

## ACTING REASONABLY WHILE USING DISPROPORTIONATE FORCE: AN OXYMORON

Clinston Chiok\*

### I. INTRODUCTION

**I**N THE RECENT DECISION OF *STEVEN*,<sup>1</sup> the defendant (D) sought to reverse *Collins*,<sup>2</sup> arguing that Parliament enacted s 76(5A) of the Criminal Justice and Immigration Act 2008 (CJIA) with the intention that if D is found not to have used grossly disproportionate force, s 76(5A) applies to deem him as using a degree of force which is reasonable, satisfying the defence of self-defence. The Court of Appeal (CA) rejected this interpretation, affirming and citing the interpretation of s 76 (5A) by Sir Brian Leveson in *Collins*. This article seeks to provide further justification for these decisions by: (a) outlining the background behind s 76(5A); (b) assessing the interpretation of s 76(5A) in *Collins*; and (c) addressing any possible justifications for an alternative interpretation of s 76(5A).

### II. BACKGROUND AND MISCONCEPTIONS BEHIND S 76(5A) CJIA

#### A. FIRST MISCONCEPTION: THE OLD LAW<sup>3</sup>

Firstly, there was a misconceived belief that the old law (i.e. the common law before it introduced a reasonableness test for self-defence) had always sanctioned intruders such as burglars to be slain on sight. Indeed, Blackstone<sup>4</sup> did suggest that householders had a *carte blanche* to kill burglars if they

\* LL.B. (Nottingham), LL.M. (*Cantab*). I am grateful to the reviewers for their assistance. All errors are my own.

<sup>1</sup> *R v Ray (Steven)* [2017] EWCA Crim 1391, [2018] 2 WLR 1148.

<sup>2</sup> *R (Collins) v Secretary of State* [2016] EWHC 33 (Admin), [2016] QB 862, [2016] 2 WLR 1303.

<sup>3</sup> John Spencer, 'Using force on burglars' [2016] 2 Arch Rev 6.

<sup>4</sup> Blackstone's Commentaries on the Laws of England Volume IV (Bl Comm Vol IV) 180.

wanted. However, this was not an absolute rule; the authority that Blackstone relied upon had an implicit requirement that the householder's force must be directed against an intruder who was himself using force.<sup>5</sup>

## B. SECOND MISCONCEPTION: COMMON LAW REASONABLENESS TEST

The Criminal Law Act 1967 introduced a test of reasonableness to the common law of self-defence.<sup>6</sup> The reasonableness of D's act was judged objectively by a jury, based on D's subjective view of the facts.<sup>7</sup> This test was applied in *Martin*,<sup>8</sup> where D shot an intruder but failed to satisfy the claim of self-defence. This directly led to the second misconception that the law had changed; using any degree of force against intruders was misunderstood as now being always illegal. In fact, even under the old law, such self-defence would have been precluded since the intruders were not using force against D. However, the media misreported the case and portrayed D as a hero who was victimised by the criminal justice system.<sup>9</sup>

## C. THE ENACTMENT OF S.76 CJIA

Several bills<sup>10</sup> were proposed in response to the public outcry regarding the decision in *Martin*,<sup>11</sup> but there was no concrete change until after the case of *Hussain*.<sup>12</sup> In that case, the defendants who were convicted did not claim self-defence but instead unsuccessfully argued that they did not carry out any assault on the household intruder. However, the media sensationalised the case and propagated the second misconception.<sup>13</sup> As a response to the public outrage, Justice Minister Jack Straw pledged to overhaul the existing law, which led to the enactment of s 76 CJIA.<sup>14</sup>

<sup>5</sup> Hale, *The History of the Pleas of the Crown* (Hale PC) 488.

<sup>6</sup> Criminal Law Act 1967 s 3.

<sup>7</sup> *R v Williams (Gladstone)* (1984) 78 Cr App R 276, [1987] All ER 411; *Beckford v R* [1988] AC 130, [1987] 3 WLR 611.

