Case No: C1/2014/3959

Neutral Citation Number: [2017] EWCA Civ 142

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, DIVISIONAL COURT
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION,
LORD JUSTICE BURNETT AND
HIS HONOUR JUDGE PETER THORNTON Q.C.
CO8332014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE DAVIS
and
LORD JUSTICE UNDERHILL

- -

Between:

THE QUEEN **(on the application of PAMELA DUGGAN)**	**Appellant**
- and -	
HER MAJESTY'S ASSISTANT DEPUTY CORONER FOR THE NORTHERN DISTRICT OF GREATER LONDON	**Respondent**
- and -	
(1) COMMISSIONER OF POLICE FOR THE METROPOLIS **(2) SERIOUS ORGANISED CRIME AGENCY** **(3) 11 SC&O19 OFFICERS** **(4) Z51** **(5) INDEPENDENT POLICE COMPLAINTS COMMISSION** **(6) DS ANDREW BELFIELD** **(7) DC STEVE FAULKNER**	**Interested Parties**

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- -

Hugh Southey QC and Adam Straw (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
Ashley Underwood QC (instructed by **Philippa Long on behalf of the Treasury Solicitor**) for the **Respondent**
Hugo Keith QC and Sarah Le Fevre (instructed by **Hugh Giles, Director of Legal Services, Metropolitan Police Service**) for the **1st Interested Party**
Clare Montgomery QC and David Patience (instructed by **Scott Ingram, Slater and Gordon**) for the **3rd Interested Party**

Hearing date: 2nd March 2017

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Judgment

Sir Terence Etherton MR, Lord Justice Davis, Lord Justice Underhill:

1. This appeal concerns the adequacy of the directions given to the jury by the coroner at the inquest into the death of Mark Wayne Duggan. Mr Duggan was shot dead by a police officer, known at the inquest as V53, on 4 August 2011.

2. V53 asserted at the inquest that he acted in lawful self-defence. The jury reached the conclusion that Mr Duggan's death was the result of "lawful killing". The appellant, Pamela Duggan ("Mrs Duggan"), who is Mr Duggan's mother, claims that by virtue of the failure of the coroner to give proper directions that conclusion should be quashed.

3. The appeal to this court is from the order of the Divisional Court dated 14 October 2014 dismissing Mrs Duggan's claim for judicial review.

The background to the inquest

4. Mr Duggan's death occurred in a police operation. That operation was intelligence led. It was based upon information that Mr Duggan was transporting a firearm across London. The minicab in which he was being driven was stopped in Ferry Lane, London, by armed police officers. It was 18:12.43 on 4 August 2011. Within a few seconds he had been fatally injured. He was shot twice by V53.

5. Mr Duggan's death gave rise to substantial public disorder across the country.

6. In accordance with the law, an inquest was held into his death.

The Inquest

7. The inquest was held between 16 September 2013 and 9 January 2014. The Recorder of Winchester, His Honour Judge Cutler CBE, sat as the Assistant Deputy Coroner for the Northern District of Greater London ("the Coroner").

8. Ninety three witnesses gave oral evidence. The statements of a further twenty one witnesses were read.

9. The following summary of the evidence is taken from the judgment of the Divisional Court.

10. For some considerable time the police had targeted the activities of a gang known as Tottenham Man Dem, the senior members of which were either known or believed to have a propensity for extreme violence. Guns and ammunition had previously been recovered in earlier attempts to contain or prevent criminal activity. Intelligence was available to the effect that Mr Duggan (who had very little by way of criminal record) was a long-standing senior member of the gang who, some two weeks earlier, had been storing a Beretta handgun at his girlfriend's address. It was known that guns were sometimes carried in socks.

11. On the day of the fatal incident, there was further intelligence that a firearm was being moved across London and, more specifically, that Mr Duggan was carrying it in a minicab which was then under surveillance. This was the background to the decision to stop the minicab and recover the firearm.

12. The minicab was stopped using three police cars. The first (Alpha) cut in front of it forcing it to stop. The second (Bravo) came alongside the driver's side. The third (Charlie) pulled up behind it. Eleven firearms officers (being the Third Interested Party) were in these three vehicles, all of whom were given ciphers for the purposes of the inquest. A number left their cars. V53 (in the front passenger seat of Charlie) was one of the first, if not the first, officer to do so. He challenged Mr Duggan and within seconds of alighting from the car had shot him twice, one of those shots being fatal.

13. The evidence suggested that Mr Duggan had been sitting behind the driver in the back of the minicab and that he moved across the back seat before sliding open its door and then jumping out. V53's evidence was that Mr Duggan was holding a gun, contained in a sock which he was pointing in his direction. His evidence can be summarised by saying that he was one hundred per cent sure that Mr Duggan had a gun and that there was no room for mistake: his focus was "just glued on the gun and what that gun is going to do to me". He described how the first round had impacted on Mr Duggan causing "like a flinching movement" such that "the gun has now moved and is pointing in my direction". He was "absolutely" clear that Mr Duggan "had that gun in his hand while [he] fired both shots". He agreed that, if there was no gun in Mr Duggan's hand, he would have had no justification to shoot him saying: "I would have no justification but secondly, sir, I wouldn't have fired". He was emphatic throughout his evidence:

> "It is 804 days since this happened and I'm 100% convinced he was in possession of a gun on shot one and shot two."

14. Other officers on the scene gave evidence of what they perceived. W70 said that he saw a gun shaped object in Mr Duggan's hand (which he described as a self loading pistol). He came to the conclusion that because of Mr Duggan's movements, he posed a threat such that had he been pointing his gun at him at that time, he believed he would have fired. R68 said that Mr Duggan appeared to be pulling something out of the waistband of his trousers but he did not see a gun. V59 gave similar evidence. R68 said that Mr Duggan's right arm was across his body inside his jacket towards the left hand side of his waistband at the relevant time and that he appeared to be pulling something out of his trousers.

