[2010] 1 A.C. 345; and see further C.F. Forsyth, *Wade and Forsyth's Administrative Law*, 11th ed. (Oxford 2014), 485–486. Sometimes civil courts refuse to pre-judge the outcome of a criminal trial, as in *Imperial Tobacco Ltd. v Attorney General* [1981] A.C. 718, but (as the cases mentioned above show) civil courts may sometimes make declarations as to matters which have implications for criminal law.

In short, using declarations to decide questions of general significance going beyond the circumstances of a particular case has been an established technique of public law for over a century. The question is not whether it can be done, but whether it is convenient to do it: *Dyson v Attorney General (No. 1)* [1911] 1 K.B. 410.

Objection (4) is that the only type of declaration as to the general effect of a norm which the Human Rights Act 1998 permits is a statutory declaration of incompatibility under s. 4. This misunderstands the role of a declaration under s. 4. It is available only when legislation is *not* unlawful (as a matter of domestic law) because it is saved by parliamentary sovereignty by virtue of s. 6(2) or 3(2). Where, as is usually the case, a violation of a Convention right is *unlawful* (s. 6(1)), the court should declare that unlawfulness in the ordinary way, as in *Anisminic v Foreign Compensation Commission* [1969] 2 A.C. 147 and countless other cases. If the unlawfulness is an inevitable result of applying guidance, that too can be declared, as in *Gillick*; unlawfulness under s. 6(1) of the 1998 Act is not special in this respect. Unlawfulness is unlawfulness, whether it results from violating a Convention right or acting in any other way contrary to law.

Objection (5) is that it would be difficult to formulate a declaration with sufficient specificity to be useful. This is no bar to making a declaration. It merely emphasises the importance of ensuring that any declaration is drawn sufficiently clearly and explicitly to be useful.

Both on authority and in principle, then, courts may declare that giving effect to guidance would violate Convention rights, when it is convenient to do so. It is to be hoped that the Supreme Court in *MM (Lebanon)* and on its resumed deliberation on *Bibi and Ali* will not restrict that useful function of public-law declarations.

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UNDERSTANDING THE "HOUSEHOLDER DEFENCE": PROPORTIONALITY AND REASONABLENESS IN DEFENSIVE FORCE

IN *Collins v Secretary of State* [2016] EWHC 33 (Admin), the High Court refused to declare that Criminal Justice and Immigration Act 2008, s. 76

(5A) – the so-called "householder's defence" – was incompatible with the right to life enshrined in Article 2 of the ECHR, in that it failed to protect the lives of attackers sufficiently. Section 76(5A) was inserted into the 2008 Act by Crime and Courts Act 2013, s. 43, and came into force in April 2013.

The facts in *Collins* are relatively unimportant since the challenge to the CPS's decision not to prosecute on those facts was dropped. However, in deciding not to prosecute, the CPS proceeded on the basis that, under the "householder defence" provisions, a householder "would be acquitted of any offence of violence unless the prosecution proved that the degree of force used was grossly disproportionate" and that, accordingly, the use of "merely" disproportionate force would be lawful. The High Court was required to consider whether the law was as assumed by the CPS and, independently, whether it was compatible with the right to life enshrined in Article 2 of the ECHR.

The High Court swiftly rejected the CPS's interpretation of s. 76(5A). It noted that s. 76(3) retains the common law standard for force that is permissible in self-defence, which remains a degree of force that was "reasonable in the circumstances as the defendant believed them to be". Accordingly, "the other provisions (and, in particular, s. 76(5A) and (6) of the 2008 Act) provide the context in which the question of what is reasonable must be approached". The applicable test, the court said, is not whether the force used was proportionate, disproportionate, or grossly disproportionate – it is whether it was reasonable. Section 76(5A), being drafted in the negative, excludes grossly disproportionate force from being reasonable in householder cases, but says nothing about whether force that is not grossly disproportionate is reasonable. That depends on various factors, including the proportionality of the force to the envisaged threat.