<sup>8</sup> *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1, [2002] 2 WLR 1.

<sup>9</sup> Spencer (n 3).

<sup>10</sup> Criminal Justice (Justifiable Conduct) Bill 2004; Criminal Law (Amendment) (Householder Protection) Bill 2004.

<sup>11</sup> *Martin* (n 8).

<sup>12</sup> *R v Hussain (Tokeer)* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60.

<sup>13</sup> 'Chris Grayling: A Tory government would seek to protect the rights of the victim' *The Telegraph* (London, 19 December 2009) <[www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-seek-to-protect-the-rights-of-the-victim.html](http://www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-seek-to-protect-the-rights-of-the-victim.html)> accessed on 27 March 2016.

<sup>14</sup> Spencer (n 3).

In effect, s 76 merely codified the existing reasonableness test,<sup>15</sup> and was criticised as “wholly unnecessary” and only “deployed as a weapon in a PR war” to assuage the public’s outrage.<sup>16</sup>

#### D. REVIVAL OF THE FIRST MISCONCEPTION: S 76(5A)

In 2012, Conservative backbenchers called for further reform of s 76 for two main reasons.<sup>17</sup> Firstly, they wanted to honour the pledge made in their 2010 election manifesto; that further reforms to s 76 would be carried out.<sup>18</sup> Secondly, it was to ensure “victims of crime do not find themselves facing prosecution for defending their own homes”.<sup>19</sup> The amendment was effected through s 43(3) of the Crime and Courts Act 2013, which inserted s 76(5A) into the CJIA. S 76(5A) states that “in a householder case, the degree of force used by [D] is not to be regarded as having been reasonable in the circumstances as [D] believed them to be if it was grossly disproportionate in those circumstances”. Certain commentators<sup>20</sup> and even the Crown Prosecution Service (CPS)<sup>21</sup> interpreted s 76(5A) to indicate that any force used in the householder context, as long as not grossly disproportionate, would be reasonable. This led to the third misconception (in truth, a revival similar to the first misconception) that householders could use any degree of force on home intruders, as long as it was not grossly disproportionate. However, *Collins*<sup>22</sup> expressly dispels this misconception.

## II. THE DECISION IN *COLLINS*

The court in *Collins*<sup>23</sup> interpreted s 76(5A) such that the question of whether force is grossly disproportionate and whether it is reasonable was to be considered disjunctively by the jury.<sup>24</sup> Ostensibly, this decision is unconvincing as it allows the absurd possibility of an act done by a

<sup>15</sup> Sally Lipscombe, ‘Householders and the Criminal Law of Self-Defence’ (Standard Note SN/HA/2959, *House of Commons Library*, 2013) 3.

<sup>16</sup> Paul Mendelle, ‘Self-defence law shows how politicians use legislation as PR’ *The Guardian* (London, 31 October 2011) <[www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr](http://www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr)> accessed 27 March 2016.

<sup>17</sup> Patrick Hennessy, ‘Conservative MPs demand greater rights for householders against burglars’ *Sunday Telegraph* (London, 9 September 2012) <[www.telegraph.co.uk/news/politics/9530564/Conservative-MPs-demand-greater-rights-for-householders-against-burglars.html](http://www.telegraph.co.uk/news/politics/9530564/Conservative-MPs-demand-greater-rights-for-householders-against-burglars.html)> accessed 27 March 2016.

<sup>18</sup> ‘Invitation to Join the Government of Britain: the Conservative Manifesto 2010’ (Conservative Party, 2010) 56.

<sup>19</sup> Hennessy (n 17).

<sup>20</sup> James Richardson, *Archbold 2016: Criminal Pleading, Evidence and Practice* (64<sup>th</sup> edn, Sweet & Maxwell 2015) para 19–48a.

<sup>21</sup> *Collins* (n 2).

