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Is English self-defence law incompatible with Article 2 of the ECHR?

Fiona Leverick

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***Crim. L.R. 347 Summary:** This paper assesses the claim that in allowing a defendant to plead self-defence on the basis of an honest but unreasonable belief that she was being attacked, English self-defence law is incompatible with Article 2 of the European Convention on Human Rights, the right to life. The case law surrounding Article 2 is examined and it is concluded that English self-defence law is indeed incompatible with Article 2 and that the European Court of Human Rights missed an

opportunity to declare this when it misunderstood the nature of English law in *Caraher v. United Kingdom*. Given that the Human Rights Act is now in force, a number of ways in which this conclusion might be put to practical effect by the relatives of those who have been killed after being unreasonably mistaken for attackers are suggested.

Introduction

In 1999 Harry Stanley was shot dead by police officers in the belief that he was a dangerous armed terrorist about to shoot them with a sawn-off shotgun. Their belief was based on a telephone call from a member of the public who had seen Mr Stanley leaving a pub carrying something that looked like a gun (it was a table leg) and thought that he spoke with an Irish accent (he was Scottish). The case is not an isolated incident. The shooting of members of the public by police officers in the mistaken belief that they posed an armed threat is a matter of considerable recent concern.¹

***Crim. L.R. 348** To date, no criminal prosecution of the police officers who shot Harry Stanley has taken place.² This is not surprising, since any criminal prosecution stands little chance of success. As English law stands, a mistake in relation to the perception of an attack does not have to be reasonable in order to ground an acquittal on the basis of self-defence. Thus, unless the Crown can establish beyond reasonable doubt that the police officers in question did *not* honestly believe that Mr Stanley was about to shoot them, those police officers are entitled to an acquittal, regardless of the reasonableness or otherwise of any grounds on which their belief was based.³

The origin of what is now a fairly long line of authority on this issue was *R. v. Williams (Gladstone)*,⁴ where the Court of Appeal concluded that a defendant charged with assault could successfully plead self-defence on the basis of an honest but unreasonable belief that she was being attacked. The reasoning behind the decision was that in order to commit the offence of assault, the defendant required an unlawful intention. The individual who honestly believes that she is acting in self-defence against a perceived attack does not have such an unlawful intention, regardless of how unreasonable are any grounds on which her perception is based. *Williams* was quickly followed in a number of subsequent English Court of Appeal cases⁵ and in a Privy Council case, *Beckford v. R.*⁶ There then came *Scarlett*,⁷ a case that initially seemed to take the law even further in suggesting that a mistaken belief that *excessive force* was necessary in self-defence did not have to be based on reasonable grounds. It became clear in *Owino*,⁸ however, that English law was not going to go down this path after all:

"The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be".⁹

In *Hughes*,¹⁰ the same judge who delivered the *Scarlett* judgment appeared to have changed his mind and outlined the law exactly as stated in *Owino* and *Owino* was ***Crim. L.R. 349** also followed in *DPP v. Armstrong-Braun*¹¹ and the recent cases of *Shaw*¹² and *Martin*.¹³

In English law, then, the position is that an unreasonable mistake in relation to the existence of an attack can lead to an acquittal on the basis of self-defence, provided the other requirements of the defence are made out. If, however, the defendant honestly but mistakenly believes that a certain (excessive) degree of force is necessary to repel that attack, an acquittal on the basis of self-defence is ruled out.

It has been proposed that there are logical and moral criticisms that can be made of English law on this matter.¹⁴ These are not the main focus of this paper. The primary concern of this paper is to examine the suggestion made in this journal by Professor Ashworth¹⁵ that, in allowing the unreasonably mistaken defendant to escape punishment for her act of killing, English law might be incompatible with the right to life guaranteed by Article 2 of the European Convention on Human Rights.¹⁶ Of course, the moral argument against English self-defence law and the claim that it might be contrary to Article 2 are linked. The main reason why English self-defence law is open to moral criticism is that it fails to respect the right to life of the innocent person who is unreasonably mistaken for an attacker. The purpose of this paper is to examine Professor Ashworth's suggestion in more detail, drawing on the case law surrounding Article 2 of the ECHR. If it is, indeed, the case that English law runs contrary

to Article 2, then it may be that a successful prosecution of police officers such as those who shot Harry Stanley could take place after all.

Article 2 of the ECHR

Article 2 of the ECHR provides that:

"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".

Why then might the honest belief test in English law be contrary to Article 2? The answer is that Article 2(1) provides that "everyone's right to life shall be protected by law". This means that there can be no doubt that the law of a State must contain some type of sanction for those who deprive others of life.¹⁷ The ECHR does not specify whether such protection should be criminal or civil, but the principle of *Crim. L.R. 350 proportionality suggests that where someone deprives another human being of her life intentionally, the legal sanction should be criminal.

There are, however, three exceptions to Article 2(1) contained in Article 2(2). Of most relevance is clause (a) which permits the use of force in self-defence or the defence of others, but only when "absolutely necessary". Allowing a defendant to kill someone who they mistakenly think is attacking them when they can provide no good reason for their belief is hardly a deprivation of life that is "absolutely necessary". And thus, in failing to attach criminal sanctions to the defendant who deprives another human being of their life in the entirely unreasonable belief that she is being attacked, English criminal law arguably fails to protect the right to life of the unfortunate person who is mistaken for an attacker.