Accordingly, it summarised the law relating to the householder defence thus:

i) Whether the degree of force used in any case is reasonable is to be considered by reference to the circumstances as the defendant believed them to be (the common law and s. 76(3));
ii) A householder is not regarded as having acted reasonably in the circumstances if the degree of force used was grossly disproportionate (s. 76(5A));
iii) A degree of force that went completely over the top *prima facie* would be grossly disproportionate;
iv) However, a householder may or may not be regarded as having acted reasonably in the circumstances if the degree of force used was disproportionate (at [33]).

A defence is only available if the householder acted reasonably.

The "headline message" of the law remains unchanged: "... a householder will only be able to avail himself of the defence if the degree of

force he used was reasonable in the circumstances as he believed them to be." The court pointed out that, as purely private situations, householder cases only stand to be assessed against the "framework obligation" in Article 2(1) of the ECHR which requires states to put in place "effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery" (at [39] ff, [64]). It noted further that "the European Court of Human Rights has consistently held that the reasonableness limb of self-defence … as applied in state actor cases is compatible with Article 2(2)'s requirement of 'absolute necessity'". On that basis, the High Court in *Collins* concluded that, even as qualified by s. 76(5A), "the test of reasonableness in the circumstances in private party householder cases … would not … breach … the Article 2(1) positive obligation" (which is in any event "shorn of strict proportionality") by insufficiently protecting the lives of attackers against householders (at [63]). It therefore declined to grant the declaration of incompatibility sought.

This ruling turns on a distinction between reasonable force on the one hand and force that is either not disproportionate (in non-householder cases) or not grossly disproportionate (in householder cases) on the other. This distinction is perfectly defensible and flows from statute. However, the manner in which the court illustrated this distinction calls for closer scrutiny.

The main concern is with the example the court used to show that force could be reasonable despite being (in householder cases) disproportionate. It suggested at [23] that, where a householder could have retreated from a threat but did not, the failure to retreat, and therefore the "use of force", might be disproportionate, while potentially remaining reasonable. The striking problem with this example is that s. 76(5A) relates to the evaluation of the "*degree* of force used" and not to the "*use* of force" alone. This is no mere quibble – the phrase "degree of force used" is defined in s. 76(10)(c) as "the type and amount of force used". A failure to retreat has no effect on either the type, or the amount of force used.

Section 76(6A) makes it clear that retreat is a separate factor, independently relevant to the overall reasonableness of the force deployed. It says that the "possibility that D could have retreated is … a factor to be taken into account … in deciding the question [*of reasonableness*]". Hence the assertion regarding retreat at [23] is either incorrect, or irrelevant to the standard specified in s. 76(5A).

These concerns with the court's example are not fatal to the court's ultimate interpretation of s. 76(5A), but clearly a better example is needed. The example would also have to be compatible with the court's assertion at [25] that, under the scheme of s. 76, even proportionate force may be unreasonable. No such example appears in the court's judgment, but it is possible to construct one. Imagine that *V* is trying to steal bread from *D* in a public park and *D* stops *V* by knocking her unconscious. Assuming that

there was no less forceful way to stop *V*, a jury may nevertheless conclude, having regard to its type and amount, that the degree of force *D* used was disproportionate (albeit not grossly disproportionate). Since this is not a householder case, s. 76(6) would oblige the court to conclude that the degree of force used by *D* was unreasonable, because it was disproportionate. But what if instead *V* had entered *D*'s home as a trespasser to steal the bread? This would then be a householder case, and s. 76(5A) would apply. Since the degree of force used is not grossly disproportionate, s. 76(5A) would not mandate the conclusion that the degree of force used by *D* was unreasonable. A jury might still conclude that it was unreasonable for *D* to have used this degree of force, if, say, *D* had a more sparing way to neutralise the threat – he could have pushed *V* out of the house and shut the door. Equally, it could conclude that *D*'s response was reasonable. We can modify this example to show that a defensive response may be unreasonable even where the degree of force used is not disproportionate (let alone grossly disproportionate), when a more sparing effective option is available.