15. W42 saw Mr Duggan framed in the doorway of the minicab, with his right hand tucked inside his jacket out of view, prompting him to shout "Show me your hands". When Mr Duggan turned and W42 was standing behind him, W42 saw his right elbow move outwards prompting him to shout "He's reaching, he's reaching". V53 fired a shot at Mr Duggan when his colleague W42 was in the line of fire behind him; the bullet penetrated Mr Duggan and also struck W42. There was evidence that firearms officers are trained to avoid the risk that a fellow officer might be struck by a round they had fired (which it was argued supported the inference that V53 would not have fired unless he honestly believed that Mr Duggan posed an imminent risk to life).

16. Nobody gave evidence of seeing the gun being thrown by anyone. That gun was a Bruni pistol, a substantial and heavy weapon. It was found about 7.5 metres from the minicab door and five metres from where Mr Duggan fell. Its muzzle was in a sock. The gun was forensically linked to a box that was still in the minicab, which also had

Mr Duggan's fingerprint on it. There was medical evidence which indicated that he could not have thrown it after he was shot. The medical evidence also suggested that at the time he was shot in the chest (the fatal shot) Mr Duggan was leaning forward at an angle of at least 30 degrees. The other shot hit Mr Duggan's arm but the forensic evidence was unable to establish in which order the shots were fired. On one view, the forensic science evidence adduced at the inquest cast significant doubt on the account given by V53.

17. The question whether a police officer had been responsible for placing the gun on the grass was explored at the inquest, but rejected by the jury.

18. Witness B lived in a flat which was on the ninth floor of a nearby building. In his evidence at the inquest he explained that he heard the screech of tyres and immediately went to his window to see what was going on. He described seeing Mr Duggan run from the minicab in the direction of Tottenham Hale station before being confronted by a police officer from Alpha car. He then ran in the opposite direction towards Blackhorse Lane and was confronted by V53 and other officers. Witness B said there was a mobile phone or BlackBerry in Mr Duggan's right hand, which was still in his hand when he fell. He described what he saw as an "execution". There was no reason why Mr Duggan was shot. He agreed that he had heard officers shouting something which may have been "put it down" or "get down".

19. Witness B's evidence to the inquest was controversial not least because there was evidence that he had also spoken in different terms to a BBC journalist, Witness C, on two occasions after the incident and before the inquest. The journalist gave evidence of what Witness B had told him, and Witness B was questioned about what Witness C had recorded in contemporaneous notes at the time of those conversations.

20. In notes of the conversation which took place on 12 April 2012 Witness B was recorded as saying he heard the words "put it down, put it down" being shouted and also noticed the BlackBerry. There was a split-second between the shouting and the shots being fired. He used the expression that it was "an execution" and also said that he did not trust the police because he had been stopped and searched "all the time". In notes of the second conversation on 18 April 2012, Witness B told Witness C that Mr Duggan had the BlackBerry in his right hand, did not reach in his pocket and did not run away. The notes continue:

> "Phone always in hand. Initially thought gun. Shiny. But read N/Papers then thought it was Blackberry. If had gun he would have aimed it at them."

21. No BlackBerry or phone was found nearby. The evidence was that a mobile phone was found in one of the pockets of the jacket that Mr Duggan was wearing.

22. The jury answered five questions before reaching their conclusion on the lawfulness or unlawfulness of the killing or their inability to make either finding.

23. In answer to question 1, the jury unanimously found that between midday on 3 August and 18.00 on 4 August 2011 the Metropolitan Police and the Serious Organised Crime Agency had not done the best they realistically could to gather and react to intelligence about the possibility of Mr Duggan collecting a gun from a man

named Hutchinson Foster. The jury elaborated on that finding but it is not necessary to set out their further comments here.

24. In answer to question 2, the jury unanimously found that the taxi in which Mr Duggan was travelling was stopped in a location and in a way which minimised to the greatest extent possible recourse to lethal force.

25. In answer to question 3, the jury unanimously found that Mr Duggan had a gun with him in the minicab immediately before it was stopped by police.

26. Question 4 asked how did the gun get to the grass area where it was later found. The jury, by a majority of nine to one, concluded that Mark Duggan threw the firearm onto the grass. Of the nine, eight concluded that it was more likely than not that Mark Duggan threw the firearm as soon as the minicab came to a stop and prior to any officers being on the pavement. One concluded that Mark Duggan threw the firearm whilst on the pavement and in the process of evading the police. One juror was not convinced of any supposition that Mark Duggan threw the firearm from the vehicle or from the pavement "because no witnesses gave evidence to this effect."

27. Question 5 asked whether Mr Duggan had the gun in his hand when he received the fatal shot. Eight of the jurors were sure that he did not. One thought that he probably did. One thought that he probably did not.

28. As a result of the conclusions to question 5, the Coroner left the jury to decide on the three possible conclusions open to them, namely (a) unlawful killing, (b) lawful killing, or (c) an open conclusion. By a majority of eight to two, the jury concluded that the killing was lawful, that is to say that it was more likely than not that Mr Duggan's death was the result of the use of lawful force. None was satisfied that the killing was unlawful. Two jurors recorded an open conclusion, that is to say that they were not satisfied so as to be sure that Mr Duggan was unlawfully killed and were not satisfied that it was more likely than not that he was killed lawfully.

