal Commission on Tribunals of Inquiry (chaired by Lord Salmon) rejected (at paragraph 134) proposals that one should be introduced, not only because effective challenge would be impossible without a rehearing of what is an inquisitorial process, but also because finality was vital. The Report, therefore, can only be challenged by way of judicial review.

18 As for the approach, it is not contentious between the parties that the court can only intervene if any particular finding is irrational or perverse. In [Reid v Secretary of State for Scotland \[1999\] 2 AC 512](#), concerning a challenge to a decision refusing to discharge a restricted patient under the [Mental Health \(Scotland\) Act 1984](#), Lord Clyde put the matter (at 541F) in these terms:

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

19 To like effect, in [Begum v London Borough of Tower Hamlets \[2003\] UKHL 5](#), Lord Millett

described the approach (at para. 99):

“A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. ... The court cannot substitute its own findings of fact for those of the decision making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court.”

20 The way in which this Inquiry proceeded is important. Sir Christopher was engaged upon the inquisitorial process of investigating Azelle Rodney's death for some three years. There were some 30 days of evidence with 85 witnesses (of whom 76 gave oral evidence). 26 of the witnesses were experts in a wide variety of fields (which included detailed analysis of contemporaneous video and audio material). There was a substantial quantity of documentary evidence. Sir Christopher held site visits and a reconstruction. No review which this court can conduct could start to match the advantages that he had and, in the context of any review of findings of fact (*a fortiori* , where, as here, the test is irrationality or perversity) it is important to bear in mind the words of Lord Hoffmann in [Biogen Inc. v Medeva Plc \(1997\) 38 BMLR 149, \[1996\] UKHL 18, \[1997\] RPC 1](#) (at para. 54) which are even more apposite when there is no appeal on the facts:

“The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.”

21 The other important principle is that, save in limited circumstances, judicial review is not available to resolve hypothetical issues as an academic exercise; as a matter of discretion, however, there may be an important point where the resolution might be required in the public interest even if the claimant has suffered no perceptible prejudice as a result of the decision (see per Laws J in [R v. Oxfordshire County Council ex parte P \[1996\] ELR 153](#) at 157B-D).

Ground 1

22 The primary ground advanced on behalf of E7 is that it was irrational for Sir Christopher to find ([19.46]) that he did not have an honest belief that “the passenger had picked the weapon up and was about to use it”. The challenge is premised by Ms Leek with the proposition that where an Inquiry is examining the actions of a distinguished police officer, taking a split second to make a decision in a dangerous and difficult situation, particularly cogent evidence would be needed before reaching a finding such as this. She rightly emphasises the seriousness of the threat contained in the intelligence reports beforehand.

23 It was of the essence of E7's account that, before he decided to shoot, he was able to see Azelle Rodney making movements which indicated he was reaching for a weapon. As the written submissions on his behalf put it:

“E7... said that Mr Rodney had looked around and ducked down within the car shortly before being shot.”

Ms Leek submits that E7 would have been able to see well enough through the Golf rear window, and had sufficient time to see and assess Azelle Rodney, before the Bravo car (in which he was a front seat passenger) drew level with the rear window of the Golf and E7 commenced shooting.

24 In mounting her attack on the rationality of the findings, Ms Leek relies heavily on the evidence of two eye witnesses who, she says, support the account of E7. The first is another

armed officer, E3, who was sitting in the front passenger seat of the first unmarked police vehicle, designated Alpha car. As the "hard stop" of the Golf was executed, the Alpha car pulled across the front of the Golf to block forward motion. E3 got out of the car, putting himself on the nearside of the Golf; he aimed his weapon at the driver, moving his selector to fire. His observation of subsequent events was from the nearside of the Golf. According to his statement of May 2005:—

"The passenger in the rear nearside seat slid down to his right out of my view. I decided that the rear seat passenger was the most dangerous of the three as he was no longer in sight and I had no idea if he was preparing an automatic weapon. I moved towards the rear nearside door of the Golf shouting "show me your hands, show me your hands"."

25 In a statement of November 2005, E3 was asked to amplify what he could see. He said that before the passenger in the rear of the car "slid down", he was looking to his right. By the time E3 shouted at the rear seat passenger, he could no longer see him. Essentially the same picture was confirmed in a further statement by E3 of January 2012. In the course of his oral evidence, E3 confirmed that he saw the rear seat passenger "duck down", but did not see him come back up again. Ms Leek submits that this evidence is supportive of E7. She says if Rodney ducked down before the shooting, he must have come up again, to explain the sites and trajectories of the bullet wounds.