This example suggests that the overall reasonableness of a defensive response depends, in addition to the proportionality concerns addressed in ss. 76(5A) and 76(6), on factors like the possibility of retreat (s. 76(6A)) and the availability of more sparing responses. So, in non-householder cases, when the most sparing defensive option is disproportionate to the threat faced, adopting it is unreasonable because of s. 76(6). In householder cases, provided that *D* adopted the most sparing response available, her response would not automatically be unreasonable even if the degree of force used was disproportionate to the threat. But even so, as per s. 76(5A), it would automatically be unreasonable if this response involved a *grossly* disproportionate degree of force.

This interpretation of the law is compatible with the observation at [27] of *Collins* that proportionate force is not necessarily reasonable force. Arguably, it is also compatible with the court's only discussion of the requirement that defensive force be used sparingly: "There may be instances when a jury may consider the actions of a householder in self-defence to be more than what might objectively be described as the minimum proportionate response but nevertheless reasonable" (at [62]).

It is submitted that the phrase "more than" should be read as qualifying the adjective "proportionate". This would be consistent with the court's observation in the very next paragraph that "the test of reasonableness … in private party householder cases … is shorn of strict proportionality". It would also offer logical consistency.

Although there is indirect evidence to support this reading of the judgment in *Collins*, a clearer example emanating from the judgment itself, to show how proportionate force can be unreasonable, and vice versa would have been infinitely preferable. The applicants may be considering an

appeal against the High Court's ruling. It is hoped that some clarification may then emerge.

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SHORN-OFF COMPLICITY

CRIMINAL complicity has been dramatically changed by the combined decisions of the UK Supreme Court and the Privy Council in *Jogee; Ruddock* [2016] UKSC 8; [2016] UKPC 7; [2016] 2 W.L.R. 681. At least since the Accessories and Abettors Act 1861, it has been settled that a person (*S*) who has intentionally assisted or encouraged another (*P*) to commit a crime has been liable to be tried, convicted, and punished as if *S* was a principal. For decades, there has also been a much-debated, additional form of complicity where the accomplice was "parasitically" liable for further crimes committed by *P* beyond the scope of a common criminal purpose shared by *S* and *P*. For that kind of liability, the accomplice need not have assisted or encouraged the further crime but need only have foreseen that it was a possible incident of the common purpose. The effect of *Jogee* and *Ruddock* is that this further form of complicity, first recognised explicitly in the Privy Council decision of *Chan Wing-Siu* [1985] A.C. 168 and later endorsed by the House of Lords in *Powell; English* [1999] 1 A.C. 1, has been shorn off the criminal law. As a result, *Chan Wing-Siu* directions will no longer be given to juries.

Complicity is conceptually difficult. It can also be practically difficult to establish which parties did specific physical acts or whether the acts were done with fault, which makes assessments of liability hard. *Jogee* and *Ruddock* were just such cases, and show how the lower threshold for liability in parasitic complicity was so attractive to prosecutors. Jogee was "egging [*P*] on" to do "something" at around the time *P* fought and ultimately stabbed *V* fatally; the only witness who gave evidence was the deceased's girlfriend. *P* and Jogee were convicted of murder, Jogee on the basis that at the very least he was an accomplice to an attack on *V* and foresaw that *P* might stab *V* with intent to cause serious harm. Ruddock was prosecuted in Jamaica on the basis that he and *P* had executed a common intention to steal a car and to kill the victim. The judge directed the jury that they could find this common intention where each defendant "knew that there was a real possibility the other defendant might have a particular intention and … went on to take part in [the offence]." Ruddock denied knowledge of the murder and claimed he was merely getting a lift in the car. Both appeals were successful since the trial judges had