The Coroner's directions to the jury

29. The jury's conclusion of lawful killing was given after the Coroner had directed them both in writing and orally on lawful self-defence. Those directions were crafted having regard to the directions of a kind commonly given in the Crown Court in a criminal trial and were given after written and then oral submissions by counsel. His directions on the point were given twice to the jury but it is sufficient to set out what he said orally on the second occasion as follows, limited to what is necessary for the purposes of this judgment:

> "You will know, and this is the direction that is given in courts up and down the country about what is self-defence … Any person is entitled to use reasonable force to defend himself or another from injury, attack or threat of attack. So, if you come to the conclusion, as is being stated by V53, that he may have been defending himself or one of his colleagues, then go on to consider these two matters. … Did V53 honestly believe, or may he honestly have believed, even if that belief is mistaken, that at the time he fired the fatal shot that he needed to use

> force to defend himself or another? If your answer is "no", then he cannot have been acting in lawful self-defence and you can put [the issue of self-defence] to one side. If your answer is "yes", that he did believe or may honestly have believed, even if mistaken, then go on to consider: "Was the force used – that fatal shot – reasonable in all the circumstances? … Obviously, if someone is under attack from someone or potentially under attack from someone he genuinely believes is violent and armed, then that person cannot be expected to weigh up precisely the amount of force needed to prevent that attack. But, if he goes over the top and acts out of all proportion to the threat, then he would not be using reasonable force and his actions would be unlawful. The question whether the degree of force used by V53 was reasonable in the circumstances is to be decided by reference to the circumstances as V53 believed them to be, again even if mistaken, but the degree of force is not to be regarded as reasonable in those circumstances as V53 believed them to be if it was disproportionate in those circumstances. … Only if you are sure that Mr Duggan was killed unlawfully will you come to this conclusion and record it as such. … If you conclude it was more likely than not that the fatal shot which killed Mark Duggan was the use of lawful force, then you would return a conclusion of lawful killing."

The legal framework

30. In the criminal law self-defence in a prosecution for assault or homicide has two limbs. The first limb is directed to the question whether the defendant had an honest belief at the time he inflicted the injury that it was necessary to use force to defend himself. In *R v Williams (Gladstone)* [1987] 3 All ER 411 it was confirmed that, if the belief was in fact held even though it was mistaken, its unreasonableness, so far as guilt was concerned, was neither here nor there. The reasonableness or otherwise of the belief was only material to the question of whether the belief was in fact held by the defendant at all.

31. The second limb, also confirmed in *Williams*, requires the force used in reaction to any perceived threat to be reasonable in all the circumstances as the defendant believed them to be.

32. That position at common law was given statutory recognition in the Criminal Justice and Immigration Act 2008 ("CJIA") s.76 (with provisions on proportionality in relation to the second limb, which are not relevant to this appeal). Section 76 applies (among other situations) where, in proceedings for an offence, an issue arises as to whether a person charged with the offence ("D") is entitled to rely on the common law defence of self-defence. The whole of section 76 is relevant to the defence of self defence in a criminal prosecution but, for present purposes, it is sufficient to set out section 76(4), which is as follows:

> "If D claims to have held a particular belief as regards the existence of any circumstances –

> (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
>
> (b) if it is determined that D did genuinely hold it, D is entitled to rely on it … whether or not
>
> (i) it was mistaken, or
>
> (ii) (if it was mistaken) the mistake was a reasonable one to have made."

33. The defence of self-defence in the civil law of tort also has two limbs. There is, however, an important difference. For the defence to apply, the defendant must show that he or she both honestly and (objectively) reasonably believed that he or she was under threat, as well as that the force was reasonable in all the circumstances: *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962.

34. There are other differences between the criminal and civil law which we discuss subsequently in this judgment.

35. Article 2 of the European Convention on Human Rights ("Article 2") is, so far as relevant, as follows.

> "Article 2 – Right to life
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> …."

36. Article 2 ranks as one of the most fundamental provisions of the Convention, from which in peacetime no derogation is permitted under Article 15. The circumstances in which deprivation of life may be justified must be strictly construed: *Jordan v United Kingdom* (2003) 37 EHRR 2 at para. 102.

37. The obligation to protect the right to life under Article 2, read in conjunction with the state's general duty under Article 1, 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: *Jordan* para. 105. 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: ibid.

38. In the case of alleged unlawful killing by state agents, the investigation must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible: *Jordan* para. 107. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or person responsible will risk falling foul of the requisite standard: ibid.

39. In *McCann v United Kingdom* [1996] 21 EHRR 97 the European Court of Human Rights ("the ECHR") held that deprivation of life which was considered absolutely necessary might be justified under Article 2(2) in certain circumstances even though it was based on a mistaken belief. The ECHR said as follows (at para. 200):

> "The Court … considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others."

40. The meaning of that part of the ECHR's judgment, and its application to a justification of self-defence at an inquest under the law of England and Wales, was the subject of the subsequent decision of the Grand Chamber of the ECHR in *Da Silva v United Kingdom* [2016] 63 EHRR 12. That case was decided after the judgment of the Divisional Court in these proceedings and has featured prominently in this appeal. We shall consider it further below.

41. Section 5 of the Coroners and Justice Act 2009 ("the 2009 Act") provides that the purpose of an investigation under Part 1 of the 2009 Act (which includes where the deceased died a violent or unnatural death) is to ascertain (a) who the deceased was; (b) how, when and where the deceased came by his or her death, including, where necessary to avoid a breach of any Convention rights, in what circumstances the deceased came by his or her death; and (c) the particulars (if any) required by the Births and Deaths Registration Act 1953 to be registered concerning the death. Section 7 requires, as part of that investigation, an inquest with a jury if the death resulted from the act of a police officer.

42. Section 10(2) of the 2009 Act provides that the determination by the jury of the matters mentioned in section 5 must not be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability.