26 Support is also sought from the evidence of a bystander, Leon Gittens. Mr Gittens was a customer at the public house adjacent to the roadway where the events took place. At the time the vehicles stopped Mr Gittens' children were on the far side of the road. Mr Gittens was understandably very shocked by what he saw that day, and it is clear that he continues to suffer a degree of distress. In his first statement of April 2005, he recounted how he saw officers surrounding the Golf. The statement goes on:

"I could hear shots being fired. The police officers went either side of the silver Golf. I saw the passenger windows in the back of the silver Golf smash. I think this was from shots fired by police. I saw the black guy in the back of the silver Golf. He appeared to duck down as the windows were shattering. The black guy in the back of the silver Golf seemed to fly upwards in the car, hitting his head on the inside roof of the car. He fell back down again, landing with his head resting against the broken window of the nearside back passenger window."

27 In late June 2005, Mr Gittens made a further statement in which he dealt with the timing of the movements of Azelle Rodney, and in the course of which he said:

"I would say that [Azelle Rodney] was looking around and ducked down before the windows smashed. At this time police were running towards the car with weapons out."

28 In a further statement of 1 June 2006 Mr Gittens gave an amplified account:

"As [officers] approached, the male in the back of the VW Golf was the most animated of the three occupants. His head was turning – looking forwards and backwards. He was very agitated and moving up and down in his seat. His body position was facing forward and he seemed to be sitting nearer my side of the car, the nearside of the VW Golf. He seemed to be constantly adjusting his position to get a better view of something ... His movements could be described as "ants in your pants". He was shouting. His mouth was moving but I couldn't hear what he was saying as the VW Golf's windows were up, and the police were shouting as well. He was shouting towards the driver of the VW Golf – literally just behind his ear. The rear occupant's hands were below the door line of the Golf but from the movement of his shoulders he appeared to be using his hands to push himself up or along the rear seat as a lever.... Prior to the shooting my attention was still on the rear occupant of the VW Golf. As the officers moved towards the car, following his agitated movements described earlier in this statement, he made a ducking movement. I couldn't see why he did this as no-one had

fired. Then there was a crack and the rear offside window smashed, immediately followed by the tailgate window smashing. The rear occupant made an unusual and unnatural movement at this point. He hit his head on the roof of the car. It was like a reflex movement. Like he'd sat on a pin... He came back down and as the glass shattered I could see him. His head was on the doorframe. His face was forward towards the front of the car and I could see the top of his head. I could see holes in his head."

29 As Ms Leek accepts, when it came to giving his evidence Mr Gittens was less clear than in his 2006 statement as to the time when the rear passenger made "a ducking movement". It is of note that he confirmed the rear seat passenger ended with his head to the nearside of the Golf: the side on which Mr Gittens himself was standing. This is agreed by all to be an error. Azelle Rodney went down to his right, namely the offside of the car, and remained in that position until moved by E3. During cross-examination, Mr Gittens accepted that it appeared to him Azelle Rodney had ducked down "as a result of the shots being fired". This was consistent with his first statement, but not his second and third statements. When pressed in further questioning, it was put to him that:

"Q: So the sequence was this: he was agitated first, and then he ducks down, before a shot has been fired?

A: Simultaneous.

Q: Right.

A: It was – it was that – it was that – that large movement was because of the crack, that large ducking down and then coming back up. That was all one movement.

....

Q: What you are trying to emphasise in your statement is that you see the ducking movement first, and then you hear the crack afterwards?

A: And then I hear the crack slightly – yeh.

...

Q: Ok, okay. You say now that you believe that movement [ducking up and down] was caused by what?

A: By him being shot."

30 E7's account of the essential events in a statement of 2 May 2005, which was made before he had access to the video footage, was as follows:

"I was looking, at an angle, through the rear window of the Golf and I was positioned to its rear offside, my attention was drawn to the rear seat passenger I could see his head, he appeared to be looking around.

We moved forward and I found myself alongside the rear offside window of the Golf. I saw the rear seat passenger apparently leaning forward in his seat holding the front passenger seat. He turned his head away from me and appeared to look over his left shoulder towards the back of the vehicle, suddenly he turned his head in the opposite direction over his RIGHT shoulder, suddenly he ducked down and I was looking at the top of his head, he appeared to be reaching down onto the passenger seat or floor well. I feared that he was reaching for a weapon, I held my fire waiting to see what he would do next. Suddenly his head popped up and he appeared to look through the front windscreen his shoulders were hunched.

