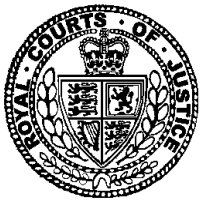

Neutral Citation Number: [2019] EWHC 2215 (Admin)

Case No: CO/463/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 August 2019

Before:

LORD JUSTICE FLAUX
-and-
SIR KENNETH PARKER
(Sitting as a Judge of the High Court)

- -

Between:

THE QUEEN ON THE APPLICATION OF OFFICER W80	**Claimant**
- and -	
DIRECTOR GENERAL OF THE INDEPENDENT OFFICE FOR POLICE CONDUCT	**Defendant**
-and-	
COMMISSIONER OF POLICE OF THE METROPOLIS (First Interested Party)	
-and-	
EFTEHIA DEMETRIO (Second Interested Party)	

- -
- -

Mr Ian Stern QC & Jonathan Dixey (instructed by **Slater and Gordon Lawyers**) for the **Claimant**
Mr Tim Owen QC, Mr Danny Simpson & Ms Michelle Butler (instructed by **Independent Office for Police Conduct**) for the **Defendant**
Mr Jason Beer QC (instructed by **Directorate of Legal Services**) for the **First Interested Party**
Ms Fiona Murphy (instructed by **Bhatt Murphy Solicitors**) for the **Second Interested Party**

Hearing dates: Tuesday 9 July 2019 and Wednesday 10 July 2019

- -

JUDGMENT

Lord Justice Flaux:

Introduction

1. In this judicial review, the claimant, who is a Specialist Firearms Officer in the Metropolitan Police, challenges the decision of the Independent Office for Police Conduct ("IOPC") of 1 May 2018 directing the Metropolitan Police Service ("MPS") to bring misconduct proceedings against him alleging a breach of the Standards of Professional Behaviour amounting to gross misconduct. The events which led to the decision occurred on 11 December 2015 when the claimant fired a fatal shot at Jermaine Baker during an intervention in Wood Green, North London.

2. The principal ground of judicial review contends that the decision of the IOPC was unlawful because, in determining that the claimant had a case to answer, it applied the wrong test in law as to whether the claimant acted in self-defence. It is accepted by the IOPC that the claimant honestly believed that his life was in danger. However, the IOPC sought to apply a civil law test applicable to the torts of assault or battery, that the officer's belief must not only be honest but also objectively reasonable for self-defence to be available and for the claimant to have a defence to the charge of misconduct. The claimant contends that this is the wrong test and that the correct test for self-defence in police misconduct proceedings is the test applicable under the criminal law, so that the claimant has no case to answer in circumstances where he had an honest, albeit mistaken, belief that his life was in danger.

3. Ground 2 contends that even if the IOPC is correct as to the legal test, the IOPC's assessment of the facts as giving rise to a case to answer was unreasonable and irrational. The criticism focuses on particular aspects of the assessment of the evidence. Permission to apply for judicial review on both grounds was granted by Swift J on 7 March 2019.

Background

4. The essential factual background can be summarised as follows. Izzet Eren was arrested with another man on 13 October 2015 on a stolen high-powered motor bike in possession of a loaded Scorpion sub-machine gun and a loaded semi-automatic handgun. Police believed they were on their way to carry out a murder. They were both charged with possession of firearms with intent to endanger life and pleaded guilty on 29 October 2015. They were remanded in custody until 11 December 2015, when they were to be sentenced at Wood Green Crown Court.

5. By 30 October 2015, the police had intelligence that there was a plot by Eren's cousin and others to snatch Eren and his co-defendant from custody whilst in transit from the prison to the Crown Court for the sentencing hearing. They planned to use a stolen Audi A6. The police mounted a large operation which involved two covert listening devices being planted in the car, specialist surveillance officers and eleven specialist firearms officers, including the claimant, in specialist vehicles. The intelligence provided to the specialist firearms officers was that the men in the car were in possession of firearms and intended to use them to free the prisoners from the van. This formed the basis of the threat assessment by the specialist firearms officers before and during the operation.

6. On 11 December 2015, the Audi was parked in a side road close to Wood Green Crown Court with three men inside, one of whom was Jermaine Baker. At about 9am, when the prison van containing Eren and his co-defendant had left HMP Wormwood Scrubs the specialist firearms officers were instructed to intervene. At the time they approached the car the officers could not see inside as the windows were steamed up, so that they did not know how many men were in the car or what they were doing. In accordance with standard procedure, there were shouts of orders to those inside the car. The claimant opened the front passenger door. Jermaine Baker was sitting in the front passenger seat. The claimant pointed his firearm between the door and the side of the vehicle. His account was that despite instructions to put his hands on the dashboard, Jermaine Baker's hands moved quickly up towards his chest where he was wearing a shoulder bag. The claimant said: "I believed at that time that this male was reaching for a firearm and I feared for the safety of my life and the lives of my colleagues. I discharged my weapon firing one shot". There was no firearm in the bag, but an imitation firearm, a black uzi style machine gun, was found in the rear of the car.

7. Following the incident all the officers present were interviewed or provided statements. As in the case of the claimant, they said that they believed on the basis of the information provided to them that the men in the car did have firearms and had the capacity and intent to use them.

8. On 13 December 2015 the claimant was informed that he was to be interviewed on suspicion of murder. He was subsequently interviewed by the IOPC under caution later in December 2015 and in February and August 2016. In the meantime, in June 2016, the other two men who had been in the car with Jermaine Baker were convicted of firearms offences and conspiracy to effect Eren's escape from custody and received substantial prison sentences.

9. The predecessor of the IOPC, the Independent Police Complaints Commission ("IPCC"), conducted an investigation and produced a detailed Report which was submitted to the Crown Prosecution Service. On 14 June 2017, the Crown Prosecution Service confirmed the decision of the Director of Public Prosecutions that there was insufficient evidence to justify criminal proceedings against any police officer. After the family of Jermaine Baker had exercised the victim's right of review, on 19 March 2018 the Crown Prosecution Service confirmed the decision not to bring criminal proceedings.

10. The IPCC Report set out at [1089] to [1096] the investigator's opinion that the claimant had a case to answer for gross misconduct on the basis of the civil law test that any mistake of fact could only be relied upon if it was a reasonable mistake to have made, which was said to be the test that investigators were advised to apply in police disciplinary proceedings. The Report was provided to the MPS as the "appropriate authority" under the statutory framework regulating whether to bring misconduct proceedings (which statutory framework I consider in more detail later in this judgment). Correspondence ensued between the IOPC and the MPS in which the MPS contended that in the IOPC Report the investigator had been incorrect as a matter of law in applying the civil law test, as opposed to the criminal law test of self-defence. The IOPC in turn maintained that it was correct to apply the civil law test.