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.* [22].

householder to be concurrently disproportionate and reasonable. Logically speaking, a reasonable act would impliedly exclude any act that involves disproportionate force. Judges themselves have used the terms “reasonable” and “proportionate” interchangeably<sup>25</sup> and the court in *Collins*<sup>26</sup> conceded that in most cases, D would be found by the jury to have acted reasonably where he was using proportionate force.<sup>27</sup> However, this illogical possibility seems to be justifiable as the court interprets s 76(5A) as only “limitative, not permissive”;<sup>28</sup> this means that s 76(5A) only operates to prevent the possibility of a grossly disproportionate degree of force being held as reasonable.<sup>29</sup> In other words, s 76(5A) operates as a filter before the reasonableness test in s 76(3) is applied. Firstly, this interpretation is logically drawn from the fact that s 76(5A) was drafted in the negative, “allowing but not requiring the fact finder to conclude that force which is disproportionate still has to be reasonable”.<sup>30</sup> Secondly, this construction of s 76(5A) is consistent with the Ministry of Justice’s view that s 76(5A) “does not give householders free rein to use disproportionate force in every case... [The] level of force used must still be reasonable in the circumstances as the householder believed them to be”.<sup>31</sup> Finally, this is in line with the explanatory notes relating to s 43(3) of the Crime and Courts Bill (which implements s 76(5A) CJIA) that “it could be reasonable for householders to use disproportionate force to defend themselves from burglars in their homes”.<sup>32</sup>

Accepting the interpretation that s 76(5A) co-exists with s 76(3), it is clear that the third misconception has been expressly dispelled and that reasonableness and proportionality cannot be used interchangeably given that they apply in different contexts. As a result of statutory drafting, when both ss 76(5A) and (3) operate, it is conceivable that a disproportionate act may be reasonable.

### **III. ARGUMENTS FOR AN ALTERNATIVE INTERPRETATION OF S 76(5A)**

While an alternative interpretation of s 76(5A) is that any degree of force will be reasonable unless it is grossly disproportionate, the justifications for such an interpretation are untenable when subject to greater scrutiny. Four such justifications will now be considered.

<sup>25</sup> *R v Keane (Daniel)* [2010] EWCA Crim 2514 [5] (Hughes LJ).

<sup>26</sup> *Collins* (n 2).

<sup>27</sup> *ibid* [25].

<sup>28</sup> Spencer (n 3).

<sup>29</sup> *Collins* (n 2) [61].

<sup>30</sup> *ibid* [25].

<sup>31</sup> ‘Use of force in self-defence at place of residence’ (Circular No 2013/02, Ministry of Justice 26 April 2013) [10].

<sup>32</sup> Crime and Courts Bill Deb (Explanatory notes) 19 December 2012 col 431.

## A. UNCERTAINTY WITH THE ‘REASONABLE FORCE’ TEST

The main criticism of the reasonable force test (s 76(3)) is that it is placed in the jury’s “black box” discretion;<sup>33</sup> what amounts to reasonable force cannot be adequately defined as each case turns on its own facts. As such, it has been said to be “unacceptably vague and gives insufficient guidance”<sup>34</sup> as to what a householder can legally do when dealing with an intruder. Is the alternative interpretation more helpful than the interpretation in *Collins*?<sup>35</sup>

Given the lack of any statutory guidance as to what constitutes grossly disproportionate, distinguishing between a disproportionate and grossly disproportionate act has been criticised to be “as decipherable as assessment of how many angels can dance on the head of a pin”.<sup>36</sup> A circular issued by the Ministry of Justice acknowledges that “there are no hard and fast rules about what is disproportionate or grossly disproportionate”<sup>37</sup> and instead tries to give some guidance by way of an illustration. It was stated that an instinctive punch from a householder, which leaves the fleeing intruder unconscious is deemed as a disproportionate act, while a grossly disproportionate act would be if the householder continues stomping or stabs the intruder after he is knocked unconscious. This illustration is troubling as it suggests the threshold is set “when it is abundantly clear that no further force is required”.<sup>38</sup> It is submitted that even if the courts were to consider adopting the alternative interpretation of s 76(5A), what amounts to a grossly disproportionate act would not be confined to circumstances that are analogous to the illustration given by the Ministry of Justice. Instead, it would just be another reasonableness test in substance and left to the jury’s discretion. Given that it is unclear what constitutes grossly disproportionate, the alternative interpretation cannot be justified on the grounds that it provides more certainty over present law.