It should be said at the outset that this does not mean that the law should require long and drawn out checks to be made in the face of an immediate life or death situation. Allowance must be made for the panic that someone is likely to experience in the heat of the moment if she becomes the subject of an unexpected attack. As Horder has pointed out, requirements of reasonableness "can be sensitive to the fact that people may make mistakes under the pressure of circumstances".¹⁸ But where the consequences of a mistake are as serious as the death of an entirely innocent human being, there is surely a duty on individuals, as far as is possible or reasonable in the circumstances, to reflect before acting.¹⁹ The criminal law could promote maximum respect for the right to life by punishing those who fail to fulfil this duty and take innocent life for absolutely no good reason. In allowing the unreasonably mistaken defendant to escape punishment entirely, English criminal law does not do this.

The paper proceeds as follows. A preliminary question of whether Article 2 even covers acts of self-defence is considered, before the substantive case law of Article 2(2) is examined in detail and the conclusion reached that English self-defence law is indeed incompatible with Article 2. A number of ways in which this conclusion might be put to practical effect are suggested.

An intentional killing?

Professor Smith,²⁰ writing in this journal, has argued that English self-defence law would not be caught by Article 2 because action taken in self-defence does not constitute an intentional killing. Article 2 after all states that no-one shall be deprived of his life "intentionally" and, as Smith puts it:

"The person acting in good faith in private defence does not have the purpose of killing or causing injury. His sole purpose is to preserve his own or another's life or safety. He may intend to kill for the purposes of English law, but not, it seems, for the purpose of the Convention".²¹

*Crim. L.R. 351 Smith cites no authority for his view and, indeed, his argument can be fairly easily dismissed from an examination of the case law on Article 2. The only real support for his position comes from the case of *X v. Belgium*,²² a Commission decision of 1969, where a case involving the shooting of a demonstrator by a police officer was declared inadmissible on the basis that it was not an intentional killing.

However, subsequent decisions and judgments have firmly rejected this interpretation. The first case to do so explicitly was *Stewart v. United Kingdom*,²³ where the Commission concluded that the exceptions in Article 2(2) are:

"... not concerned exclusively with intentional killing. Any other interpretation would hardly be consistent with the object and purpose of the Convention or with a strict interpretation of the general obligation to protect the right to life. In the Commission's opinion, the text of Article 2, read as a whole, indicates that paragraph 2 does not primarily define situations where it is permitted intentionally to kill an individual, but defines the situation where it is permissible to "use force" which may result, as the unintended outcome of the use of force, in the deprivation of life".²⁴

In subsequent cases, the court has followed the Commission and held that killings undertaken in self-defence and the defence of others *are* covered by Article 2, regardless of the precise nature of the intention of the perpetrator.²⁵

With this issue disposed of, we can turn to an examination of the substantive case law surrounding Article 2(2) of the ECHR.

The substantive case law on Article 2(2)

Compared to some other more commonly asserted rights contained in the ECHR, there has been relatively little case law on Article 2. The European Court of Human Rights did not issue a judgment specifically under Article 2(2) until the case of *McCann*, in 1995. Prior to this, however, Article 2(2) was considered by the Commission in *Kelly v. United Kingdom*.²⁶

The decision of the Commission in Kelly

The first case to arise under Article 2(2) in which a killing was actually based on a mistaken belief was that of *Kelly v. United Kingdom*.²⁶ In *Kelly*, a 17 year old joyrider was shot and killed by soldiers in Northern Ireland in the mistaken belief that he and the other three occupants of the car he was driving were escaping terrorists.

In its decision, the Commission began by emphasising the "strict and compelling" test of "absolute necessity" contained in Article 2(2). On this basis, it might be thought that logically *any* case in which force is used in the mistaken belief that it is necessary cannot possibly satisfy the test of "absolute necessity". After all, by *Crim. L.R. 352 definition the force used was not necessary at all: the individual simply *thought* that it was.²⁷ The Commission rejected this interpretation and noted the finding of the High Court in Northern Ireland that the soldiers reasonably believed the occupants of the car to be terrorists. The Commission went on to point out that this finding was supported by the facts of the case: the car was stolen; it had been seen in the vicinity of a house and car belonging to a member of the security forces; and the driver of the car made "determined and even desperate" efforts to evade the checkpoint. Taking these factors into account, the Commission reached the conclusion that the force used by the soldiers, despite it being based on a mistaken belief, met the "absolute necessity" test.

Nowhere in *Kelly* does the Commission explicitly state that such a mistaken belief must be based on reasonable grounds, although the Commission's emphasis of the facts supporting the belief of the soldiers suggests that this was their view. In any event, the issue was soon addressed directly in *McCann et al. v. United Kingdom*, the first judgment of the court under Article 2(2).

The judgment in McCann

*McCann et al. v. United Kingdom*²⁸ was decided by the court in 1995 and, like *Kelly*, involved a killing based on a mistaken belief. The case stemmed from the shooting of three members of the IRA in Gibraltar by SAS soldiers. The soldiers had been told that the three deceased had planted a car bomb (this was not true) and were able to detonate it by remote control, by pressing a single button concealed on their person (even if there were a bomb, this would have been extremely unlikely). An inquest in Gibraltar returned a verdict of lawful killing and no criminal proceedings against the SAS members were brought.