11. On 19 March 2018, the IOPC wrote to the MPS, recommending under paragraph 27(3) of Schedule 3 to the Police Reform Act 2002 that the claimant should face misconduct proceedings. The MPS replied that it did not agree with the IOPC's recommendation and had decided not to follow that recommendation. On 1 May 2018, as it had power to do under paragraph 27(4) of Schedule 3, the IOPC wrote to the MPS, directing it to bring disciplinary proceedings. It is that decision by the IOPC which is challenged on this judicial review.

12. The Notice of Decision to refer an allegation to a misconduct hearing under regulation 21 of the Police (Conduct) Regulations 2012 which was served on the claimant stated:

> "On 11.12.15 you shot Jermaine Baker dead.
>
> In doing so you breached the Standards of Professional Conduct including in particular in respect of Use of force: You used force that was not necessary and/or was not proportionate and/or was not reasonable in all the circumstances.
>
> Although you acted out of an honest belief that Mr Baker was reaching for a firearm at the time you shot him, that belief was mistaken and not one which it was reasonable to make having regard to:
>
> □ The evidence from the audio recordings that some officers had told Mr Baker to put his hands up.
>
> □ The evidence of the positioning of the track wound to Mr Baker's wrist indicates his hand was likely to have been positioned with the palm side facing towards the windscreen, raised approximately to the level of his neck.
>
> □ The evidence that you shot Mr Baker at a very early stage of the interception and almost immediately after opening the front passenger door.
>
> The AA's case is that, as a matter of law, the panel should find that you breached the standard, even though your mistaken belief was honestly held if they find it was unreasonable."

The law as to the use of force

13. Before considering the statutory and regulatory framework in more detail, it is appropriate to consider the law as to the use of force and as to self-defence and the differences between the criminal law and the civil law. This is helpfully summarised in the judgment of the Divisional Court (Sir Brian Leveson P, Burnett J (as he then was) and Judge Peter Thornton QC) in *R (Duggan) v North London Assistant Deputy Coroner* [2014] EWHC 3343 (Admin); [2016] 1 WLR 525 at [31] to [36]:

> "31 The law of self-defence in England and Wales is different in the criminal law from the civil law. In the first place, when a defendant in criminal proceedings is being prosecuted for an

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 upon the defendant. In the second place, in a criminal court, the prosecution must disprove self-defence to the criminal standard of proof. To establish self-defence in the civil court the defendant must prove it to the civil standard of proof. In the third place there is a difference in the ingredients of self-defence between the two jurisdictions.

32 Self-defence has always comprised two limbs. The second is the same in both jurisdictions and (subject to the discrete issue that arises under the fourth ground of appeal) has not been the subject of argument in this claim. That second limb requires the force used in reaction to any perceived threat to be reasonable in all the circumstances. The first limb is directed towards the question whether the defendant in criminal proceedings had an honest belief at the time he inflicted injury that it was necessary to use force to defend himself. The difference in treatment between the two jurisdictions of this limb of the test for self-defence arises when the belief turns out to be mistaken…

33 In *Ashley v. Chief Constable of Sussex Police* [2008] 1 AC 962 the House of Lords rejected an attempt to bring the criminal and civil law into alignment in this respect by removing the objective element from the civil law test. In his short concurring opinion, Lord Bingham of Cornhill encapsulated the reasoning in one paragraph, para 3:

> "As to the first issue, the test for self-defence as a defence in a civil action is well established and well understood. There is no reason in principle why it should be the same test as obtains in a criminal trial, since the ends of justice which the two rules respectively exist to serve are different. There is nothing to suggest that the civil test as currently applied causes dissatisfaction or injustice and no case is made for changing it, even if that were an appropriate judicial exercise. I would not wish to inject any note of uncertainty into the current understanding of this rule."

34. The analysis of the history of the law of self-defence in the Court of Appeal in the same case ([2007] 1 WLR 398) shows that historically the two tests had been aligned and that it was the civil test that was applied in both jurisdictions (see paragraph 45 of the judgment of Sir Anthony Clarke MR). There will be cases where an honest but mistaken belief may have an unreasonable foundation but the most profound differences between the approaches in the criminal and civil courts are in the burden and standard of proof.

35. In *R v. Gladstone Williams* (1984) 78 Cr App R 276 Lord Lane CJ observed that the issue whether the tests were different

had "been the subject of debate for more years than one likes to think and the subject of more learned academic articles than one would care to read in an evening." However, it was in that case that the difference was affirmed. The Court of Appeal considered itself bound so to conclude by earlier authority in the Court of Appeal and House of Lords (*R v. Kimber* [1983] 1 W.L.R. 1118 and *D.P.P. v. Morgan* [1976] AC 182) arising from a sexual assault case and a rape case respectively. Lord Lane's short summary of the position was:

> "The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt is concerned, is neither here nor there. It is irrelevant…If the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; … that is so whether the mistake was, on an objective view, a reasonable mistake or not…In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected."

36 In the result, for the purposes of the criminal law the necessity to respond to an imminent attack must be judged on the assumption that the facts were as the defendant believed them to be, whether or not mistaken, and if mistaken, whether or not the mistake was objectively reasonable. That position has now been confirmed in statute: see section 76 of the Criminal Justice and Immigration Act 2008, in particular subsection (4):

> "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.""

14. For present purposes, it should be noted that, although the civil and criminal tests have sometimes been referred to as objective and subjective respectively, in the case of the criminal test that is something of a misdescription. As noted in [32] of the judgment of the Divisional Court in *Duggan* quoted above, the criminal test has two limbs: whilst for the first limb it is sufficient that the defendant has an honest belief

that his life is in imminent danger, even if the belief is mistaken and unreasonable, the second limb (as in the civil test) requires the force used in response to a perceived threat to be reasonable in all the circumstances. That requires an objective assessment which is for the jury not the defendant: see the judgment of the Court of Appeal Criminal Division given by Hughes LJ in *R v Keene* [2010] EWCA Crim 2514 at [5]. The existence of this second objective limb is an important consideration when questions arise as to whether it is in the public interest to adopt the criminal test or the civil test in misconduct proceedings.

The statutory and regulatory framework

15. In 2004 the then Home Secretary commissioned the Taylor Review into arrangements for dealing with police misconduct, which concluded that the system as it then stood was unduly bureaucratic and legalistic. The key recommendations were accepted by the government which asked the Police Advisory Board to deal with detailed implementation. A working party was set up with representatives from police forces and associations and the IPCC, which produced a draft set of professional standards, the Standards of Professional Behaviour, deliberately written in everyday common sense language. The final version was issued as Schedule 2 to the Police (Conduct) Regulations 2008. They are now Schedule 2 to the Police (Conduct) Regulations 2012, in identical wording. Under the heading "Use of Force" the Standards of Professional Behaviour state: "Police Officers only use force to the extent that it is necessary, proportionate and reasonable in the circumstances".