While a stronger argument could be made if the statute were to provide definitions or clearer guidance on what grossly disproportionate means, it is submitted that this will still not be advantageous over the current test. Listing all circumstances where an act would be grossly disproportionate would be an impossible task, as there are too many different factual circumstances. Not all situations can be anticipated and this will lead to the pursuit of an elusive

<sup>33</sup> Joshua Getzler, ‘Use of Force in Protecting Property’ (2006) 7 *Theoretical Inquiries in Law* 131, 151.

<sup>34</sup> Ian Dennis, ‘What Should Be Done about the Law of Self-Defence?’ [2000] *Crim LR* 417.

<sup>35</sup> *Collins* (n 2).

<sup>36</sup> Nicola Wake, ‘Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives’ (2013) 77(6) *Journal of Criminal Law* 512.

<sup>37</sup> Circular No. 2013/02 (n 31) [12].

<sup>38</sup> Wake (n 36).

“will-o’-the-wisp”<sup>39</sup> of “an appropriate one-size-fits-all” statutory definition.<sup>40</sup> Lord Woolf opined that this would lead to “amendment after amendment to the law, making it more and more complex and difficult to apply”.<sup>41</sup> Smith & Hogan observe that the current reasonableness test works perfectly well in practice, as its “virtue is that it is malleable and can be applied appropriately in different contexts”.<sup>42</sup> As such, it is submitted that flexibility over certainty would be more appropriate in practice. Moreover, s 76(7) already gives a wide margin of appreciation in D’s favour when determining reasonableness; the jury must take into account that D “may not be able to weigh to a nicety the exact measure of any necessary action”.<sup>43</sup> Thus, the advantages of statutory certainty are far outweighed by the potential problems it would bring.

## B. RECOGNISING THE SPECIAL STATUS OF THE HOME

Miller<sup>44</sup> suggests that the law should treat home intrusion cases in a special manner, so as to recognise that “there is a special emotional affinity between a person and his home”<sup>45</sup> and that it is the “ultimate place of safety”.<sup>46</sup> The special status of the home has been stated as early as in the 17<sup>th</sup> century, with Sir Edward Coke expressing that “a man’s home is his castle, *et domus sua cuique est tutissimum* [and each man’s home is his safest refuge]”.<sup>47</sup> As Miller<sup>48</sup> points out, English law has historically taken into account the special status of home. In *R v Hussey*,<sup>49</sup> the Court of Appeal affirmed the right of the tenant who was facing wrongful eviction to shoot his landlady. Would allowing any degree of force that is not grossly disproportionate in a householder case suitably reflect the significant status of home?

<sup>39</sup> Michael Reynolds, ‘The rise and fall of the Atkin doctrine: searching for a will-o’-the-wisp’ (2004) 20(3) Construction Law Journal 111.

<sup>40</sup> Jill Dickinson, ‘Open season for burglar battering: is it time to check in with the civil courts?’ (2013) 2 Journal of Personal Injury Law 63.

<sup>41</sup> HL Deb 10 December 2012, vol 741, col 885.

<sup>42</sup> David Omerod and Karl Laird, *Smith and Hogan’s Criminal law* (14th edn, OUP 2015) 436.

<sup>43</sup> Criminal Justice and Immigration Act 2008, s 76(7)(a).

<sup>44</sup> Sophie Miller, “‘Grossly disproportionate’: home owners’ legal licence to kill’ (2013) 77(4) Journal of Criminal Law 299.

<sup>45</sup> Boaz Sangero, *Self-defence in Criminal Law* (Hart Publishing: Oxford 2006) 267.