The European Court of Human Rights considered the question of whether or not the Gibraltar Constitution was compatible with Article 2. The Gibraltar Constitution provides that force in defence of a person against violence is permitted if it is of a quality that is "reasonably justifiable". The court interpreted this phrase according to what they termed "United Kingdom law", drawing on the three cases of *Lynch*,²⁹ *Thain*³⁰ and *Williams*,³¹ the first two of which originate from Northern Ireland and the last of which is an English case. On this basis, the court decided that the domestic law to be assessed was as follows:

"... the reasonableness of the use of force has to be decided on the basis of the facts which the user of force honestly believed to exist; this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds

for that belief. Given that honest and reasonable belief, it must then be questioned whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest".³²

It is difficult to tell from this paragraph whether the court thought that domestic law required a mistaken belief in the facts to be reasonable or whether they thought *Crim. L.R. 353 that an honest but unreasonable belief would suffice. In the first sentence they seem to be saying that the test of what the user believed is subjective but in the next sentence, they refer to an "honest and reasonable belief". It may be that their confusion stemmed from the three cases cited. Of these, *Lynch* requires a mistaken belief in facts to be reasonable. *Williams*, however, was the first case in English law to allow an honest but unreasonable mistake of fact to ground a claim of self-defence. The reasonableness or otherwise of a mistaken belief was not the central issue in *Thain*, but the case followed *Williams* in its statement of the law on the matter.

From this rather confused basis, the court stated that domestic law does not have to be formulated identically to the test in Article 2, as long as "the substance of the Convention right was protected by domestic law"³³ and, in this case, they concluded that it was. On the basis of this assessment, it is difficult to reach any firm conclusions on whether or not English self-defence law might be incompatible with Article 2. It is impossible to tell whether or not the court correctly understood "domestic law" and whether they were approving the honest belief test or not. Later parts of the *McCann* judgment suggest that they were not. The court went on to consider the actions of the individual SAS soldiers and stated that:

"... the use of force by agents of the State in pursuit of one of the aims [in Article 2(2)] may be justified under this provision 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".³⁴

This would seem to suggest that English law's lower standard of mere "honest belief" is contrary to Article 2. The confused discussion of domestic law by the court in *McCann* does not, though, allow us to anticipate this outcome with any confidence.³⁵

The judgment in Andronicou

The emphasis in *McCann* on the need for a mistaken belief to be based on good reasons was repeated in the 1997 judgment of the court in *Andronicou and Constantinou v. Cyprus*.³⁶ This case stemmed from the actions of the Cypriot authorities in using officers of the MMAD³⁷ to attempt to bring to an end a domestic dispute between a man (Lefteris Andronicou) and his fiancée (Elsie Constantinou). Andronicou had been holding Constantinou hostage in the flat they shared and it was known that he was armed with a double-barrelled shotgun, a weapon capable of firing two bullets before it needed to be re-loaded. On the basis of a number of arguably ambiguous statements made by Andronicou, the authorities formed the view that he would kill Constantinou and himself at midnight and, as a result, the MMAD, armed with machine guns, stormed the flat. They found Andronicou in a small room, using Constantinou as a human shield. Andronicou fired two shots, one of which hit an MMAD officer. The remaining MMAD officers *Crim. L.R. 354 returned fire with their machine guns, killing both Andronicou and Constantinou. At least some of the shots were fired when Andronicou was on the ground, no longer holding the shotgun (which by this time was no longer a threat anyway as its two bullets had been discharged). He had no other weapons, although in explaining their actions, the MMAD officers said that they thought he was still armed.

The court concluded that no violation of Article 2 had occurred,³⁸ stating that:

"... the Court cannot with detached reflection substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment in what was for them a unique and unprecedented operation to save life. The officers were entitled to open fire for this purpose and to take all measures which they honestly and reasonably believed were necessary to eliminate any risk either to the young woman's life or to their own lives".³⁹

No consideration was given specifically to domestic criminal law but once again the court can be seen to be stressing the need for a mistaken belief to have some reasonable basis.

The judgment in Gul

The most recent Article 2(2) case to arise for decision is that of *Gul v. Turkey*.⁴⁰ This case stemmed from the actions of a group of Turkish police officers who shot Mehmet Gü'l on the suspicion that he was an armed terrorist. The police had received

information from an informant that the address at which Gul lived housed a terrorist. There was no evidence prior to this that Gul had any involvement in terrorist activity. The police officers knocked on his door in the middle of the night. While Gul was in the process of opening the door, the officers fired at him and killed him without warning. There was evidence that at least 50 shots were fired. The police officers claimed that Gul had fired the first shot as he was opening the door, but this claim was rejected by the court. For the court, the only possible basis for the actions of the police officers was that the click of the key turning, as Gul opened the door, sounded like a gun being cocked.

The court concluded unanimously that the actions of the police officers constituted a violation of Article 2. They began their judgment by repeating the "good reasons" test from *McCann*. They then went on to state that:

"... the firing of at least 50-55 shots at the door was not justified by any reasonable belief of the officers that their lives were at risk from the occupants of the flat. Nor could the firing be justified by any consideration of the need to *Crim. L.R. 355 secure entry to the flat as it placed in danger the lives of anyone in close proximity to the door".⁴¹

In *Gul*, as in *Andronicou*, the issue of domestic criminal law was not up for consideration but once again the court can be seen stressing the need for a mistaken belief to be based on good reasons. And, unlike in *Andronicou*, *Gul* shows that the court is willing to find a violation of Article 2 where the actions of individuals (albeit officers of the state) are based on a belief for which there is no reasonable basis.