16. Under regulation 3 of both the 2008 and 2012 Regulations, "misconduct" is defined as "a breach of the Standards of Professional Behaviour" and "gross misconduct" as "a breach of the Standards of Professional Behaviour so serious that dismissal would be justified". The Regulations and the Standards of Professional Behaviour are thus silent as to whether, in assessing the extent to which the use of force is necessary, proportionate and reasonable, the civil law or the criminal law test will be applied.

17. At the same time as the 2008 Regulations came into force on 1 December 2008, the Home Office Guidance on Police Officer Misconduct issued under section 87 of the Police Act 1996 became effective. This provided, so far as relevant:

> "1.1 Public confidence in the police is crucial in a system that rests on the principle of policing by consent. Public confidence in the police depends on police officers demonstrating the highest level of personal and professional standards of behaviour. The standards set out below reflect the expectations that the police service and the public have of how police officers should behave. They are not intended to describe every situation but rather to set a framework which everyone can easily understand. They enable everybody to know what type of conduct by a police officer is acceptable and what is unacceptable**.** The standards should be read and applied having regard to this guidance.
>
> Use of Force

> 1.32 Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.
>
> 1.33 There will be occasions when police officers may need to use force in carrying out their duties, for example to effect an arrest or prevent harm to others.
>
> 1.34 It is for the police officer to justify his or her use of force but when assessing whether this was necessary, proportionate and reasonable all of the circumstances should be taken into account and especially the situation which the police officer faced at the time. Police officers use force only if other means are or may be ineffective in achieving the intended result.
>
> 1.35 As far as it is reasonable in the circumstances police officers act in accordance with their training in the use of force to decide what force may be necessary, proportionate and reasonable. Section 3 of the Criminal Law Act 1967, section 117 of the Police and Criminal Evidence Act 1984 and common law make it clear that force may only be used when it is reasonable in the circumstances.
>
> 1.36 Article 2 (2) of the European Convention on Human Rights provides a stricter test for the use of lethal force. The use of such force must be no more than is absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully undertaken to quell a riot or insurrection."[1]

18. The Police Act 1996 gave power to the Secretary of State for the Home Department to issue codes of practice. Section 39A of that Act, added by the Police Reform Act 2002, gives the Secretary of State power to issue codes of practice to chief officers of police relating to the discharge of their functions. One such code of practice issued under section 39A is that on the Police Use of Firearms and Less Lethal weapons which came into effect on 3 December 2003. One of the purposes of the code stated in 1.1.1. is "to provide a statement on standards of …operational practice relating to police use of firearms…" In section 2.1 headed "Law relating to the use of force" the code provides:

> 2.1.1 This code applies within the framework of law governing the use of force by the police, which forms part of the general law of England and Wales the relevant parts of which are summarised within ACPO Manuals of Guidance.
>
> 2.1.2 Use of force by police officers must take place within the bounds of the law, which is to be found in

[1] So far as relevant the Guidance issued at the same time as the 2012 Regulations was in the same terms.

> a International law, and especially the provisions of the European Convention on Human Rights (ECHR) now incorporated in domestic law by the Human Rights Act 1998;
>
> b The common law; and
>
> c Statute law, including section 3 of the Criminal Law Act 1967 and section 117 of the Police and Criminal Evidence Act 1984;"

19. The ACPO Manual of Guidance referred to was superseded by Armed Policing Authorised Professional Practice issued by the College of Policing on 23 October 2013. In the section headed "Legal Framework" is a sub-heading "Reasonable Force" which provides:

> "In line with leading case law on the common law principles of self-defence (*R v Williams* 78 Cr App Rep 276 and *Palmer v The Queen* [1971] AC 814) an individual has the power to use reasonable force to defend themselves.
>
> The meaning of 'reasonable force' when either self-defence, section 3(1) of the Criminal Law Act or section 3(1) of the Criminal Law Act (Northern Ireland) applies and is defined by the common law as restated by section 76 of the Criminal Justice and Immigration Act 2008.
>
> There is a subjective element to this defence; the question of whether the degree of force used by a person was reasonable in the circumstances is to be decided by reference to those circumstances as that person genuinely and honestly believed them to be.
>
> This is so even if their belief is mistaken. Whether the degree of force used in the circumstances (as the person believed them to be) was actually reasonable will, however, be assessed objectively by the courts.
>
> The degree of force used by a person will not be regarded as having been reasonable if it was disproportionate in the circumstances."

20. Section 39A of the Police Act 1996 was amended by the Anti-social Behaviour, Crime and Policing Act 2014 with effect from 13 March 2014, to transfer the power to issue codes of practice from the Secretary of State to the College of Policing. The College of Policing was established in 2012. Part of its function is to set professional standards which are consistent across all 43 police forces in England and Wales. Section 39A as amended now provides, so far as relevant:

> "(1) The College of Policing may, with the approval of the Secretary of State, issue codes of practice relating to the

> discharge of their functions by chief officers of police if the College considers that—
>
> (a) it is necessary to do so in order to promote the efficiency and effectiveness of police forces generally,
>
> (b) it is necessary to do so in order to facilitate the carrying out by members of any two or more police forces of joint or co-ordinated operations, or
>
> (c) it is for any other reason in the national interest to do so.
>
> (4) The College of Policing shall consult with the National Crime Agency before issuing or revising a code of practice under this section.
>
> (5) The Secretary of State shall lay any code of practice issued by the College of Policing under this section, and any revision of any such code, before Parliament.
>
> (7) In discharging any function to which a code of practice under this section relates, a chief officer of police shall have regard to the code."

21. Pursuant to the power under section 39A the College of Policing issued a Code of Ethics in July 2014. A draft of the Code had originally been sent out for consultation with a consultation period between 24 October 2013 and 29 November 2013. As the College of Policing explains in a Note headed "How we developed the Code of Ethics" the consultation took in every police force, all the main staff associations and unions, the IPCC, Her Majesty's Inspectorate of Constabulary, academia and the public.

22. The draft Code contained section 4 headed "Use of Force", paragraph 4.3 of which provided:

> "It will be for you to justify your use of force, and show that it was proportionate, lawful, necessary and reasonable. In assessing your use of force, the circumstances facing you at the time will be taken into account."