Judicial Review

43. Mrs Duggan commenced these proceedings for judicial review by a claim form dated 24 February 2014. The defendant was the Coroner. In due course, a number of Interested Parties were joined. They included the Commissioner of Police for the Metropolis, the National Crime Agency, SC & O.19 Officers (of the Specialist

Firearms Command for the Metropolitan Police Service), other police officers and the Independent Police Complaints Commission,

44. The remedy claimed was for a declaration that the Coroner's direction to the jury was unlawful and violated Article 2, and either an order quashing the conclusion of lawful killing and replacing it with an open verdict or an order quashing the inquest's conclusion and ordering a fresh inquest.

45. Four grounds were specified in support of the claim. They may be summarised as follows. (1) The Coroner ought to have directed the jury that if they were sure Mr Duggan did not have a gun at the moment he was shot, they could not return a conclusion of lawful killing. That was necessary to avoid inconsistent conclusions, and to avoid a conclusion for which there was not sufficient evidence. (2) A mistaken belief in the existence of an imminent threat cannot found a conclusion of lawful killing at an inquest unless it was also a reasonable mistake. (3) In any event, the Coroner misdirected the jury on the meaning of lawful killing because he failed to make it clear that they should be satisfied on the balance of probabilities that V53 mistakenly believed in an imminent threat, rather than that "he may have believed" in that threat. (4) Lethal force by a state agent is only lawful if it is 'absolutely necessary' in all the circumstances – it is not enough that the force was 'reasonable'. On the facts of this case the difference between the two tests was sufficiently great to result in a breach of the procedural obligation under Article 2.

46. For the purposes of this appeal, it is necessary to highlight the second of those grounds. It is consistent with the civil law, rather than the criminal law, test for self-defence. The second ground reflects the case advanced before the Divisional Court that, under the jurisprudence of the ECHR, for the purposes of Article 2 there can be no lawful self-defence unless the mistaken belief in the existence of an imminent threat is objectively a reasonable belief. The second ground also reflects the case advanced before the Divisional Court that the domestic law test is the appropriate one for a conclusion of lawful killing at an inquest.

47. The Divisional Court (the President of the Queen's Bench Division, Sir Brian Leveson, Mr Justice Burnett and His Honour Judge Peter Thornton QC (Chief Coroner)) handed down the judgment of the Court on 14 October 2014.

48. The Court recorded (in para. [4]) that Mrs Duggan did not challenge the rejection by the jury of a conclusion of unlawful killing, and also observed that it was not in issue that there was evidence upon which the jury were entitled to reject a finding of unlawful killing. As the Court elaborated (at para. [5]), the challenge was limited to the positive conclusion, reached on the balance of probabilities, of lawful killing. It was not argued that there should be a further inquest but only that the conclusion of lawful killing should be quashed. In reality, that would have the same effect as if there had been an open conclusion.

49. The Court held (at para. [90]) that the first ground was unarguable and refused the renewed application for permission to advance that ground.

50. As to the second ground, the Court held (at paras. [67] and [68]) that the argument that lawful killing as a conclusion at an inquest is available only if the jury conclude there was no civil wrong is inconsistent with the statutory regime governing inquests.

51. The Court also rejected (at para. [78]) the argument that the honest belief of the state actor responsible for a death only qualifies as justifiable self-defence under Article 2 if it was objectively reasonable as is the case under the civil law test in England and Wales.

52. As to the third ground, the Court observed (at para. [83]) that the Coroner's direction to the jury on the criminal law of self-defence had not been the subject of criticism and had accorded with the practice followed in many other inquests. The Court also observed that all counsel involved in the inquest were extremely experienced in the conduct of inquests in this area of practice; the Coroner circulated his directions in advance for comment and submissions as to content; and, although there were many such submissions, both oral and written, the point taken under the third ground was not among them. The Court concluded (at paras. [86] and [87]) that jury would not have been misled as to the correct standard of proof.

53. The Court held (at para. [90]) that the fourth ground was unarguable and refused the renewed application for permission to advance that ground.

54. The Court concluded (at para. [89]) that the inquest fully satisfied the requirements of the procedural obligation under Article 2 as elucidated by the ECHR and the domestic courts.

55. Finally, the Court stated (at para. [91]) that the conclusions of the jury at the inquest did not relieve the Commissioner of Police for the Metropolis or his officers from any liability in tort since it was not the purpose of the inquest to determine civil liability, for which the burden of proof and the ingredients are different.

The appeal

56. Permission to appeal was initially refused on the papers by Lord Justice Richards but was granted by Lord Justice Sales on 27 October 2015 following an oral hearing.

57. The written grounds of appeal set out five respects in which it was claimed the Divisional Court made an error of law. It is sufficient, for the purposes of this judgment, to mention the following grounds. First (para. 4.1 of the written grounds), the Divisional Court wrongly decided that the question of whether the legal force used against Mr Duggan was lawful should be answered by reference to the purely subjective, criminal law, test for self-defence, under which the officer is entitled to rely on a mistaken belief that there was an imminent threat, no matter how unreasonable the mistake was. Second (para. 4.2 of the written grounds), the jury should have been asked to decide whether the force was lawful by reference to the civil law test, and so should have been asked whether the officer's mistaken belief was a reasonable one. Third (para. 4.3 of the written grounds), the Divisional Court failed to recognise that the Coroner's direction was contrary to the procedural duty under Article 2 to carry out an effective investigation.

58. The listing of the hearing of the appeal and the date for skeleton arguments were deferred to await the outcome of the judgment of the ECHR in *Da Silva*. In that case the ECHR had to consider, among other things, the test applicable to determine whether the use of lethal force was justified for the purposes of Article 2. It also had to consider whether the subjective test of honest belief, under the criminal law relating

to self-defence in England and Wales, and as habitually applied in inquests, meets the standard required by Article 2 or, alternatively, whether an honest belief must be assessed against an objective standard of reasonableness.