<sup>46</sup> Denise Drake, ‘The Castle Doctrine: An Expanding Right to Stand Your Ground’ (2008) 37 St Mary’s Law Journal 573 at 596.

<sup>47</sup> Co Inst.

<sup>48</sup> Miller (n 50).

<sup>49</sup> *R v Hussey* (1924) 18 Cr App R 160.

It is submitted that this justification is untenable. Firstly, *Hussey*<sup>50</sup> is not followed in the modern line of cases.<sup>51</sup> Secondly, allowing this alternative interpretation would breach an even more fundamental concept: the sanctity and right to life.<sup>52</sup> While home intruders are frequently portrayed as violent criminals, Leverick notes that most “just want to escape without contact with the home owner at all—they only want to steal property”.<sup>53</sup> As Miller states, do we want a legal system “where people are allowed to shoot dead someone who is only trying to steal their TV”?<sup>54</sup> Furthermore, this justification is only tenable if the householder does not mistake someone as an intruder. However, s 76(3) CJIA allows the defence to apply even under a mistaken belief, as it is decided by reference to the defendant’s subjective beliefs of the circumstances. Therefore, if the householder should always be allowed to kill in defence of his home, “the aggressive armed burglar can be safely dispatched, but so also can the ten-year-old boy stealing apples from the kitchen”.<sup>55</sup>

Fundamentally, Jones<sup>56</sup> provides an argument that the underlying thrust of this justification does not reflect reality; the home does not have a special status for everyone. He notes that people in “weaker positions in the domestic power relationships”, such as youths, may not regard their home as a “safe haven”. For others, their home is where threats occur from the occupants themselves and not trespassers; the Office for National Statistics estimates that 8.2% of women and 4.0% of men reported experiencing domestic abuse in 2015, equivalent to 1.3 million women and 600,000 men.<sup>57</sup> Furthermore, s 76(5A)’s scope is limited to where D uses force while he is “in or partly in a building”.<sup>58</sup> How can the proposed test be justifiable if its applicability depends whether the householder engages the intruder in his room instead of his garden?<sup>59</sup> As such, clearly even the special status of home cannot justify the alternative interpretation.

<sup>50</sup> *Hussey* (n 55).

<sup>51</sup> *R v Faraj (Shwan)* [2007] EWCA Crim 1033 [22] (Tuckey LJ).

<sup>52</sup> Art 2 ECHR.

<sup>53</sup> Fiona Leverick, *Killing in Self-Defence* (OUP 2008) 139.

<sup>54</sup> Miller (n 50).

<sup>55</sup> Dennis (n 34).

<sup>56</sup> Gill Jones, ‘Experimenting with Households and Inventing “Home”’ (2000) 52 *International Social Science Journal* 183,184.

<sup>57</sup> ‘Chapter 4: Intimate personal violence and partner abuse’ (Office for National Statistics, 11 February 2016).

<sup>58</sup> Criminal Justice and Immigration Act 2008, s 76(8A)(b).

<sup>59</sup> Claire de Than and Jesse Elvin, ‘Mistaken private defence: the case for reform’ in Alan Reed and Michael Bohlander (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Routledge 2014).

### C. CONSISTENCY WITH THE CIVIL LAW

The Occupiers' Liability Act 1984 governs the civil law liability that is imposed on occupiers towards trespassers. Notwithstanding the act imposing a reasonableness test to determine whether a duty is owed, Jill Dickinson<sup>60</sup> observes that courts are growing more likely to find that the entrant, rather than the occupier, is responsible for the injuries suffered. This is evidenced from Lord Hoffmann's statement in the tort case of *Tomlinson*<sup>61</sup> that it is "extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities that they freely choose to undertake... if people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair".<sup>62</sup> Since the civil law seems more likely to favour the occupier, could developing the criminal law in line with its civil counterpart be good justification for the alternative interpretation of s 76(5A)?