23. The IPCC provided its response to the consultation on 29 November 2013. It did not include any comment about the wording of section 4. The final version of the Code (which had been laid before Parliament in accordance with section 39A(5)), contained materially different wording at what are now [4.3] and [4.4] which provide:

> "4.3 According to this standard you must use only the minimum amount of force necessary to achieve the required result.
>
> 4.4 You will have to account for any use of force, in other words justify it based upon your honestly held belief at the time that you used the force."

24. In a College of Policing Briefing Note in relation to the changes between the consultation version and the final version, it is stated in relation to section 4 "Use of Force" that the explanation for the changes is "Clearer structure and wording". What the Court does not know is what representations were made to the College of Policing during the consultation process that might have led to a change which, at least arguably, substituted for an objective test a subjective one.

25. The Home Office Guidance on Police Officer Misconduct issued under section 87 of the Police Act 1996 was revised in July 2014 at the time that the Code of Ethics was published. In the Introduction, it states:

> "Those who are responsible for administering the procedures described in this guidance are reminded that they are required to take its provisions fully into account when discharging their functions. Whilst it is not necessary to follow its terms exactly in all cases, the guidance should not be departed from without good reason. This guidance is not a definitive interpretation of the relevant legislation. Interpretation is ultimately a matter for the courts."

26. Chapter 1 is headed "Guidance on Standards of Professional Behaviour". The Introduction section of that provides, inter alia:

> 1.1 The standards of professional behaviour are set out in Schedule 2 to the Conduct Regulations. As the professional body for policing in England and Wales, the College of Policing is responsible for setting standards of policing practice and for identifying, developing and promoting ethics, values and integrity. The Code of Ethics, issued by the College of Policing, sets out in detail the principles and expected behaviours that underpin the standards of professional behaviour for everyone working in the policing profession in England and Wales. This includes police officers, to whom the Conduct Regulations apply.
>
> 1.2 The standards of professional behaviour, as reflected in the Code of Ethics, are a statement of the expectations that the police and the public have of how police officers should behave. They are not intended to describe every situation but rather to set a framework which everyone can easily understand. They enable everybody to know what type of conduct by a police officer is acceptable and what is unacceptable. The standards should be read and applied having regard to the Code of Ethics.
>
> 1.3 The standards of professional behaviour also reflect relevant principles enshrined in the European Convention on Human Rights and the Council of Europe Code of Police Ethics. The Code of Ethics is issued as a code of practice under section 39A of the Police Act 1996 (as amended). The Code of Ethics applies to everyone in the police. For the purposes of

> any consideration under the Conduct Regulations the standards of professional behaviour apply to police officers of all ranks from Chief Officer to Constable, Special Constables and to those subject to suspension.
>
> 1.4 The Code of Ethics is the framework that underpins the standards of professional behaviour as set out in the Conduct Regulations. The Code of Ethics should inform any assessment or judgement of conduct when deciding if formal action is to be taken under the Conduct Regulations."[2]

27. Paragraph 1.12 provides:

> "The headings below describe the standards of professional behaviour as they are set out in Schedule 2 to the Conduct Regulations. The Code of Ethics goes into greater detail about the expectations underlying each of these standards. There is also an additional heading below in relation to "Off-duty conduct". There are additional explanatory paragraphs below some of the headings that are outside of the scope of the Code of Ethics and which should be used in considering whether there has been a breach of the standards of professional behaviour for the purposes of formal disciplinary action under the Conduct Regulations."

28. Paragraph 1.17 deals with Use of Force. It no longer provides the detail in the previous Guidance as set out at [17] above but simply reiterates the relevant Standard of Professional Behaviour in relation to Use of Force.

29. A Home Affairs Committee Report headed "The College of Policing: three years on" published in July 2016 notes that the Code of Ethics is a written guide to the principles that every member of the policing profession is expected to uphold and the standards of behaviour they are expected to meet and that Chief Constables are expected to implement and embed the Code within their constabularies. The Report goes on to state:

> "The College and the National Police Chiefs' Council must work harder to ensure that the Code is instilled "in the DNA" of serving officers…
>
> The Code of Ethics should be viewed by serving officers as having the equivalent status of the Hippocratic Oath. They should be required to acknowledge the Code formally by signing a copy of it at the end of their training. We recommend that the Code of Ethics and the Police (Conduct) Regulations are consolidated and made enforceable and that the resulting single document is put under the control of the College of Policing."

[2] Apart from a slight change in numbering this section of the Guidance remains unchanged in the June 2018 revision which is now current.

The approach of the IPCC and the IOPC

30. The advice to investigators to apply the civil law test, referred to in [1091] of the Report, is a Legal Guidance Note dated 28 January 2014 from Mr David Emery, Head of Legal Services at the IPCC (now the IOPC). That sets out "Use of Force" as one of the Standards of Professional Behaviour: "Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances" and notes, by reference to [1.35] of the Home Office Guidance 2012 (quoted at [17] above), that the wording of the standard is drawn from multiple legal sources. It then notes that the Guidance references sources relevant to both the civil law test and the criminal law test but does not say which should apply to police complaints system investigations.

31. The Note then sets out an accurate summary of the two tests and the differences between them. It then states that there is little judicial authority as to whether the civil law test or the criminal law test applies to police complaints system decision-making. It states that the only authority is *R (On the application of Erenbilge) v IPCC* [2013] EWHC 1397 (Admin), which Mr Emery then discusses. As he says, that case involved a mistake of fact as to whether the claimant had attempted to kick out at officers seeking to restrain him. He then quotes [20] of the judgment of Mr Philip Mott QC, sitting as a Deputy High Court Judge:

> "There is also an uncertain question as to whether the civil or the criminal test applies here, or indeed the intermediate test. To some extent the IPCC is investigating potential criminal liability and has the power, and indeed the duty, to refer cases to the Director of Public Prosecutions where appropriate. I have had no authority cited to me on the point and it may well be that there is none. I approach this case on the basis that the civil test applies, whatever that may be."

32. As Mr Emery goes on to say, the judge did not articulate why he approached the case on the basis that the civil law test applies. Mr Emery then discusses, by reference to the decision of the House of Lords in *Ashley v. Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962 whether misconduct proceedings are more akin in nature to criminal proceedings or to civil proceedings. He notes that on the one hand they fit the mould of prosecution and defence and involve sanctions which include dismissal, arguably a punitive sanction of sorts. On the other hand they apply the civil standard of proof. He concludes at [21]:

> "Whatever underlying policy reasons, the court in *Erenbilge* has given a steer that the civil law test should be applied in relation to police complaints system decision-making. Therefore, we should apply this test in relation to any decision-making that is directed towards misconduct proceedings. However, it is logical to apply the criminal law test in relation to and decision-making directed towards criminal proceedings."