59. The judgment of the ECHR was given on 30 March 2016. We will consider the judgment more fully below. It is sufficient at this point to say that in the majority judgment it was held (at paras. 244 and 245) that the use of lethal force by agents of the state may be justified under Article 2 where it is based on an honest belief which, even if mistaken, is perceived for good reasons to be valid at the time, and that the reasonableness of that belief should be determined subjectively from the viewpoint of the person acting in self-defence at the time of the events and not assessed against an objective standard of reasonableness. It was also stated (at para. 247) that, in applying the test, the ECHR had not treated reasonableness as a separate requirement but rather as a relevant factor in determining whether a belief was honestly and genuinely held.

60. The Court held (at para. 252) that the criminal test for self-defence in England and Wales, whose focus is on whether there existed an honest and genuine belief that the use of force was necessary, and where the subjective reasonableness of that belief (or the existence of subjective good reasons for it) is principally relevant to the question of whether it was in fact honestly and genuinely held, is not significantly different from the standard applied in *McCann* and in the post-*McCann* case law and does not fall short of the standard required by Article 2.

61. Leading and junior counsel for Mrs Duggan on the hearing of the present appeal, Mr Hugh Southey QC and Mr Adam Shaw, represented the applicant in *Da Silva*.

62. Following the judgments in *Da Silva*, Mrs Duggan seeks to alter her principal submission on the Coroner's failure to direct the jury as to the need for objective reasonableness to ground lawful self-defence (corresponding to para. 4.1 of the written grounds of appeal), and instead to advance a new submission that the direction was unlawful because the Coroner did not expressly tell the jury that, in assessing whether the belief held by V53 was an honest and genuine one, they needed to consider the reasonableness or otherwise of the belief.

63. Mr Southey has submitted that Mrs Duggan does not need permission to amend the written grounds of appeal to raise this new argument, which was not advanced in the Divisional Court, because of the wide terms of paragraph 4.3 of the written grounds of appeal. If, however, permission is required, he has applied for such permission.

64. Mrs Duggan continues to maintain, as a ground of appeal, that the Coroner should have directed the jury in accordance with the civil law test for self-defence (para. 4.2 of the written grounds of appeal).

65. We consider that permission to appeal is required to raise the new argument, not raised in the Divisional Court, that the Coroner wrongly failed to direct the jury that the reasonableness or otherwise of V53's belief that he faced an imminent threat was relevant to whether or not V53 genuinely and honestly held that belief. Paragraph 4.3 of the written grounds of appeal (the third ground mentioned in paragraph [47] above), was merely consequential on the other two grounds in paragraphs 4.1 and 4.2 of the written grounds.

66. Having heard full argument on the new issue, and in the light of the wider public interest in these proceedings, we grant permission to appeal on the new ground.

The merits of the appeal

The absence of a direction as to the relevance of the reasonableness of V53's belief

67. Mr Southey emphasised the following evidence at the inquest as raising an issue as to the reasonableness, and hence the honesty and genuineness, of the belief of V53 that he faced an imminent threat when he shot Mr Duggan. V53's evidence was that Mr Duggan was holding a gun, which was contained in a sock and which Mr Duggan was pointing in his direction. Eight of the ten members of the jury, however, were sure that Mr Duggan did not have a gun in his hand when he was shot. Eight members of the jury concluded that it was probable that Mr Duggan threw the gun, which was with him in the minicab, as soon the car came to a stop and prior to any officers being on the pavement. V53's stated belief was, therefore, mistaken, which he apparently formed even though he was a very experienced and highly trained firearms officer, and even though, according to his evidence, he had "lovely vision" and his "focus [was] just glued on the gun", and between the two shots he reassessed the situation and was of the view there was still a threat. V53 accepted that, if there was in fact no gun in Mr Duggan's hand, he would have had no justification to shoot Mr Duggan.

68. Furthermore, Witness B's evidence was that he had a clear view of Mr Duggan, who had a phone clutched in his hands; both his hands were up above the shoulders near his face. He said that Mr Duggan's left hand was open, facing forwards, and his right hand was curled around the phone, which was a small phone and not a gun, and Mr Duggan was not aiming at anyone and did not appear to be in an aggressive pose.

69. The Coroner himself ruled that the question of unlawful killing was to be left to the jury because there was evidence on which the jury could be sure that the shooting was not done in self-defence of V53 and others or to prevent crime. The Coroner did not, however, expressly direct the jury that the reasonableness or otherwise of V53's stated belief that Mr Duggan was holding a gun and pointing it in his direction was relevant to whether V53 honestly and genuinely held that belief.

70. Mr Southey pointed out that, in the written submissions to the Coroner of Mr Duggan's family and loved ones on the proposed directions to the jury, it was submitted that the Coroner should say to the jury that the less reasonable was V53's belief the less likely it was to be an honest belief, and an express reference was made to section CJIA s.76(4). Although the Coroner did not expressly address and reject that submission, Mr Southey submitted that it was implicitly rejected when the Coroner decided on the final content of the directions to the jury.

71. Mr Southey acknowledged that, notwithstanding CJIA s.76(4), it is not necessary in every criminal trial in which the defendant relies on self-defence, to give a direction in terms of that sub-section. He said, however, that such a direction may need to be given in a criminal trial when an issue arises on the facts as to the honesty and genuineness of the defendant's belief and its reasonableness. He submitted that there is, however, an even greater need in an inquest for particularity on this point in the directions to the jury because, unlike the position at a criminal trial, there are no closing speeches at an inquest. Moreover, as stated in *Jordan* (at para. 102), the

importance of Article 2 requires that its provisions be interpreted and applied so as to make its safeguards, including the official investigation, practical and effective.