Bringing the account up-to-date: the missed opportunities and Caraher

A number of further opportunities have arisen where the court could have looked at the issue of mistaken belief in self-defence but, for various reasons, did not do so. In *Kaya v. Turkey*,⁴² the court declined to consider the substance of the claim that an unarmed Kurdish farmer had been shot by security forces in the belief that he was a terrorist, preferring instead to focus on the planning and control of the operation as a whole. In *Aytekin v. Turkey*,⁴³ the court declined to consider the shooting of an unarmed building contractor at a vehicle checkpoint because the applicant had failed to exhaust domestic remedies. On the same basis, the court also declined to consider the substance of three cases brought against the United Kingdom, *Jordan*, *McKerr* and *Kelly et al.*⁴⁴ In all of these cases, however, the court did reaffirm that the test to be applied in assessing claims of mistaken belief in an attack was whether or not that belief was formed on the basis of "good reasons".

法院確實重申，在評估對襲擊的錯誤信念索賠時，應採用的測試是該信念是否基於“充分理由”。

To date, no further substantive cases on Article 2(2) have been considered by the court. The compatibility of domestic self-defence law with Article 2 has, however, fallen for direct consideration by the court in an admissibility decision, *Caraher v. United Kingdom*.⁴⁵ The application, which was rejected as inadmissible, stemmed from the shooting of two men by soldiers in Northern Ireland. The soldiers had opened fire on a car that was driving away from a car park, killing one man and injuring the other. The soldiers who fired the shots claimed that the car had driven off with another soldier on the bonnet and they were firing in order to prevent injury to him. There was no suggestion that any of the men were armed or terrorists.

The two soldiers who fired the shots were charged with murder but acquitted. The application required the court to consider whether the standard governing the use of lethal force in domestic law was weaker than the Convention standard under Article 2(2). Unfortunately, in doing so, the court entirely misunderstood the nature of domestic law. The trial took place in Northern Ireland and it is clear from the report of the case⁴⁶ that the trial judge, Hutton L.C.J., was proceeding on the basis that an honest but unreasonable belief in imminent danger would suffice to ground a plea of self-defence or the defence of others. In his judgment, he surveyed the authorities on mistake in self-defence and concluded that:

*Crim. L.R. 356 "... in deciding whether the Crown has proved that the force used was reasonable beyond a reasonable doubt, the tribunal of fact must have regard not to what was actually happening but to what the accused at the time honestly thought was happening".

He continued, stating quite clearly that, in the light of *Williams and Beckford*:

"... the issue is to be determined in the light of the facts as the accused honestly believes them to be, whether his belief was reasonable or unreasonable".

The court, however, appeared to be proceeding on an entirely different understanding of domestic law. They concluded that domestic law was not substantially divergent from the "good reasons" test in *McCann*, stating that:

"... the approach taken by the domestic judge in the trial, in having regard to the *honest and reasonable belief* of the two soldiers that one of their colleagues was at risk ... is compatible with the principles established in *McCann*".⁴⁷

With respect, though, this was not the standard that the trial judge applied. Hutton L.C.J. was working on the basis of an honest belief alone, not the "honest and reasonable belief" standard understood by the court. The misunderstanding seems to have arisen because the court focused on one part of the judgment to the exclusion of all other parts and indeed took this passage completely out of context. In the passage thought by the court to be a pronouncement on domestic self-defence law, Hutton L.C.J. stated that:

"... there was a reasonable possibility that Marine B was carried away on the bonnet of the [car] and that, in the emergency of the moment, there was a reasonable possibility that the two accused fired at the driver because they honestly believed it was necessary to do so to save Marine B from death or serious injury and that in the circumstances as the accused honestly believed them to be there was a reasonable possibility that this constituted reasonable force".

Taken out of context, it is possible to see why the court took this to mean that English law requires a mistake of fact to be reasonable. However, read in the context of the rest of the judgment, it is clear that, when the trial judge uses the term "reasonable" in this passage, he is actually referring to the standard of proof to be applied in criminal cases: beyond reasonable doubt. And of course, as has already been demonstrated, he is absolutely clear when outlining the relevant law on self-defence that an honest mistake of fact does *not* need to be reasonable.

For purposes of completeness, two further admissibility decisions in connection with Article 2(2) should be noted. First, *Brady v. United Kingdom*⁴⁸ was an application declared inadmissible by the court in 2001. The application stemmed from a police operation to arrest the perpetrators of a robbery on a Working Mens' Club in Newcastle, where a police officer shot one of the perpetrators who was carrying a torch, mistaking it for a gun. The court assessed the actions of the police *Crim. L.R. 357 officer in the light of the *McCann* test, stressing the need to have good reasons for an honest belief, and concluded that this test was met.

Secondly, at least one case relating to Article 2(2) remains for consideration by the court. The application *McShane v. United Kingdom*⁴⁹ was declared admissible in 2000, but has yet to be heard. The application stemmed from an RUC decision to use a vehicle to attempt to quell a crowd disturbance in Derry, as a result of which a man was crushed under an advertising hoarding.

What can we conclude from the case law on Article 2(2)?

The court and Commission have consistently held that where force is used under one of the three exceptions contained in Article 2(2), any mistaken belief of fact must be held "for good reasons". This was implied in the Commission decision of *Kelly* and subsequently directly stated in the judgments of *McCann, Andronicou, Gul, Jordan, McKerr and Kelly et al.* and the admissibility decisions of *Carraher* and *Brady*. There seems to be little doubt that in allowing the lesser standard of honest but unreasonable belief, English law does not meet the requirements of Article 2 of the ECHR.

Ashworth also points to the "good reasons" standard as evidence that English law might contravene the ECHR.⁵⁰ However, he also puts forward three reasons why the court might not make such a judgment in practice,⁵¹ each of which is worth addressing.