33. Given that the Note was produced in January 2014 and the College of Policing had consulted the IPCC in relation to the draft Code of Ethics two months earlier, it is unfortunate that the Note makes no mention of the draft Code (of which it seems from

his witness statement that Mr Emery was unaware). It is equally unfortunate that the Note was not updated in the light of the Code of Ethics and the up-dated Home Office Guidance, both published in July 2014.

34. The IOPC has disclosed an internal draft email from the Investigations Directorate Training Manager evidently drafted after the Code of Ethics was published which stated: "Legal are further considering the implications of the new Code of Ethics and further guidance will be provided. In the meantime it is something you need to be aware [of] and can use when considering whether any individual…has behaved in a manner justifying disciplinary proceedings." It is unclear if this email was ever sent to investigators or whether internal lawyers did consider the implications of the Code. At all events, no further guidance was provided, which is unfortunate.

35. As Mr Tim Owen QC candidly accepted on behalf of the IOPC, the IPCC/IOPC's investigators have not adopted a consistent approach as to the applicable test for the use of force. Whether through lack of awareness of Mr Emery's Legal Guidance Note or otherwise, some investigators have adopted the criminal law test in their Reports. Others have adopted the wider civil law test. However, this inconsistency, although unfortunate, is not determinative. It is for the Court on this judicial review to determine which test is the correct one.

36. The IOPC originally argued in these proceedings that the Code of Ethics was not applicable to it or at most of marginal relevance. In oral submissions, Mr Owen QC abandoned that extreme position and accepted that the IOPC must have regard to the Code of Ethics, although he still maintained that it was open to the IOPC to say that if [4.4] of the Code is stating the criminal law test is applicable, it is wrong as a matter of law and therefore not binding on the IOPC (a matter to which I return below). That acceptance that the IOPC must have regard to the Code of Ethics is clearly correct in the light of the Introduction to and paragraph 1.4 of the July 2014 Home Office Guidance (quoted at [25]-[26] above). It also obviates the need to consider in detail the extensive submissions by Mr Ian Stern QC on behalf of the claimant and Mr Jason Beer QC on behalf of the MPS as to why the Code of Ethics is applicable to the IOPC in the same way as it is applicable to Chief Officers of Police and police officers generally.

The parties' submissions on Ground 1

37. On behalf of the claimant, Mr Stern QC submitted that the answer to the issue in Ground 1 as to whether the criminal law test or the civil law test should be applied was to be found in the trilogy of materials: The Police (Conduct) Regulations, the July 2014 Home Office Guidance and the Code of Ethics. This trilogy of materials had statutory authority: see [40] of the judgment of HHJ Saffman (sitting as a Judge of the High Court) in *R (Chief Constable of Cleveland Constabulary) v Police Appeals Tribunal* [2017] EWHC 1286 (Admin), to that effect.

38. He submitted that [4.3] of the draft Code of Ethics was focusing on the subjective belief of the officer. "The circumstances facing you at the time" means "as you perceived them to be". However, whether he was right or wrong in that submission, [4.4] of the Code as published was stating that the criminal law test was applicable. Whilst he accepted that the Code was not as well written as it might be, he submitted that the fact that the paragraph stated that the officer would have to "justify [the use of

force] based upon your honestly held belief at the time that you used the force" was a clear indication that it was the criminal law test of honest, albeit mistaken or even unreasonable, belief that was applicable. If it had been intended to apply the civil law test, there would have been express reference to the officer having to justify an honest and reasonable belief.

39. He made the point that, since it was now accepted by the IOPC that it had to have regard to the Code of Ethics, it would have had to consider [4.4] in its decision-making and explain why it was wrong or not applicable. However, the IOPC had not taken this approach. Its correspondence and its Grounds of Defence appear to have proceeded on the basis that the IOPC did not have to consider the Code of Ethics.

40. He submitted that the Legal Guidance Note was defective in that *Erenbilge* was not a satisfactory basis for concluding that the civil law test should apply. It was a case where there was no representation of the police so the point was not fully argued, but more importantly the case was decided before the Code of Ethics came into force. In the light of [4.4] of the Code the case would be decided differently today.

41. Mr Stern QC also submitted that the case law of the European Court of Human Rights in relation to Article 2 of the European Convention on Human Rights supported the claimant's case that the appropriate test is the criminal law one. Article 2 provides as follows:

> "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;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

42. Mr Stern QC submitted that the test applied by the European Court in deciding whether the use of lethal force is justified is that set out in *McCann v United Kingdom* (1996) 21 EHHR 97 at [200]:

> "[T]he use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention 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. 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."

43. He submitted that the European Court had recently confirmed in *Da Silva v United Kingdom* (2016) 63 EHHR 12 at [245] that the question of whether the state actor (here the claimant) had an honest belief that his life was in imminent danger was to be determined subjectively, not by reference to an objective standard. He submitted that, since the criminal test for self-defence was thus sufficient to meet the objectives of Article 2 in holding the State to account, it would be very odd if a different, more stringent test applied to the position of the individual officer.

44. On behalf of the MPS, Mr Jason Beer QC supported the claimant's submissions in relation to Ground 1 but did not address submissions to Ground 2. He submitted that *Erenbilge* was a very slender basis for the application of the civil law test. In following the Legal Guidance Note based on *Erenbilge* the IOPC had failed to take into account the Code of Ethics. The Code, together with the July 2014 Home Office Guidance and the Code of Practice on Police Use of Firearms (and associated Armed Policing Authorised Professional Practice issued by the College of Policing) formed a trilogy of instruments issued under statutory authority which provided the solution to Ground 1. These materials all made it clear that it was the subjective criminal law test which was applicable. Since it is now accepted by the IOPC that it has to have regard to the Code of Ethics, it is not necessary to consider the detailed and careful submissions made by Mr Beer QC as to why the IOPC has to apply the Code of Ethics.

45. Mr Owen QC's primary submission on behalf of the IOPC was that the claimant and the MPS vastly overstate their case in so far as it is based on [4.4]. It was doing no more than stating how operational officers would have to account for their use of force. On any view it was not a clear and unambiguous articulation that the use of force by officers would be judged in misconduct proceedings by reference to the criminal law test. [4.4] was uninformative because it still begged the question as to what was necessary, proportionate and reasonable in all the circumstances. He submitted that the position of the IPCC when it wrote to the MPS on 6 June 2017 was consistent with this. The IPCC had not said that the Code of Ethics and [4.4] could be ignored, rather it had challenged the assertion by the MPS that [4.4] could be used to read into the relevant standard of professional behaviour that an unreasonable mistake will provide a defence.