72. Mr Southey emphasised that an inquest, which is intended to fulfil the procedural requirements of Article 2, is the only process which involves the deceased's family and which enables the public to access the results of those procedural requirements. In that connection, he referred to the statements in *Da Silva* (at para. 232) that "What is at stake here is nothing less than public confidence in the state's monopoly on the use of force", (at para. 233) that the investigation, to be effective for Article 2 purposes, "must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible", and (at para. 234) that "Where a suspicious death has been identified at the hands of a state agent, particularly stringent scrutiny must be applied by the domestic authorities to the ensuing investigation".

73. Mr Southey pointed out that in *Da Silva* the ECHR observed (at paras. 106, 249 and 255) that the coroner had acknowledged that the reasonableness of the officer's belief was relevant in helping to decide whether the belief was honestly held. He also submitted that the ECHR in *Da Silva* was stating a mandatory requirement when it said (at para. 246) that the ECHR had treated reasonableness as a relevant factor in determining whether a belief was honestly and genuinely held, and when it said the following (at para 248):

> "It can therefore be elicited from the Court's case-law that in applying the *McCann and Others* test the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary. In addressing this question, the Court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, it was not based on subjective good reasons), it is likely that the Court would have difficulty accepting that it was honestly and genuinely held."

74. Mr Southey also drew attention to the ECHR's criticism in *Petrov v Bulgaria* 63106/00 10 June 2010 of the investigation of the potentially fatal shooting of the applicant by the Bulgarian police, when the ECHR said (at para. 52) that "the military investigating and prosecuting authorities and the military court disregarded material circumstances, such as the fact that the officers had no reason to believe that the applicant represented a danger to anyone".

75. We dismiss this limb of the appeal for reasons which can be briefly stated.

76. There is nothing in either domestic legislation or the jurisprudence of the ECHR which requires that, in every case where a self-defence justification is raised at an inquest, a specific direction must be given to the jury that, in deciding whether a belief of imminent threat was honestly and genuinely held, the reasonableness or unreasonableness of that belief from the viewpoint of the person claiming the defence is a relevant consideration.

77. Mr Southey acknowledged that is the situation in a criminal trial. In *R v Palmer* [1971] AC 814 Lord Morris, giving the judgment of the Privy Council said the following (at p.831F-832A):

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. … There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence."

78. In *Beckford v The Queen* [1988] AC 130, in which the Privy Council approved the reasoning and decision in *Williams*, Lord Griffiths, giving the judgment of the Privy Council, said (at p. 145):

> "…no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances. In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable."

79. More recently, in *R v Keane and McGrath* (2010) EWCA Crim 2514, the Court of Appeal rejected the proposition that CJIA s.76 introduced the need for complicated directions to a jury in a criminal prosecution and rejected the notion that a summing up must rehearse all the contents of section 76. Hughes LJ, giving the judgment of the Court, said as follows:

> "4. The law of self-defence is not complicated. It represents a universally recognised commonsense concept. In our experience juries do not find that commonsense concept at all difficult to understand. The only potential difficulty for a judge is that he needs to remember the potential possibility of what lawyers would call a subjective element at an early stage of the exercise, whilst the critical question of the reasonableness of the response is, in lawyer's expressions, an objective one. In using those lawyer's terms we do not for a moment suggest that it is helpful to use them in a summing-up.
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> 5. It is however very long established law that there are usually two and sometimes three stages into any enquiry into self-

defence. There may be more, but these are the basic building blocks of a large proportion of the cases in which it is raised:

1. If there is a dispute about what happened to cause the defendant to use the violence that he did, and there usually is such a dispute, then the jury must decide it, attending of course to the onus and standard of proof.

2. If the defendant claims that he thought that something was happening which the jury may find was not happening, then the second question which arises is what did the defendant genuinely believe was happening to cause him to use the violence that he did? That question does not arise in every case. If it does arise then whether his belief was reasonable or not, providing it is genuinely held, he is to be judged on the facts as he believed them to be unless his erroneous belief is the result of voluntarily taken drink or drugs, in which event it is to be disregarded.

3. Once it has thus been decided on what factual basis the defendant's actions are to be judged, either because they are the things that actually happened and he knew them or because he genuinely believed in them even if they did not occur, then the remaining and critical question for the jury is: was his response reasonable, or proportionate (which means the same thing)? Was it reasonable (or proportionate) in all the circumstances? Unlike the earlier stages which may involve the belief of the defendant being the governing factor, the reasonableness of his response on the assumed basis of fact is a test solely for the jury and not for him. …

6. The single judge invited the court to consider whether the statutory formulation of the law in section 76 might have contributed to any degree of confusion and debate which ensued before the judge in the second of our cases. We do not think in fact that section 76 contributed significantly to the debate in question, nor to such degree of confusion as there was. For the avoidance of doubt, it is perhaps helpful to say of section 76 three things: (a) it does not alter the law as it has been for many years; (b) it does not exhaustively state the law of self-defence but it does state the basic principles; (c) it does not require any summing-up to rehearse the whole of its contents just because they are now contained in statute. The fundamental rule of summing-up remains the same. The jury must be told the law which applies to the facts which it might find; it is not to be troubled by a disquisition on the parts of the law which do not affect the case."