The reluctance of the European Court of Human Rights

The first of Professor Ashworth's points is that the court has not always put into practice its own strict standard, given *Andronicou* where the court repeated the "good reasons" test, but reached the conclusion that the actions of the MMAD officers were "absolutely necessary" for the purposes of protecting themselves from attack despite a significant body of evidence to the contrary. Considering *Andronicou* in isolation, I would agree with Ashworth. If having "good reasons" for a belief covers dispatching several rounds of machine gun fire in a small room after *Andronicou* had already dispatched both of the bullets from his shotgun and was lying on the floor with no sign of another weapon, it is difficult to envisage the type of conduct that would not be caught under the "good reasons" test. However, Ashworth was writing before the court's judgment in *Gul*, which shows that the court is willing, and did in fact, put its own strict standard into practice. Even so, *Gul* is itself only an isolated case and it still might be said that the court has been generally reluctant to concern itself with either the substance of domestic

很難設想出哪種行為不會在"充分理由"測試下被抓住。

law or the actions of individuals, preferring instead to focus on faults in investigation procedure or rejecting claims entirely as not having exhausted domestic remedies.⁵²

In addition, the court has had at least two clear opportunities to rule on the substance of English self-defence law and on both occasions has declined to declare it contrary to Article 2. In *McCann*, this could be partially explained by the fact that *Crim. L.R. 358 domestic law on the issue was not yet settled. By the time of *Caraher* the honest belief issue was conclusively settled in English (and Northern Irish) law but the court appeared to miss this point, assuming instead that domestic law required mistakes of fact to have a reasonable basis. Unsurprisingly, given this misunderstanding, the substance of domestic law was declared to be in line with Article 2. However, given that proceedings can now be sought in the United Kingdom courts under the Human Rights Act, these concerns are perhaps less relevant.⁵³

Law enforcement officers and private citizens

The second of Professor Ashworth's points is that all of the cases on Article 2(2) to date have centred on the actions of law enforcement officers and not ordinary citizens. For this reason, the extent to which Article 2 has "horizontal effect" might be questioned. Doubtlessly a case could not be brought under Article 2 against any private individual. This does not mean, however, that a case could not be brought against the United Kingdom stemming from the actions of a private individual.⁵⁴

The court has frequently stressed that the duty imposed on States by the Convention is not exclusively a negative one to refrain from interference with Convention rights. The Convention also imposes a positive obligation on States to take appropriate steps to safeguard the Convention rights of those within its jurisdiction.⁵⁵ This positive obligation extends in some circumstances to protecting citizens from breaches of their Convention rights caused by the acts of other private citizens.⁵⁶ In *Osman v. United Kingdom*,⁵⁷ it was accepted that this obligation required the State to put in place "effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and [punishment] of breaches of such provisions". In *A v. United Kingdom*,⁵⁸ the failure of English criminal law to provide adequate protection to a child who was beaten by his stepfather was found to constitute a violation of Article 3. English criminal law at the time allowed the defence of "reasonable chastisement" to a beating administered by a parent that would otherwise have constituted an assault occasioning actual bodily harm. In *X and Y v. Netherlands*,⁵⁹ the failure of the law of the Netherlands to provide for the criminal prosecution of someone who was suspected of having indecently assaulted *Crim. L.R. 359 a 16 year old woman with learning difficulties was found to constitute a violation of Article 8 of the Convention, the right to have one's family life respected. Any prosecution required the alleged victim to make a legal complaint, something the woman was not capable of doing. There was no mechanism in place to allow someone to make a complaint on her behalf unless she was under 16 or had been placed in guardianship, a procedure available only to those over 21.

It is established, then, that a State's failure to protect its citizens, via the criminal law, from the actions of other private citizens can constitute a violation of the Convention.⁶⁰ It is on this basis that a court could find the English "honest belief" test to be a violation of Article 2 on the basis of an incident involving a private individual. Richard Buxton, a Lord Justice of Appeal, has argued in this journal that the English law of self-defence would not be found contrary to Article 2 on this basis because it would be impossible to establish that it was the criminal law that caused the defendant in question to act in the way she did.⁶¹ With respect, however, establishing causation in this way was not a requirement in either *A v. United Kingdom* or *X and Y v. Netherlands*.

A related but potentially more problematic hurdle might be to establish that a change in the law would actually provide any increase in protection to citizens at all. After all, the argument could be made that knowing that only a reasonable belief in the need to use self-defensive force can ground an acquittal would never have a deterrent effect on defendants who make honest mistakes because such defendants believe that they are acting reasonably, even when they are not. This is unlike the situation in, for example, *A v. United Kingdom*, where a change in the law on reasonable chastisement has more obvious potential to influence the behaviour of parents towards their children because they would then know what they are and are not permitted to do by way of physical punishment of their children.⁶² In response, it might be said that a reasonableness requirement for self-defence does have some, admittedly limited, deterrent potential as it would send out the message that we should all take reasonable care to check the accuracy of our beliefs before acting rashly in self-defence.

The possibility of a dual standard

The final point made by Professor Ashworth is that the ECHR is silent on the possible justifications for the use of non-lethal force. This perhaps stems from a suggestion made by Professor Smith⁶³ that even if English self-defence law is found to be contrary to Article 2 of the Convention, given that Article 2 is concerned solely with the right to life, any judgment would apply only to self-defensive force that resulted in death. This, he claims, could lead to the absurd conclusion that a defendant who killed her "attacker" would be judged according to whether or not her belief was reasonable but a defendant who merely injured her attacker would be *Crim. L.R. 360 judged according to her honest belief, regardless of whether or not it was based on good reasons.