46. That letter also made the point about the object of police disciplinary proceedings being to maintain public confidence in policing and said: "public confidence in policing may not be maintained if officers who use lethal force on the basis of unreasonable mistakes cannot be dismissed as a result of doing so." Mr Owen QC submitted that this point about the object of misconduct proceedings was crucial to understanding the legitimate scope of the misconduct regime. The purpose of police misconduct proceedings was best served by the application of the objective civil law test.

47. Mr Owen QC submitted in the alternative that, if [4.4] meant what the claimant and the MPS said it meant, it was wrong as a matter of law as it was not consistent with the purpose of misconduct proceedings and the protection of the public. He submitted that the Home Office Guidance and the Code of Ethics could not be read as restricting

the scope of misconduct under a statutory misconduct regime. He referred to [24.17] of Bennion on Statutory Interpretation to the effect that guidance in relation to the operation of an Act cannot alter the true legal meaning of a statute and that ultimately statutory interpretation is a matter for the Courts, a point made by Baroness Hale in [67] of her judgment in *Boyle v SCA Packing* [2009] UKHL 37; [2009] 4 All ER 1181.

48. He submitted that [1.32] to [1.34] of the 2008 and 2012 Home Office Guidance could not be said, on any sensible reading, to be limited to the criminal law test. Accordingly, if [4.4] of the Code of Ethics meant what the claimant and the MPS claimed, it must have changed the law. It would be ultra vires or *Wednesbury* unreasonable for the Code of Ethics to purport to do that.

49. On behalf of Jermaine Baker's partner and family, Ms Fiona Murphy made submissions supporting the position of the IOPC. She referred to the statement at [2.3] of the College of Policing Guidance on Outcomes in police misconduct proceedings:

> "The purpose of the police misconduct regime is threefold:
>
> ■ maintain public confidence in and the reputation of the police service
>
> ■ uphold high standards in policing and deter misconduct
>
> ■ protect the public."

She submitted that the objective civil law test better meets these purposes and particularly that of upholding high standards, which are standards of propriety not criminality.

50. Like Mr Owen QC, she submitted that [4.4] of the Code of Ethics could not bear the meaning which the claimant and the MPS sought to put upon it. The Code was directed at operational police officers and [4.4] was only an enjoinder to an officer to account for his subjective beliefs. That paragraph could not determine the standard by which the conduct of an officer such as the claimant was to be assessed, which should be an objective standard.

51. Ms Murphy submitted that the fact that the standard of proof in misconduct proceedings was the civil standard of the balance of probabilities pointed to an objective standard in relation to misconduct. She referred to the opinion of Lord Neuberger in *Ashley* where he said at [87]:

> "The fact that the belief of imminent attack must be reasonable in the tortious context, but need only be genuine to operate as a defence to a criminal charge, seems to reflect the same sort of dichotomy between the jurisdictions as the difference in the applicable standards of proof."

52. She also referred to what Davis LJ said in *R (Maughan) v HM Senior Coroner for Oxfordshire* [2019] EWCA Civ 809 at [47-[48] about the choice between standards of proof being a matter of context and underpinning purpose, which she submitted also

pointed to the adoption of an objective civil law test given the purpose of misconduct proceedings.

53. Ms Murphy submitted that screening out at the case to answer stage of all cases where the officer had a subjectively honest but objectively unreasonable belief would not only be inconsistent with the purposes of misconduct proceedings but would be inconsistent with the rest of the misconduct regime, in particular the assessment of seriousness under section 4 of the Guidance on Outcomes. She placed particular reliance on [4.4] which provides for seriousness of misconduct to be assessed by reference to the factors identified in the guidance given by Popplewell J in *Fuglers LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin):

> "Assess the seriousness of the proven conduct by reference to:
>
> ■ the officer's culpability for the misconduct
>
> ■ the harm caused by the misconduct
>
> ■ the existence of any aggravating factors
>
> ■ the existence of any mitigating factors."

54. Ms Murphy submitted that the subjective belief of the officer, even if unreasonably held, would come in as a mitigating factor, as was clear from [4.8] which provides:

> "Carefully assess the officer's decisions and actions in the context in which they were taken. Where the misconduct has taken place on duty, consider the policing context and whether the officer followed the College of Policing's National Decision Model. Many police officers are required to take decisions rapidly and/or in highly charged or dangerous situations, for example, in a public order or other critical incident. Such decisions may carry significant consequences. Take care not to confuse these consequences with what the officer knew or could reasonably have known at the time of their decision."

55. If the existence of an honest but unreasonably held belief meant there was no case to answer, then the extent of an officer's mistake would not be considered in assessing the seriousness of his misconduct, which would be contrary to this Guidance. It is right to say that Mr Owen QC also made submissions to the same effect about the inconsistency between screening out of cases at the case to answer stage by reference to the criminal law test and the Guidance on Outcomes.

The parties' submissions on Ground 2

56. Mr Stern QC submitted that, even if the IOPC is correct as to the test, its assessment of the facts as giving rise to a case to answer was unreasonable and irrational. He accepted that the test by which this issue is to be judged is that set out by this Court in *R (Commissioner of the City of London Police) v IOPC* [2018] EWHC 2997 (Admin) where Sharp LJ said at [14] to [16]:

> "14. We turn next to the correct approach to a claim of irrationality in this context. Mr Steele, for the defendant, emphasises two important features of the statutory scheme in the context of a rationality challenge. First, the statutory scheme provides for a process of engagement between the IOPC and the AA, but ultimately the decision on whether there is or is not a case to answer in these types of investigations falls to the IOPC. By virtue of PRA sch.3, para.27(4)(b) the claimant is under an express statutory duty to comply with the IOPC's direction in this regard. Parliament therefore considered that the judgment on the "case to answer" issue should be one for the IOPC to make. Further, in making that judgment, the IOPC has a broad evaluative role in considering and assessing the evidence; a matter which the claimant expressly accepts.
>
> 15. This is the context in which the high *Wednesbury* threshold for establishing irrationality must be properly observed. This is, of course, not to say that the IOPC's decision is immune from review altogether, but rather that the court will expect a particularly clear case before it will intervene.
>
> 16. Secondly, the threshold for identifying a case to answer is itself a low one. There merely needs to be sufficient evidence upon which a reasonable misconduct meeting or hearing could, on the balance of probabilities, make a finding of misconduct or gross misconduct. The investigator's task is to report their opinion as to whether there is such a case to answer before another panel."