80. It is also clear both from the Crown Court Bench Book (Directing the Jury) of March 2010 and its successor, The Crown Court Compendium (Jury and Trial Management and Summing Up) of May 2016, that, on the first limb, a specific direction on the

reasonableness of the defendant's belief of an imminent threat is not required in every case where the defendant relies on self-defence. It is clear, for example, that in *R v Yaman* [2012] EWCA Crim 1075, which was one of the cases to which Mr Southey referred and in which the issue was whether proper directions had been given to the jury in the light of CJIA s.76, the Court of Appeal (Criminal Division) did not consider that such a direction ought to have been given: see paras. [25] and [31].

81. Indeed, it is desirable not to give such a direction unless it is really necessary. The jury may well be confused by cumulative directions as to, on the one hand, the relevance of "subjective reasonableness" on the question whether the defendant honestly and genuinely believed there was an imminent threat, and, on the other hand, whether the degree of force used was (objectively) reasonable in all the circumstances.

82. Mr Southey rightly points out that there are differences between criminal trials and an inquest, including the absence of closing speeches at an inquest, which make the need for care and clarity in a summing up at an inquest all the more important. That was a point made by Mr Justice Collins in *R (Anderson) v HM Coroner for Inner North London* [2004] EWHC 2729 (Admin). Nevertheless, the touchstone for the desirability of an express direction on the relevance of reasonableness in deciding whether a belief as to an imminent threat was honestly and genuinely held is the same for an inquest as for a criminal trial, namely if the honesty of the belief and its reasonableness are in issue and it is considered that a direction would assist the jury in reaching its decision.

83. Despite the references made by Mr Southey on this point to various passages in *Da Silva*, we have no hesitation in rejecting his submission that *Da Silva* imposes a mandatory requirement for a direction in every inquest, where there is a justification of self-defence, on the relevance of reasonableness to honesty and genuineness of belief. The central issue in *Da Silva* was whether or not Article 2 requires that belief in an imminent threat must be objectively reasonable for a killing by a state agent to be lawful. In rejecting that proposition, the ECHR merely pointed out that the "subjective reasonableness" or otherwise of a belief, that is to say viewing matters from the viewpoint of the state agent, is nevertheless of relevance to whether the belief was honestly and genuinely held.

84. It was never an issue in *Da Silva* as to whether that needed to be spelled out to the jury at an inquest. *Da Silva* was concerned with the necessary conditions for a lawful killing in the context of Article 2. It is not a requirement of lawful killing, in the context of Article 2, that the state agent's belief of imminent threat must have been reasonable. The only requirement is that the state agent honestly and genuinely held such a belief. The reasonableness of that belief is merely an implicit, and, it might be said, common sense, consideration in deciding whether that requirement is satisfied

85. In the case of Mr Duggan's inquest it was entirely unnecessary to give a direction to the jury on the relevance of the reasonableness or otherwise of V53's belief that Mr Duggan was pointing a gun at V53. The whole point of the evidence of those who were present and saw the shooting was to establish whether V53 had reasons for holding that belief. For example, the evidence of Witness B, including the apparently inconsistent evidence that he had previously given to Witness C, the evidence of other officers on the scene, and the evidence that intelligence suggested that Mr Duggan

was in possession of a gun in the minicab and that the gang he was believed to belong to had a history of extreme violence, were all relevant to that question. The Coroner, in this respect, properly reminded the jury of all relevant features of the evidence [in the language of Lord Griffiths in *Beckford*] going to the first limb of the defence.

86. While it was true that, as the Coroner ruled, there was evidence which would entitle the jury to bring in a conclusion of unlawful killing, it was equally clear that there was evidence which entitled the jury to reach the conclusion that there was lawful self-defence. The five questions, put to and answered by the jury, before reaching their decision on unlawful or lawful killing or open conclusion inherently and necessarily invited consideration of the reasonableness, as part of its assessment of the genuineness, of V53's belief that Mr Duggan was pointing a gun. It is accepted on behalf of Mrs Duggan that the jury was entitled on the evidence to reject the conclusion of unlawful killing. Their conclusion of lawful killing, which could only have been made on the footing that V53 honestly and genuinely believed Mr Duggan was pointing a gun at him, inevitably and implicitly involved an evaluation by them of the evidence indicating whether V53 could reasonably have held that belief in the light of what he knew and saw.

87. The point presently taken was not taken before the Divisional Court. Indeed, it was particularly noted in the judgment of the Divisional Court (at para. [83]) that the Coroner's direction to the jury on the criminal law of self-defence had not been the subject of criticism. The fact that the point was not taken before the Divisional Court or in the original grounds of appeal, but only after the decision in *Da Silva* critically undermined the main ground of the appeal on objective reasonableness, lends weight to the conclusion that the absence of a direction on the relevance of reasonableness to honesty and genuineness of belief was not in truth perceived to be critical at the time of the inquest.

<u>The absence of any conclusion by the jury on breach of the civil law</u>

88. Turning to the second limb of the appeal, Mr Southey's simple proposition was that, in the absence of lawful self-defence, the killing of Mr Duggan was a tort, and so the Coroner ought to have directed the jury (but wrongly failed to direct them) to reach a conclusion on whether there had been a lawful or unlawful death for the purposes of the civil law. That would have required directions to the jury on the elements of self-defence in civil law.

89. Mr Southey relied, for this part of the appeal, on the observations of the ECHR in *Jordan* cited above, as well as the statement in paragraph 105 of *Jordan* that the essential purpose of the official investigation required under Article 2 when individuals have been killed as a result of the use of force "is to secure the effective implementation of the domestic laws which protect the right to life". He also referred to the statement of the ECHR in *Da Silva* (at para. 230) that the state must ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished. Mr Southey submitted that our domestic tort law is intended to protect the right to life and to safeguard physical integrity and so the procedural requirements of Article 2 must extend to an effective enquiry whether there has been compliance with that law.