Everything about his actions and his body language led me to believe that he had picked up a firearm and was preparing to shoot a fully automatic firearm but I still couldn't see a weapon. I was aware that my colleagues were deploying on foot from

their vehicles. I believed that I couldn't delay my decision to fire any longer. We had been told that he had access to fully automatic weapons and I felt that my colleagues were in immediate danger. I opened fire through the closed nearside rear window of the Golf and the window shattered. I fired several shots in quick succession. I could see no effect from my rounds on the suspect. The remaining glass in the window was obscuring my vision and I moved slightly and saw the suspects head and shoulders upright in the vehicle. I fired several more shots and he appeared to pitch forward and out of my view across the rear seat. I immediately left the vehicle.”

31 It is a critical feature of this account, given two days after the event, that E7's key observation of Mr Rodney, including the observation that Rodney “suddenly ducked down and appeared to be reaching down to the passenger seat or floor well”, was made by E7 after the Bravo car was alongside the Golf, and by observation through the rear offside window of the Golf. On this account it was in that way and at that time that E7 observed Rodney ducking down, followed by a pause while E7 “held my fire”. It was when Azelle Rodney's head came up again with shoulders hunched, that E7 concluded, first, that he was preparing to shoot and, second, that he “couldn't delay [his] decision to fire any longer”.

32 E7 made another witness statement in August 2011. He made reference to the statement of 2 May 2005, and he had by now seen the video footage of the incident. In the course of the 2011 statement, E7 did not revisit the question of his viewpoint of Azelle Rodney while he decided whether to fire. He made no correction to the account given in his statement of 2 May 2005.

33 E7 made a further witness statement of 12 April 2012 responding to specific questions set out in a letter of 23 March. These questions did not direct him to his viewpoint whilst deciding to fire and it is fair to note that E7 said it was difficult, seven years after the incident, to be sure whether the additional information he was providing was recollection or reconstruction. However, he volunteered no amendment to the statement of May 2005. E7 made no further statement before giving evidence to the Inquiry.

34 It thus remained E7's account, until giving oral evidence, that there was a period of observation of Azelle Rodney by E7 after the two vehicles were side by side, that observation taking place through the rear offside window of the Golf, before he took the decision to fire.

35 Unchallenged expert evidence and unchallenged timings derived from the video footage set an essential context to the evidence given orally by E7. These matters are succinctly summarised in paragraph 19.39 of the report. The essential points are as follows. E7's first opportunity to see Azelle Rodney was limited to what could be seen through the rear window of the Golf. Secondly, the Bravo car initially impacted the Golf's rear offside door in such a position that E7 could not have seen through the rear offside door window: the relative positions of the vehicles demonstrating that point are reproduced in Figures 8 and 9 in the Report. The Golf was then shunted forward due to a rear impact from the third police car, (“Charlie”). During that shunt forward and during the second move forward of the Bravo car, before Bravo collided with the offside front door, E7 still could not see through the rear offside door window. Finally, E7 opened fire on Azelle Rodney within 0.06 seconds of Bravo car colliding with the front offside door of the Golf. In other words, the expert evidence and objective timings from the video combined to demonstrate that E7 opened fire on Azelle Rodney within less than a tenth of a second from when the car in which he was a passenger stopped beside the Golf.

36 In giving oral evidence, E7 indicated that his attention was drawn to Azelle Rodney once the Alpha police car had overtaken the Golf. He then described seeing Mr Rodney (with emphasis added):

“... apparently with his hands on the seat in front of him, and he appeared to be leaning forward, and I made the assumption that that was because his vehicle was braking and he had gone forward, leant forward and put his hands onto the seat. He then seemed to push himself back in his seat and I saw him apparently look over his left shoulder, and then apparently look over his right shoulder. And at the point that he looked over his right shoulder, we had moved to a position where I was looking at him through the nearside window – sorry, correction, I have done this before, the offside window, so the window nearest to me. He appeared to look straight through me. It was as if he hadn't actually seen that I was there. And then almost immediately, he ducked down, and so

one moment I was looking at him sitting upright and the next moment, I was looking at the top of his head... He ducked down across the seat, so effectively he was lying across the back seat with his head towards me. The next thing I knew, he was sitting in an upright position. His shoulders were hunched, he was leaning forward. I couldn't see his hands. I was absolutely convinced at that point that the only explanation I could think of for him ducking down and coming up so quickly again was that he had obtained a firearm. I assumed from the floor of the vehicle. That was my assumption.