57. On behalf of the claimant, Mr Stern QC took issue with the analysis by the IOPC of a number of aspects of the assessment of the evidence on the basis of which the investigator had concluded that there was a case to answer. First was the conclusion that the positioning of the track wound on Mr Baker's body indicated that the palm of his left hand had been raised facing the windscreen, consistent with putting his hands up ([1070], [1075] and [1095] of the Independent Investigation Report). Mr Stern QC submitted that contrary to Mr Owen QC's skeleton argument, the expert evidence of the pathologist and ballistics expert had expressed no view as to which way the palm was facing. He also sought to demonstrate, by reference to the post-mortem photograph, that it was not possible for Mr Baker's palm to have been facing outwards. Given that Mr Baker was sitting in the passenger seat with his shoulder bag high on his chest, if the conclusion that the palm was facing outwards was in error, Mr Stern QC submitted a lot of the case fell by the wayside.

58. Second, Mr Stern QC criticised the reliance by the IOPC on evidence from the available audio recordings that some officers had told Mr Baker to put his hands up so that he may have had insufficient time to raise his hands even though he was in fact surrendering. Mr Stern QC made the point that there were defects in the recordings (and thus the transcripts) since part of the "store and retrieve system" was missing and the live feed was not of perfect quality. In fact on one of the recordings an officer can be heard saying "put your hands on dashboard" which is what the claimant said that

he had shouted at Jermaine Baker. This could not be heard on the "store and retrieve" system which was incomplete.

59. The investigator's analysis of the transcripts was to the effect that the banging noise at 00.04 on the store and retrieve system was believed to be the shot. There was no corresponding banging noise at the equivalent time on the live feed. Mr Stern QC submitted that it was not known where the suggestion came from that that was the shot. If it was the spectrogram derived from the store and retrieve system, that could hardly be reliable given that parts of the store and retrieve system were missing.

60. Third, Mr Stern QC criticised the reliance by the IOPC on the shortness of time before the shot not having allowed Jermaine Baker enough time to comply with any oral warnings. This was contrary to the evidence from analysis of the audio recordings which showed a three second gap between the claimant opening the door and the shot being fired.

61. Fourth, Mr Stern QC was critical of the treatment by the IOPC of whether Jermaine Baker was wearing a balaclava pulled down over his face as the claimant contended. The IOPC investigator concluded (at [1086] to [1088] of the Report) that this was contradicted by other evidence and that it was unlikely that he would have pulled the balaclava down at that time given that the prison van was still half an hour away. Mr Stern QC submitted that on a proper analysis of the other evidence, it did not contradict the claimant's evidence. There was simply an absence of mention of the balaclava by other officers. He also submitted that the blood staining on the balaclava was consistent with it having been pulled over Jermaine Baker's face at the time he was shot.

62. Accordingly, Mr Stern QC submitted that the reliance by the IOPC on these matters as demonstrating a case to answer was irrational and *Wednesbury* unreasonable.

63. Mr Owen QC submitted that, although Swift J had given permission on Ground 2 because he had given permission on Ground 1 and because: "the scope of the argument under Ground 2 is narrow", in fact it only raised a narrow issue if the claimant succeeded on Ground 1, in which event the IOPC conceded the decision to direct misconduct proceedings would have to be quashed and a fresh decision made. If Ground 2 was to be considered on the basis contended for by the claimant, that, even if the objective test applied, it had been irrational to direct a misconduct hearing, this argument was hopeless. To determine it would require an examination of all the evidence. He submitted that the issue for the Court was whether the IOPC had been correct to determine that on one possible construction of the facts and applying the objective test, there was sufficient evidence upon which a reasonable misconduct panel could determine on a balance of probabilities that the claimant had breached the use of force standard of professional behaviour.

64. Looking at the evidence as a whole, a reasonable misconduct panel could determine that there had been such a breach and the decision by the IOPC that there was a case to answer was entirely legitimate. Submissions to the same effect were made by Ms Murphy.

Analysis and conclusions

65. In my judgment, seeking to categorise misconduct proceedings as either criminal or civil in nature is not a profitable exercise and misconduct proceedings are essentially *sui generis*. Untrammelled by any authority, statutory or otherwise, I might well be persuaded that, in police misconduct proceedings, the question of whether the use of force was justified should be judged by the civil law objective test that the belief of the officer as to the threat faced must not only be an honest one, but also objectively reasonable. On one view, the application of such a test would better accord with the purpose of police misconduct proceedings, being, inter alia, to promote adherence to standards of conduct that the public might reasonably expect from police officers and to maintain public confidence in policing.

66. However, in my judgment, the July 2014 Home Office Guidance and the Code of Ethics pose insuperable obstacles to the Court ruling that the question whether the Use of Force Standard of Professional Behaviour has been breached is to be determined by reference to the civil law objective test. The Home Office Guidance and the Code of Ethics itself make it clear that the Code of Ethics is intended to and does set out the details of those Standards of Professional Behaviour. As [1.2] of the Home Office Guidance states: "The standards should be read and applied having regard to the Code of Ethics." Equally, the last sentence of [1.4] makes it clear that the determination by a Chief Officer of Police or the IOPC of whether proceedings for misconduct should be pursued against an officer is to be made by reference to the Code of Ethics: "The Code of Ethics should inform any assessment or judgement of conduct when deciding if formal action is to be taken under the Conduct Regulations."

67. Whilst [4.4] of the Code of Ethics may not be as clearly drafted as it might be, I cannot accept the submissions of Mr Owen QC and Ms Murphy that somehow the accounting by an officer for the use of force is not concerned with whether he or she is guilty of misconduct. This paragraph is part of the details of the relevant Standard of Professional Behaviour, Use of Force, breach of which may well lead to misconduct proceedings. The principal context in which an officer will have to "justify it [the use of force]" is in justifying his or her conduct so as to demonstrate that there has not been a breach of that standard. What is required to justify the use of force is an honestly held belief at the time, clearly a reference to the first limb of the criminal law test. If it had been intended to apply the civil law objective test, the provision would have been bound to say something like: "justify it based upon your honestly and reasonably held belief at the time that you used the force". In other words I am quite satisfied that [4.4] does mean what Mr Stern QC submitted that it meant.

68. Furthermore, for a number of reasons, I cannot accept Mr Owen QC's submissions as to why, if [4.4] of the Code of Ethics does mean that the test is the criminal law test, somehow that is wrong in law. First, the only case where it has been suggested that the IOPC should apply the civil law test to the use of force in misconduct proceedings is *Erenbilge.* I agree with Mr Beer QC that that case is a very slender thread on which to determine the correct test. Quite apart from the fact that the police were not represented, the judgment was in effect *ex tempore* (given in the afternoon after a hearing in the morning) and the judge does not set out any analysis as to why he adopted the civil law test. In any event the IPCC had applied a harsher test than it ought to have done but the judge still concluded that the decision not to uphold the

complaints against the officers was a reasonable one. Given that the same result would have been reached applying the criminal law test, in one sense that part of the decision concerned with the test could be said to be obiter. Whatever its precise status, I do not consider that *Erenbilge* could be said to be established law which the College of Policing was obliged to apply in devising the Code of Ethics.