The use of non-lethal force is covered by the ECHR in Articles 3 and 5. Article 5 provides that "everyone has the right to liberty and security of person". Like Article 2, it lists a number of exceptions under which it is permissible to deprive an individual of her liberty, including, in Article 5(1)(c), when it is "reasonably considered necessary to prevent his committing an offence or fleeing after having done so" (my emphasis). There seems little doubt here that if a case of mistaken belief in self-defence were to arise under Article 5, the court would use a similar "good reasons" test to that used under Article 2. However, most cases of self-defence involving non-lethal force have been considered not under Article 5 but under Article 3. Article 3 provides that "no-one shall be subjected to torture or to inhuman or degrading treatment or punishment". It has no exceptions of the sort contained in Article 2(2) and, indeed, in *Ribitsch v. Austria*,⁶⁴ the court explicitly stated that Article 3 makes "no provision for exceptions".⁶⁵

Two points can be made in relation to this. First, even if Article 3 really is an absolute provision without exceptions, this would not imply the lesser standard of honest belief in relation to non-lethal self-defensive force that Smith fears. Rather, it would seem to suggest that self-defensive force, if it reaches a level deemed to be inhuman and degrading treatment, would not be permitted *at all*.

Secondly, in practice, it seems that the court *has* implied into Article 3 exceptions of the same type as those in Article 2(2). It might seem strange that this is possible, given the seemingly absolute nature of the prohibition. However, the way the court has approached the issue is not to state that inhuman or degrading treatment is "permitted" if it is undertaken in self-defence, but that reasonable force used in the course of self-defence *does not constitute inhuman or degrading treatment in the first place*.

In *Ribitsch v. Austria*, for example, the court proceeded on the basis that force would not constitute inhuman and degrading treatment under Article 3 if it was necessary for certain purposes:

"[I]n respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3".⁶⁶

Hurtado v. Switzerland,⁶⁷ *Tomasi v. France*,⁶⁸ *Klaas v. Germany*⁶⁹ and *Rehbock v. Slovenia*⁷⁰ all proceeded in a similar manner. As yet, no case has arisen under Article 3 involving mistaken belief, so the attitude of the court cannot be predicted with any certainty. However, it does not seem far-fetched, given the strict necessity test set out in *Ribitsch v. Austria*, to conclude that if a case involving mistaken belief in relation to non-lethal self-defence force *were* to arise under Article 3, the court *Crim. L.R. 361 would use the same test as that under Article 2: whether or not the belief of the perpetrator was based on good reasons. Thus the fear that a dual standard in relation to lethal/non-lethal force might result appears to be groundless.

In conclusion

The purpose of this paper was to assess the claim that in allowing an honest unreasonable mistake to ground an acquittal on the basis of self-defence, English law is contrary to Article 2 of the ECHR. The reason for this claim is that, in allowing the unreasonably mistaken defendant to escape punishment in this way, English law fails to respect the right to life of the person who, through no fault of their own, is mistaken for an attacker. An examination of relevant case law leads to the conclusion that the substance of English law does indeed contravene Article 2. It had been suggested that because killing in self-defence is not an intentional killing, Article 2 does not apply. Regardless of the theoretical merits of this suggestion, it can be dismissed as it has consistently been held that self-defensive killing *does* fall to be assessed under Article 2. Further, an examination of relevant cases shows that the court has consistently required that a mistaken belief in the need to use self-defensive force be based on good reasons. It is also clear, from cases such as *A v. United Kingdom* and *X and Y v. Netherlands*, that a violation of the

Convention can take place when there has been a failure on the part of the State to provide a criminal law sanction that protects its citizens from the violent acts of other individuals, regardless of whether these individuals were State officials or private citizens. This is not to say that the Convention would necessarily require English law to convict the unreasonably mistaken self-defender of murder. It may be that a conviction for a lesser offence, such as manslaughter, is sufficient. Consideration of the degree of punishment appropriate in such circumstances is outside the scope of this paper. The point is that English law as it stands at present contains no sanctions whatsoever for the defendant who deprives another of her life in the unreasonable belief that she was an attacker.⁷¹

However, to return to the theme of the start of this article, for those whose relatives have been killed after being mistaken for attackers by police officers, the conclusion that English law is incompatible with Article 2 is of little relevance if there is not some means of giving this conclusion practical effect. How, then, might this be achieved in the English courts?

Under section 6 of the Human Rights Act 1998, it is unlawful for a public authority, including a court or tribunal, to act in a way incompatible with a Convention right. Under section 7(1) of the Human Rights Act, it is possible to rely on the Convention right concerned in any legal proceedings. This suggests at least three ways forward. First, if the Crown Prosecution Service declines to prosecute a police officer who has killed or injured an individual on the basis of an honest but *Crim. L.R. 362 unreasonable belief in an imminent attack, the way would be open for a challenge to this decision by means of judicial review. This would be on the basis that, in making their decision, the CPS has acted unlawfully in failing to give account to the Convention rights of the victim or her family.

An alternative course of action might be for the victim or her relatives to bring a civil action against the police officer concerned or indeed against her employer. If the defendant tried to put forward the defence of honest belief, the way would then be open for the claimant to claim that this violates her rights under Article 2.

A further possibility, although not one that could be initiated by the victim or her family, would be for the Crown to raise the question in the course of a criminal prosecution. This would not have to be done at the trial itself. Sections 39 and 40 of the Criminal Procedures and Investigations Act 1996 allow points of law to be raised at the pre-trial hearing stage. If a police officer pleaded self-defence on the basis of her honest but unreasonable belief in an imminent attack, the Crown could ask the presiding judge to withdraw the defence on the basis that it is unlawful.