90. We dismiss this ground of appeal.

91. There are several differences between the criminal law and the civil law on self-defence. In a prosecution for assault or homicide it is for the prosecution to prove that the act was not done in lawful self-defence. In the civil law the burden of proving self-defence lies on the defendant. In a criminal court the prosecution must disprove self-defence to the criminal standard of proof. In civil proceedings the defendant must prove self-defence to the civil standard of proof.

92. Moreover, and importantly in the present context, there is a difference between the criminal law and civil law as to the relevance of reasonableness to the issue of the defendant's honest and genuine belief of imminent danger of being attacked where that belief was mistaken. In the criminal law, as we have discussed, the question whether the belief was reasonable is at most relevant to whether the belief was in fact honestly and genuinely held. In the civil law the defendant must not only hold the belief but it must be objectively reasonable. That distinction was maintained and justified on policy grounds by the House of Lords in *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962, where Lord Scott, with whom the other members of Appellate Committee agreed on this point, said as follows:

> "17. … One of the main functions of the criminal law is to identify, and provide punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good order of society. It is fundamental to criminal law and procedure that everyone charged with criminal behaviour should be presumed innocent until proven guilty and that, as a general rule, no one should be punished for a crime that he or she did not intend to commit or be punished for the consequences of an honest mistake. There are of course exceptions to these principles but they explain, in my opinion, why a person who honestly believes that he is in danger of an imminent deadly attack and responds violently in order to protect himself from that attack should be able to plead self-defence as an answer to a criminal charge of assault, or indeed murder, whether or not he had been mistaken in his belief and whether or not his mistake had been, objectively speaking, a reasonable one for him to have made. As has often been observed, however, the greater the unreasonableness of the belief the more unlikely it may be that the belief was honestly held.
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> 18. The function of the civil law of tort is different. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights. Thus, for instance, the right of freedom of expression may conflict with the right of others not to be defamed. The rules and principles of the tort of defamation must strike the balance. The right not to be physically harmed by the actions of another may

> conflict with the rights of other people to engage in activities involving the possibility of accidentally causing harm. The balance between these conflicting rights must be struck by the rules and principles of the tort of negligence. As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions. To hold, in a civil case, that a mistaken and unreasonably held belief by A that he was about to be attacked by B justified a pre-emptive attack in believed self-defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance. It is one thing to say that if A's mistaken belief was honestly held he should not be punished by the criminal law. It would be quite another to say that A's unreasonably held mistaken belief would be sufficient to justify the law in setting aside B's right not to be subjected to physical violence by A. I would have no hesitation whatever in holding that for civil law purposes an excuse of self-defence based on non existent facts that are honestly but unreasonably believed to exist must fail."

93. We were not shown any domestic case which requires an enquiry as to breach of the civil law at an inquest. The judgment of the Divisional Court gave a succinct and lucid historical account of the former verdicts at an inquest of justifiable or excusable homicide and the modern conclusions of lawful and unlawful killing. As that account shows, it has never been the function of an inquest to concern itself with civil liability for a death, and the conclusion of lawful killing has always been understood to have been linked to crime and amounted to a statement that the jury believed that the deceased was probably not the victim of a homicide.

94. So far as concerns Article 2, there is no decision of the ECHR which expressly states that the procedural requirements of Article 2 impose an obligation on the state to investigate a breach of the civil law. Indeed, such an interpretation of Article 2 would be contrary to the policy and purpose underlying Article 2 and was implicitly rejected in *Da Silva*.

95. The procedural requirements of Article 2 are imposed on the state. As was observed by Lord Scott in *Ashley* in the passages quoted earlier in this judgment, the criminal law identifies, and provides punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good order of society. The civil law of tort, on the other hand, is concerned with disputes between citizens or persons or bodies in the

exercise of private rather than public functions. As was made clear in *Da Silva*, the procedural requirements of Article 2 are concerned with the public's confidence in the state's monopoly on the use of force and that, where appropriate, the official investigation must lead to the punishing of those responsible for the unjustified use of force. Similar points had been made by the ECHR in *Nachova v Bulgaria* (2006) 42 EHRR 43 (at para. 113) about the need for the investigation to be effective in the sense of being capable of leading to the identification and punishment of those responsible. Those requirements are consistent with standards and consequential penalties imposed by the criminal law rather than those imposed to resolve private disputes.

96. Consistently with that analysis, in *Jordan* the ECHR rejected the argument that civil proceedings would be an adequate compliance by the state with the procedural requirements of Article 2 even though they would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. The ECHR's rejection (at para. 141) was on the grounds that it is a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the punishment of any alleged perpetrator.

97. Furthermore, the very question addressed by the ECHR in *Da Silva* was whether, for the purposes of Article 2, the criminal law of self-defence in England and Wales was a sufficient justification of killing where the belief of an imminent threat was both mistaken and not objectively reasonable. In holding that it was sufficient justification, the ECHR was implicitly, if not explicitly, deciding that Article 2 does not require an investigation into the objective reasonableness of the belief which might found a civil action. That conclusion is given added weight by the fact, accepted by the parties to the appeal, that the ECHR in *Da Silva* was aware of *Ashley* and, hence, of the clear distinction made there between the subjective reasonableness of the defendant's belief for self-defence in a criminal prosecution and the objective reasonableness of the defendant's belief for self-defence in the civil law.

98. Furthermore, as Ms Clare Montgomery QC submitted on behalf of the SC&019 officers, it would be a procedural nonsense and a recipe for confusion for a jury if the investigation under Article 2(2) had to address two different legal standards.

99. It is not necessary, in the circumstances, to decide whether, in any event, this second limb of the appeal is precluded by section 10(2) of the 2009 Act.

Conclusion

100. For all those reasons, we dismiss this appeal.