69. Second, both the primary legislation (the Police Act 1996) and the secondary legislation (the Police (Conduct) Regulations 2012) are silent as to which test is to be applied. The Regulations do not define misconduct beyond it being a breach of the Standards of Professional Behaviour. Accordingly, the reliance by Mr Owen QC on [24.17] of Bennion is misplaced. It is well-recognised that guidance cannot alter the legal meaning of a statute. Indeed the Home Office Guidance of July 2014 expressly acknowledges this in (b) of the Introduction where it says: "This guidance is not a definitive interpretation of the relevant legislation. Interpretation is ultimately a matter for the courts." However, this Home Office Guidance and the Code of Ethics are not purporting to explain the meaning of the primary or even secondary legislation. Rather the Home Office Guidance and the Code of Ethics are seeking to define further what the relevant Standard is, here the Use of Force, where the primary and secondary legislation is, perhaps unfortunately, silent on the issue.

70. Third, whilst as I have said, the application of the objective civil law test might, on one view, more strongly promote the purpose of police misconduct proceedings, the submissions of Mr Owen QC and Ms Murphy to the effect that the application of the criminal law test would somehow fatally undermine or thwart that purpose are unjustified. They overlook two important aspects of the criminal law of self-defence, both of which will continue to be relevant, even though the Code of Ethics adopts the criminal law test. First, as already noted above, the test has a second limb, that the force used in response to a perceived threat has to be reasonable in all the circumstances, which requires an objective assessment by the IOPC in determining whether there is a case to answer. Second, "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." ([76] of the judgment of the Court of Appeal (Sir Terence Etherton MR, Davis LJ and Underhill LJ) in *Duggan* [2017] EWCA Civ 142; [2017] 1 WLR 2199. Accordingly, as Mr Stern QC submitted, the criminal law test is far more nuanced than Mr Owen QC suggested.

71. Fourth, the College of Policing, as the regulator now appointed by statute, indisputably enjoys a wide area of discretionary judgement in fulfilling its functions, which include the setting of uniform professional standards. As I have explained above, the College of Policing had good reasons for adopting the criminal law test in the Code of Ethics, and that the adoption of that test was not inconsistent with the relevant statutory purpose. It is notable that there has been no public law challenge to the Code of Ethics, whether from the IOPC or anyone else. In these circumstances I would reject the submission that [4.4] is either ultra vires, or so unreasonable that no reasonable College of Policing, seeking to promote the statutory purpose, could have adopted it.

72. Fifth, contrary to the submissions by Mr Owen QC and Ms Murphy, it does not seem to me that there is an inconsistency between the application of the criminal law test in relation to self-defence in determining that there is a case to answer and the guidance

given as to assessing the seriousness of misconduct in the Guidance on Outcomes. As already noted above, the second limb of the criminal law test requires that the force used in response to a perceived threat be reasonable in all the circumstances, which involves an objective assessment. In a given case, the IOPC might determine that the officer had had an honest but unreasonable belief as to the threat faced but that the force used was arguably not reasonable in all the circumstances, so that there was a case to answer. If the misconduct tribunal subsequently concluded that there had been misconduct, the assessment of its seriousness would necessarily involve consideration of the matters set out in section 4 of the Guidance on Outcomes.

73. Sixth, it is clear from the Strasbourg jurisprudence culminating in *Da Silva* that, for the purposes of Article 2 of the European Convention on Human Rights, the use of force by a state actor will be justified where it is based on an honest, albeit mistaken belief. At [245] of the judgment in that case, the European Court of Human Rights stated:

> "The Government have argued that the reasonableness of a belief in the necessity of lethal force should be determined subjectively. Although the applicant has accepted this, the third party intervener has submitted that an honest belief should be assessed against an objective standard of reasonableness. It is, however, apparent both from the application of the stated test to the particular facts in *McCann and Others* itself and from the Court's post-*McCann and Others* case-law that the existence of "good reasons" should be determined subjectively. In a number of cases the Court has expressly stated that as it is detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life or the lives of others; rather, it must consider the events from the viewpoint of the person(s) acting in self-defence at the time of those events (see, for example, *Bubbins*, cited above, § 139 and *Giuliani and Gaggio*, cited above, §§ 179 and 188). Consequently, in those Article 2 cases in which the Court specifically addressed the question of whether a belief was perceived, for good reasons, to be valid at the time, it did not adopt the standpoint of a detached observer; instead, it attempted to put itself into the position of the person who used lethal force, both in determining whether that person had the requisite belief and in assessing the necessity of the degree of force used…"

74. I agree with Mr Stern QC that there would be a potential tension between the State not being accountable under Article 2, where the state actor had an honest albeit mistaken belief, and the state actor him or herself being judged by the more stringent civil law standard in determining whether the actions for which, on this hypothesis, the State was not responsible, amounted to gross misconduct.

75. For all those reasons, I consider that it is the criminal law test which is to be applied in determining whether there is a case to answer, from which it follows that the IOPC applied the wrong test and its decision must be quashed.

76. Ground 2 would only arise if the claimant were wrong in relation to Ground 1 and the IOPC applied the correct test, being the objective civil law test. The claimant nonetheless contends that the determination by the IOPC that there was a case to answer and that misconduct proceedings should be pursued was irrational and *Wednesbury* unreasonable. As the cases in this area, most recently the decision of this Court in the *City of London Police* case, make clear, the threshold of establishing such irrationality and unreasonableness is a high one, given the broad evaluative role given to the IOPC in assessing the evidence. As Elias LJ said in *R (IPCC Chief Executive) v IPCC* [2016] EWHC 2993 (Admin) at [21] (cited with approval in the *City of London Police* case at [19]): "if there is a case to answer on one legitimate construction of the facts, the investigator has to recommend that there is a case to answer…"

77. Having considered carefully all the points made by Mr Stern QC in relation to the evidence, the findings of the investigator and the decision of the IOPC, it seems to me impossible to say that, on one legitimate construction of the facts, there was not a case for the claimant to answer if the objective civil law test were to be applied. It simply cannot be said that the claimant is incontrovertibly right in his version of what occurred or that, even if he were, there would still not be a case to answer applying the objective civil law test. The claimant simply fails to surmount the very high threshold of irrationality.

Conclusion

78. In relation to Ground 1, I consider that in applying the objective civil law test in determining that there was a case to answer, the IOPC applied the wrong test. It should have applied the criminal law test. Its decision must be quashed. In those circumstances, Ground 2 is academic but, if it were not, it fails for the reasons I have given.

Sir Kenneth Parker

79. I agree.