如果一名警官以她對即將發生的襲擊的誠實但不合理的信念為由提出自衛辯護，王室可以要求主審法官以非法為由撤銷辯護。

Whichever route is taken, the hope is expressed here that English law will be brought into line with Article 2 of the ECHR. As was stated in McCann the object and purpose of the Convention is the "protection of individual human beings".⁷² Requiring an honest belief to have some reasonable basis serves to protect the right to life of all of us by sending out the message that killing for no good reason is not tolerated in the United Kingdom. Any victim of a defendant who has killed for no good reason has been denied this protection and the family of the victim should be entitled to expect that the defendant in question be condemned and punished.



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Footnotes

¹ To Mr Stanley's case might be added that of Derek Bennett, shot dead by police officers while "armed" with a cigarette lighter in the shape of a pistol; Michael Fitzgerald, an unarmed man shot by police in his own home after neighbours had mistaken him for a burglar; or Stephen Waldorf, shot by police while he was driving a car owned by David Martin, a man suspected of being a violent bank robber. See S. Morris, "First the shooting, now the questions" *The Guardian*, July 18, 2001.

² The Crown Prosecution Service (CPS) initially decided not to prosecute. They reviewed this decision as a result of pressure from the Stanley family but concluded in December 2001 that the decision not to prosecute would

stand. See V. Morris, "Police who shot unarmed man will not face criminal charges" (2001) *The Guardian*, December 14, 2001.

3 This was confirmed in the CPS press release explaining the reasons behind the decision not to prosecute, one of which was that "it would be very difficult for prosecutors to disprove the officers honestly believed that they were facing a sawn-off shotgun". See V. Morris, above.

4 [1987] 3 All E.R. 411.

5 *Jackson* [1985] Crim.L.R. 674; *Asbury* [1986] Crim.L.R. 258; *Fisher* [1987] Crim.L.R. 334.

6 [1987] 3 All E.R. 425.

7 [1993] 4 All E.R. 629.

8 [1996] 2 Cr.App.Rep. 128.

9 Collins J. in *Owino* at 132-133.

10 [1995] Crim.L.R. 956.

11 [1999] Crim.L.R. 416.

12 [2002] 1 Cr.App.Rep. 10.

13 [2002] 2 W.L.R. 1.

14 See F. Leverick, "Mistake in self-defence after *Drury*" (2002) forthcoming in *Juridical Review*; A. Simester, "Mistakes in Defence" (1992) 12 O.J.L.S. 295-310.

15 A. Ashworth, "Human Rights: Case Commentary on *Andronicou and Constantinou v. Cyprus*" [1998] Crim.L.R. 823-825. See also A. Ashworth, "The European Convention and criminal law" chapter in J. Beatson, *The Human Rights Act and the Criminal Justice and Regulatory Process* (University of Cambridge Centre for Public Law, Hart Publishing, 1999); B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice* (London, Sweet and Maxwell, 2001).

16 Subsequently referred to as the ECHR.

17 See for example *McCann et al. v. United Kingdom* (1996) 21 E.H.R.R. 97, where the court held that "national law must strictly control and limit the circumstances in which a person may be deprived of his life" (paragraph 151).

18 J. Horder, "Occupying the moral high ground? The Law Commission on duress" [1994] Crim.L.R. 334-342 at 341.

19 It has been argued that the standard of reasonable behaviour should be set even higher for trained public officials such as police officers, when they are acting in their official "role". See J. Gardner, "Compassion without respect: nine fallacies in *Smith*" [2001] Crim.L.R. 623.

20 J. Smith, "Surgical Separation: Case Comment on *Re: A (Children)*" [2001] Crim.L.R. 400-405.

21 At 403.

22 May 21, 1969 (1969) 12 Yearbook 174.

23 July 10, 1984 (1985) 39 D.R. 162.

24 Paragraph 15.

25 The passage from *Stewart* is repeated in, for example, *McCann et al. v. United Kingdom* (1996) 21 E.H.R.R. 97; *Andronicou and Constantinou v. Cyprus* (1998) 25 E.H.R.R. 491; *Gul v. Turkey* (2002) 34 E.H.R.R. 28; *McKerr v. United Kingdom* (2002) 34 E.H.R.R. 20; *Jordan v. United Kingdom, Kelly et al. v. United Kingdom* (2001) 11 B.H.R.C. 1.

26 (1993) 16 E.H.R.R. CD20. Not to be confused with *Kelly et al. v. United Kingdom*, a judgment of the court on the same issue in 2001 (discussed later in this paper).

27 This was in fact the view of Mr Loucaides, one of the dissenting Commissioners in the Commission's admissibility decision in *McCann*.

28 (1996) 21 E.H.R.R. 97.

29 *Lynch v. Ministry of Defence* [1983] N.I. 216.

30 *Thain* [1985] N.I. 457.

31 *Williams (Gladstone)* [1987] 3 All E.R. 411.

32 Paragraph 134.

33 Paragraph 152.

34 Paragraph 201, my emphasis.

35 The claim that the individual soldiers acted contrary to Article 2 was eventually rejected, the court concluding that their belief that the suspects were about to detonate a bomb was indeed based on good reasons. The U.K. was, though, found to have violated Article 2 in respect of its planning and control of the operation.

36 (1998) 25 E.H.R.R. 491.