...

Then my vehicle was alongside him again, and by this time my weapon was on my shoulder. The selector was to fire, to fire, my finger was on the trigger. I remember thinking to myself: have I got any more time here? Can I give him any more time? And I decided that he was posing an imminent threat. I believed that he had picked up a fully automatic weapon, and I was convinced that he was imminently about to fire it. I knew that I had no reaction time... And so I felt I had no choice. I felt that it was absolutely necessary that I fired then and there, to protect my colleagues. So I – I commenced firing.”

37 Unchallenged evidence from David Hague, a collision reconstruction expert, was that the video demonstrated a period of ten seconds from the beginning of the overtaking manoeuvre by Alpha car until the moment of the first shot. Bravo car first came alongside the Golf when it collided with the rear offside door but, as we have already observed, that did not give E7 a view through the rear offside window. If he had a view at all of Azelle Rodney at that stage it had to be through the rear window. The Golf was then shunted forward. From the time when the Golf was shunted forward, Bravo car took just over three seconds to be driven forward so as to be in a position next to the Golf. We repeat that the first shot was 0.06 of a second after Bravo car stopped next to the Golf.

38 The sequence and timing of the shots (set out above) was also unchallenged evidence, and is recited in the Report ([19.16 and 19.19]). Azelle Rodney was therefore first struck when he was upright and struck again as he fell to his right. There is no question of him “ducking down” and coming up again in the course of the sequence of shots.

39 Ms Leek's submission is that it was irrational of the Chairman to the Inquiry to reject E7's evidence; that it was capable of support from the evidence of E3 and Mr Gittens and that the expert and objective evidence leaves sufficient room so that E7 could have had adequate observation of Azelle Rodney, through the rear window and then the side window, consistent with his account of observation and decision to fire.

40 The essential submission of Mr Underwood, on behalf of the Chairman, is that the Inquiry was fully entitled to reject E7's account. The account given in the initial statement, and maintained until shown to be impossible by the objective and scientific evidence, was that his observation of Azelle Rodney leading to the decision to fire was all conducted through the rear offside window. That could not be true. It was only when it was shown to be impossible, that E7 altered his account to suggest observation through the rear window. The evidence of E3 was equivocal: E3 could not confirm E7's suggestion (which was essential for the suggested appreciation of threat) that Azelle Rodney had ducked down and come up again in a posture suggestive of threat with a weapon. E3 did not see that. The evidence of Mr Gittens was so obviously flawed as to be unreliable and in any event was equivocal on the essential points. The conclusion which Sir Christopher reached was both open to him and rational.

41 These conclusions were clearly expressed in these terms (at [19.41]):

“E7's essential contention has to be that as a preliminary to firing he had a sufficiently prolonged view of Azelle Rodney to be able to discern behaviour suggestive of an immediate armed response, whether that view reflected one sustained sighting through the Golf's rear offside window, or a number of shorter sightings, principally or wholly through the tailgate window. I am fairly reminded of the effect upon the present potential for accurate recollection of involvement in a sudden, traumatic episode... of the delay and of the inevitable pressure to offer reconciliation with the experts' findings. While some or all of these factors may serve to explain the fashioning and presentation of E7's

evidence (and to evoke a certain amount of sympathy), they do not add to his accounts the weight needed to challenge or modify the otherwise overwhelming weight of the expert analysis. Essentially, his accounts cannot be reconciled with the expert evidence with its effect summarised in paragraph 19.39, and thus have to be rejected as a basis for this fact finding.”

42 Sir Christopher went on to consider whether the accounts of E3 and/or Mr Gittens offered crucial support to that of E7. He concluded that they did not.

43 We reject the criticism of these conclusions. In effect, E7 gave two accounts in each of which he was looking through the rear offside window when he saw Azelle Rodney duck down and move back up again; he assessed that as a threat and then fired. Sir Christopher was justified in concluding that was not consistent with the unchallenged evidence that firing began within 0.06 seconds of Bravo car coming to a halt beside the Golf. He was equally justified in discounting the evidence of Mr Gittens (whose account was equivocal on the central point) and in setting aside the evidence of E3 (who did not see all the relevant events).

44 Ms Leek makes subsidiary attacks on various specific findings in the report, which relate to this ground of challenge. The first is the finding (at [19.43.2]) that the Colt gun found on the back seat of the car was in a “position in which it was ... inconsistent with it ever having been in [Azelle Rodney's] hands”. It is clear that this conclusion was no more than that the Colt had not been in his hands during the short sequence of events which led to his death: in our judgment, given the position of the gun when it was found, Sir Christopher was entitled to reach this conclusion.