Despite *Hinks*<sup>63</sup> primarily deciding on the criminal law of theft, it can be distilled from the judgment that disharmony between the civil and criminal law does not of itself justify a departure from the present state of criminal law. Lord Steyn in *Hinks*<sup>64</sup> states, "in a practical world there will sometimes be some disharmony between the two systems. In any event, it would be wrong to assume on *a priori* grounds that the criminal law rather than the civil law is defective".<sup>65</sup> Therefore, unless there is some other justifiable reason for accepting the alternative interpretation of s 76(5A), the divergence between the civil and criminal law is tolerable.

### D. ADDRESSING THE PUBLIC'S CONCERN

During a debate regarding the implementation of s 76(5A), Member of Parliament Mr Shailesh Vara made reference to an ICM poll for *The Sunday Telegraph*; 79% of the respondents indicated that householders should have more discretion in the degree of force used against home intruders. He expressed that "if we are here to do good for the public and listen to them, this measure [s 76(5A)] would put into place what the public want".<sup>66</sup> Can societal demands justify an alternative interpretation?

<sup>60</sup> Dickinson (n 40).

<sup>61</sup> *Tomlinson v Congleton BC* [2003] UKHL 47, [2004] 1 AC 46.

<sup>62</sup> *ibid* [84]–[85].

<sup>63</sup> *R v Hinks* [2001] 2 AC 241.

<sup>64</sup> *ibid*.

<sup>65</sup> *ibid* 252.

<sup>66</sup> Crime and Courts Bill Deb 5 February 2013, col 285.



As Spencer expresses, “legislating about criminal justice in the hope of pleasing public opinion as reflected in the popular press is a dangerous and foolish game to play, because on criminal justice matters, public opinion—as misled by the popular press—is seriously misinformed”.<sup>67</sup> To illustrate how the popular press misleads public opinion, the Daily Mail’s headlines on the decision in *Collins*<sup>68</sup> wrongly states, “A person is permitted to use disproportionate force to challenge an intruder in their home... only grossly disproportionate force is illegal”.<sup>69</sup> It is natural for the public to support the alternative interpretation of s 76(5A), given that they bear the two long-standing misconceptions (as discussed at Sections II.A and II.B above) at the back of their minds. Spencer<sup>70</sup> rightly expresses that the politicians should not be playing the demagogue and legislating to address misunderstandings, instead they should be using their position to correct the public perception of the criminal law.

#### IV. CONCLUSION

The decision in *Collins*<sup>71</sup> (and by extension, the endorsement by the CA in *Steven*)<sup>72</sup> is convincing as it is based on proper reasoning; the court’s interpretation of s 76(5A) is consistent with the relevant explanatory notes and other legal guidance. While the interpretation may be criticised for allowing the absurd possibility of a disproportionate force to be held as reasonable, it is justifiable on the basis that the interpretation is an inevitable result of how s 76(5A) is drafted. Furthermore, *Collins* is convincing because it takes the law in the right direction. As considered earlier, there are no justifiable reasons that support the alternative interpretation of s 76(5A). Therefore, the public is clearly misconceived in believing that s 76(5A) effectively sanctions disproportionate force; *Collins* is correct in finding that s 76(5A) was never intended to change substantial law.

<sup>67</sup> John Spencer, ‘The Drafting of Criminal Legislation – Need it be so impenetrable?’ [2008] Cambridge Law Journal 585, 599.

<sup>68</sup> *Collins* (n 2).

<sup>69</sup> Ian Drury, ‘Judge says homeowners CAN beat up burglars because new “householder defence” does not break human rights laws’ *Daily Mail* (London, 15 January 2016) <[www.dailymail.co.uk/news/article-3401442/Judge-says-homeowners-beat-burglars-new-householder-defence-does-not-break-human-rights-laws.html](http://www.dailymail.co.uk/news/article-3401442/Judge-says-homeowners-beat-burglars-new-householder-defence-does-not-break-human-rights-laws.html)> accessed on 27 March 2016.

<sup>70</sup> Spencer (n 67) 599.

<sup>71</sup> *Collins* (n 2).

<sup>72</sup> *Steven* (n 1).