37 Mihanokiniti Monada Amesis Derasis: a Cypriot government unit trained specifically to shoot to kill.

- 38 A somewhat surprising decision, given that the operation to end the siege suffered from a number of other flaws. To list but a few: despite Andronicou's well-known distrust of the police, negotiations were undertaken by an untrained police officer, who was heard to threaten Andronicou on a number of occasions; the area around the flat was not sealed off during negotiations, nor were the telephone calls to and from the flat limited (this meant Andronicou could make and receive telephone calls during the negotiations as he chose); a plan to administer soporific drugs in food sent into the flat failed because the drug used took two hours to take effect (an alternative drug would have worked within ten minutes). It was a close decision (five votes to four) and it differed from that of the Commission, who thought that there had been a violation of Article 2 (15 votes to three).
- 39 Paragraph 192, my emphasis.
- 40 (2002) 34 E.H.R.R. 28.
- 41 Paragraph 82, my emphasis.
- 42 (1999) 28 E.H.R.R. 1.
- 43 [1998] H.R.C.D. 882.
- 44 *McKerr v. United Kingdom* (2002) 34 E.H.R.R. 20; *Jordan v. United Kingdom, Kelly et al. v. United Kingdom* (2001) 11 B.H.R.C. 1. Although in all three of these cases, violations of Article 2 were found on account of the investigation procedure following the incident.
- 45 App. 24520/94, January 11, 2000. Unreported but see case comment in (2000) E.H.R.L.R. 3, 326-329.
- 46 *Elkington and another*, January 21, 1993, LEXIS transcript.
- 47 My emphasis.
- 48 App. 55151/00, April 3, 2001. Unreported but see case comment in (2001) J.C. L. 65(5), 417-419.
- 49 App. 43290/98, December 12, 2000. Unreported.
- 50 And he was writing before the cases of *Gul*, *Jordan*, *McKerr* and *Kelly et al.*, where the standard was reaffirmed.
- 51 A. Ashworth, *Principles of Criminal Law* (3rd ed., Oxford, O.U.P., 1999) 149.
- 52 A point made by R. Buxton, "The Human Rights Act and the Substantive Criminal Law" [2000] Crim.L.R. 331 at 338. See also *Kaya v. Turkey*; *Aytekin v. Turkey*; *Jordan v. United Kingdom*; *McKerr v. United Kingdom* and *Kelly et al. v. United Kingdom* above.
- 53 Buxton doubts that an English court would "feel confident enough" to hold that English criminal law was contrary to Article 2, given the previous reluctance of the European Court of Human Rights to do so. See Buxton, above, at 338. I am not sure I share his concern. In determining ECHR questions under the Human Rights Act, English courts are required only to "take into account" previous European Court jurisprudence on any matter rather than being bound by it (s.2 of the Human Rights Act 1998). And anyway, the European Court has never directly considered the issue of whether or not the English honest belief test is contrary to Article 2, having missed opportunities to do so in *McCann* and *Caraher*, so the point is still open for consideration.
- 54 Ashworth himself recognises this. See A. Ashworth, "The European Convention and criminal law", above at 42.
- 55 *Cacici v. Turkey* (2001) 31 E.H.R.R. 5; *Bromiley v. United Kingdom* App. 33747/96, November 23, 1999, unreported but see case comment in (2000) 2 E.H.R.L.R. 186-188; *Salman v. Turkey* (2002) 34 E.H.R.R. 17. See also *NHS Trust A v. M, NHS Trust B v. H* [2001] 1 All E.R. 801.
- 56 *Stubbings v. United Kingdom* (1997) 23 E.H.R.R. 213; *H.L.R. v. France* (1998) 26 E.H.R.R. 29.
- 57 (2000) 29 E.H.R.R. 245.
- 58 (1999) 27 E.H.R.R. 611.
- 59 (1986) 8 E.H.R.R. 235.
- 60 For further discussion of the extent of the State's positive duty to secure an individual's Convention rights against interference from private citizens, see S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London, Sweet and Maxwell, 2001) at 91-92 and F. Jacobs and R. White, *The European Convention on Human Rights* (2nd ed., Oxford, Clarendon, 1996) at 18-19.
- 61 See Buxton, above, at 338.
- 62 Thanks to James Chalmers for this point.
- 63 J. Smith, *Smith and Hogan Criminal Law* (9th ed., London, Butterworths, 1999) at 254.
- 64 (1995) 21 E.H.R.R. 573.
- 65 Paragraph 32.
- 66 Paragraph 38, my emphasis.
- 67 Judgment of January 28, 1994, Series A, no. 280-1.
- 68 (1993) 15 E.H.R.R. 1.
- 69 (1994) 18 E.H.R.R. 305.

70 Judgment of November 28, 2000 App. 29462/95. Unreported but see case comment in (2001) E.L. Rev. 26 Supp. (Human Rights Survey 2001) 155.

71 There may also be implications for other areas of English criminal law. The defence of use of force in the prevention of crime under s.3 of the Criminal Law Act 1967 also allows an honest but unreasonable belief that one was acting for the purpose of crime prevention to ground an acquittal (see *Fisher* [1987] Crim.L.R. 334) and therefore may also be incompatible with Article 2. The argument here is perhaps especially compelling as s.3 of the Human Rights Act 1998 requires primary legislation to be read and given effect in a way which is compatible with the Convention rights. It may also be argued that allowing an honest but unreasonable belief in consent to acquit a defendant charged with rape (*Morgan* [1976] A.C. 182) is contrary to Article 3 of the Convention.

72 Paragraph 146.