45 Ms Leek further submits that the conclusion (at [19.43.4]) to the effect that Mr Gittens' description of events “plainly includes that which must have occurred, Azelle Rodney reacting to being shot in the arm, and cannot be readily dismissed” is circular. Whilst this finding might have been more happily expressed, in our judgment all that Sir Christopher must be taken to convey was that, given Mr Gittens' evidence was clearly confused as to some matters, it was capable of being consistent with him seeing Azelle Rodney's movements as he was shot, rather than his movements just before he was shot.

46 In summary, recognising that we are not a tribunal of fact and that our task is only to consider whether there are arguable grounds for judicial review, that is to say, for submitting that the findings of the Inquiry were irrational or perverse, we have no doubt that they are not.

Ground 2

47 The second ground is based on the assumption that the first two shots fired by E7 were lawful. On the basis that E7 has failed to erect an arguable case for reviewing the primary decision of the Inquiry, the alternative conclusions expressed by Sir Christopher become academic insofar as he is concerned. Ms Leek argues, however, that they go to the heart of how firearms officers are expected to react to serious threats to their own personal safety and that of others.

48 Although not seeking judicially to review any finding of the Inquiry, Miss Anne Studd QC, for the Commissioner of the Metropolitan Police, supports the application in relation to this ground for broadly the same reasons. In short, Sir Christopher's approach is challenged, and there is a real concern that the report will carry “unusual weight” in the context of investigations into operations where a police officer has discharged a firearm. Most investigations of this nature are conducted by coroners, sitting with a jury: the views of a distinguished retired judge (as Chairman of an Inquiry) will be more than persuasive of the correct approach.

49 Elaborating upon the issue, Miss Studd points to the mechanism adopted in the Report of a shot by shot analysis “advanced by the timings and the respective opinions of [two experts]”, which has been used to negate what the officer could reasonably have been expected to know and appreciate at the time. She contends this ignores what the officer could reasonably have been expected to identify and assess in a period of less than two seconds. She further argues that the process does not enable a determination to be made of the reasonableness of the shots fired with the intent of neutralising a threat, and is unfair for what amounts to two reasons. First, it is based on information not available to the officer at the time at which his decisions were made (i.e. knowledge of whether and, if so, where Azelle Rodney was hit, along with Mr Rodney's likely

reaction to each shot and what he then contemplated doing). Secondly, it is at odds with the speed with which decisions of this nature are taken and information processed and assessed in the heat of the moment (in this case in a time frame of 0.21–0.72 of a second).

50 Sir Christopher's conclusions flowed from E7's evidence. E7 asserted that each shot was aimed and not fired blind; that he fired several shots in quick succession and could see no effect on the suspect; that, after the initial shots, the remaining glass in the window of the Golf was obscuring his vision so that he moved slightly and saw the suspect's head and shoulders upright and, believing that he still posed a threat, fired several more shots ceasing to fire when he pitched forward. Sir Christopher compared this account with the objective evidence that, after the first shots, Mr Rodney could not have been 'head and arms upright' because five of the six shots that hit him did so at a steeply downward angle: the third shot struck the back, the fourth and fifth shots entered the ear and progressed down the body to the waist and the final two shots entered through the top of the head. Because of the objective evidence, Sir Christopher did not accept E7's account that he fired these subsequent shots because he saw Azelle Rodney upright and apparently not affected by the earlier shots.

51 Miss Studd challenges the shot by shot analysis contained in Report ([21.10]). In particular Sir Christopher concluded that the first shot, having missed, underlined to Azelle Rodney the threat implicit in E7's presence with a firearm held in the aim and that the second shot, having struck his right upper arm "plainly ... neutralised" the threat so that "shooting should be at an end". As we have already pointed out, the time lapse between the first and second shot was 0.22 of a second and between the second and third 0.24 of a second. Miss Studd argues that no reason is given as to how, in the time frame, the officer should have realised that Azelle Rodney had been struck in the right upper arm so as to neutralise the threat and, given the speed of the following shots, how that information should have been processed. As Ms Leek submits, the fact that Azelle Rodney was falling towards E7 does not mean that E7 perceived or appreciated that, in the fraction of a second that followed before the next shot.

52 As for the next two shots (successively 0.24 and 0.22 of a second later), Sir Christopher observed that they were "aimed towards the back of a disabled man then twisting downwards" and that E3 "self evidently no longer need[ed] static cover". Miss Leek argues that, given the car window was probably shattering, it was hard to see how E7 could have been aware that Azelle Rodney was in that state or, given his focus on the potential threat, why it should have been obvious static cover was no longer needed for E3.

53 The fifth and sixth shots fired were successively 0.22 and 0.21 of a second later. Sir Christopher observes that they were "accurately aimed" in the vicinity of the right ear. Miss Studd argues that there was no evidence (and given the time frame it was unrealistic) that E7 aimed for the right ear. She also points to his primary conclusion (challenged as part of the first ground) that E7's response was "an immediate burst of fire seemingly as a pre-emptive measure" ([19.46]) and that firing at Azelle Rodney commenced 0.06 of a second after Bravo car came alongside the Golf and was "oblivious of the actual conduct of the suspect there being no time to see and consider such" ([21.2]).

54 These six shots had been fired less than 1.5 seconds after the Bravo car stopped by the Golf. In our judgment, there is considerable force in the expressed concern that minute dissection of fractions of a second with the benefit of hindsight will discourage an appropriate response, in real time, to threats thereby resulting in potentially increased danger to those involved in (or likely to be affected by) these exceedingly difficult operations. [Section 76\(4\) of the Criminal Justice and Immigration Act 2008](#) requires a court to determine the genuinely held belief of the individual in question, as to the circumstances when considering whether the degree of force used was reasonable, whether or not the belief in question was mistaken, or (if it was mistaken) whether it was reasonable. The reasonableness or otherwise of a belief is only relevant to the question whether it was genuinely held. This inevitably requires consideration of the dynamic situation and militates against an analysis by fractions of a second.

55 In the event, this issue did not arise in the Inquiry because Sir Christopher rejected the evidence of E7, in circumstances that we have concluded were neither irrational nor perverse. Having rejected his evidence, it was, at least arguably, not appropriate for the Chairman, even in the course of an alternative analysis, to have relied on E7's assertion that he aimed each shot, without also recognising the time frame and the consequences which flow from it. Sir Christopher had, after all, accepted that E7 was not deliberately lying, postulating that the trauma and

subsequent stressful history had affected his present perceptions ([19.44]).

56 However, in the circumstances, we see no value in granting permission for this ground to be further argued. Save for the issue which concerns the Commissioner, it is academic and does not advance the investigation of the death of Azelle Rodney in any way. As for the Commissioner's concerns, we hope that this judgment will provide some guidance as to a proper approach, and will help to ensure that the investigation of any future incident is addressed having regard to the overall circumstances, without undue weight being placed upon minute dissections of time.

Ground 3

57 The third ground concerns the conclusions reached by Sir Christopher about what was discernible on the audio recording. He had to rely on differing accounts of what could be heard. Only one expert (out of four) and two police officers (the origin of whose contribution is unclear) detected a reference to a man or guy at the back who "held up a gun". A different expert and the same two officers added "Can you tell the DI please".

58 Sir Christopher was satisfied that the recording featured an exchange between two surveillance officers, and went on to hold that he could "discern a possibility" (but no higher than that) that there was a concurrent contribution by E7, as the only person in a position to see whether Azelle Rodney held up a gun and who would be concerned to notify the DI. As Mr Underwood observed in his skeleton argument, there was evidence that somebody said the words. Notwithstanding (as Ms Leek submits) that there was no-one who gave evidence that there was concurrent speech on the recording, we would reject the argument that this expression of a mere possibility (which conclusion Sir Christopher reached having received submissions on behalf of E7) was either irrational or perverse.

Conclusion

59 We consider the first and third grounds upon which E7 seeks to challenge the Report to be unarguable. The hurdle of proving that Sir Christopher reached irrational conclusions on the facts is incapable of being surmounted. The second ground of this application proceeds on a basis of fact which Sir Christopher did not find to be the case, in circumstances in which his primary decision was one which was entirely open to him: to that extent it is academic. Having said that, although we accept that the approach which he adopted was open to challenge, having dealt extensively with that issue, we see no value in granting permission to pursue the issue further, in circumstances where it could not change the fundamental conclusion of the Inquiry. Permission is therefore refused.

60 It is unusual for judgment to be reserved and then handed down following a renewed application for permission to apply for judicial review. However, due to the understandable public interest in this case and the issues involved, that is the course we have taken: we also give leave for the judgment to be cited.

Crown copyright

© 2017 Sweet & Maxwell