

## **INQUEST/INQUEST Lawyers Group/Police Actions Lawyers Group Briefing – March 2006**

### **Fatal shootings by police and the death of Jean Charles de Menezes**

1. INQUEST is working with the lawyers advising the family of Jean Charles de Menezes who was shot dead by police on 22 July 2005. INQUEST met with his family when his parents and brother were visiting from Brazil in Autumn 2005. We also briefed the delegation from the Brazilian Government which visited London in August 2005 and January 2006 in relation to the case.

### **Lethal force, “shoot to kill”**

2. The introduction and implementation of *Operation Kratos* by the Metropolitan Police, and the subsequent death of Jean-Charles de Menezes, indicates a blatant disregard for the right to life by the Government, and a seriously flawed policy. Whilst this death occurred in the counter-terrorist context there have been many previous incidents involving the use of lethal force that have raised similar issues of concern. Since 1995, 27 men have been shot dead by police officers. INQUEST has worked at varying levels on 14 of those cases as highlighted in Appendix A below. A disturbing number of these cases reveal the tragic consequences which can arise when faulty intelligence leads to the abuse of lethal force.<sup>1</sup>

### **About INQUEST/ILG/PALG**

3. INQUEST is the only non-governmental organisation in England and Wales that works directly with the families and friends of those who die in custody to provide an independent free legal and advice service to bereaved people on inquest procedures and their rights in the Coroner's Court. We provide specialist advice to lawyers, the bereaved, advice agencies, policy makers, the media and the general public on contentious deaths and their investigation. We also monitor deaths in custody where such information is publicly available and identify trends and patterns arising.

4. The INQUEST Lawyers Group represents over 100 solicitors and barristers based across England and Wales. Many of them are leading human rights practitioners with a depth of knowledge and experience of working on inquests and other related legal procedures. The Police

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<sup>1</sup> Harry Stanley was shot in 1999 in Hackney, East London, when the table leg he was carrying was mistaken for a sawn-off shot gun. Diarmuid O'Neill was shot and killed in Hammersmith hotel by police in 1996. James Brady was shot and killed in Newcastle Neil McConville was killed by police in Northern Ireland in April 2003, following a car chase.

Actions Lawyers Group PALG is comprised of solicitors, barristers and legal executives who represent complainants against virtually every police force in England and Wales. Its large and varied membership ensures that the collective experience of PALG is considerable.

5. Fuller details of the important work we do are set out at Appendix B.

## Background

6. The shooting dead of Jean Charles de Menezes by the police on a London underground train at Stockwell tube station on July 22<sup>nd</sup> 2005 raises many questions. This is not the first police shooting to have occurred since the Independent Police Complaints Commission (“IPCC”) assumed responsibility for investigating deaths in police custody in April 2004. It is however the first police shooting in England & Wales undertaken pursuant to a State approved shoot to kill policy. There are a number of unique features regarding this case. However, there are also many similarities with previous fatal shootings by police and other deaths following police use of force.
7. INQUEST has previously submitted evidence to the Inquiry into Police Shootings in 2002 conducted by the Police Complaints Authority. We highlighted:
  - a. the number of cases in which the police have resorted to the use of firearms rather than use other techniques such as negotiation, family liaison;
  - b. the poor treatment of the bereaved, lack of information and participation in the investigation and inappropriate family liaison;
  - c. failings in the investigation process, choice of investigating force and firearms ‘experts’;
  - d. the lack of criminal and disciplinary charges against police officers;
  - e. the failure to learn the lessons from cases;
  - f. the failure to review and update police training and policies.
8. The shooting of Jean Charles de Menezes took place in an unprecedented context. However, similar concerns have arisen in many other cases that INQUEST has been involved with since 1990. Most recently these include those of Azelle Rodney (2005), Phillip Prout (2004), Keith Larkins (2003) Derek Bennett (2003) and Harry Stanley (1999). Many of the cases raise questions about possible operational and intelligence failings. There has been widespread concern by families and lawyers about the investigation of these cases. In particular the practice of police officers *‘pooling their recollections’* and writing their notes up together

was recently criticised by the IPCC in relation to the case of Harry Stanley.<sup>2</sup>

9. The IPCC investigation must comply with minimum human rights standards as set out in both domestic and European case law. Five essential features are required in order for the investigation to be compliant with the Human Rights Act. These are: independence, effectiveness, promptness & reasonable expedition, public scrutiny and accessibility to the family of the deceased. The failure to conduct an investigation which embodies these requisite qualities will of itself constitute a violation of Article 2 ECHR – the Right to Life.

#### **Concerns regarding the de Menezes case**

10. INQUEST has three main areas of concern in relation to the shooting of Jean Charles de Menezes. The first relates to the shooting itself and events preceding it. This includes the introduction of the ‘shoot to kill’ policy, apparently pursuant to *Operation Kratos*. The second area of concern relates to events following the shooting and the third area is the current law as it applies to police use of lethal force.

11. We draw particular attention to:

- a. the introduction of a new ‘shoot to kill’ policy on police use of lethal force, without any parliamentary scrutiny or public debate;
- b. the non-availability of guidelines relating to *Operation Kratos*;
- c. the public statements made by the Metropolitan Police Commissioner following the shooting and his letter to the John Gieve, Permanent Secretary at the Home Office, sent on 22<sup>nd</sup> July 2005; dated 21 July 2005;
- d. the failure of the Metropolitan Police to involve the IPCC immediately after the shooting during the vital ‘golden hours’ of the investigation;
- e. the failure of the IPCC to secure a hand over of the investigation until 27<sup>th</sup> July 2005 i.e. 5 days (including 3 working days) after the shooting;
- f. the above two factors leading to the potential for covering up, hiding or distorting crucial evidence relating to the shooting (a recent leak from the IPCC report reveals a police debriefing the evening of the shooting and at least one officer tampering with the logs);

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<sup>2</sup> IPCC Press Release 09 February 2006 Harry Stanley – IPCC publishes decision and report

- g. the poor treatment of the de Menezes family by the Metropolitan Police;
- h. the failure by the Metropolitan Police and the IPCC to correct misinformation put into the public domain regarding Jean Charles de Menezes;
- i. apparent operational and intelligence failings – not new phenomenon;
- j. the role of the pathologist;
- k. the involvement of military personnel in policing the streets of London without public knowledge or debate;
- l. the disclosure of the IPCC report to the police, Metropolitan Police Authority, Home Secretary and CPS. This contrasts with the position of the family who will potentially not see the report for months, depending on the progress and outcome of CPS decision making;
- m. the classifying of parts of the IPCC report as ‘secret’ as it ‘involves matters of national security’;

### **The shooting and events leading up to it**

- 12. Our ability to elaborate on these concerns is at this stage inevitably limited by the fact that while the IPCC inquiry is now completed, the findings of that investigation have not been published or communicated to the family. We do not wish to prejudice the outcome of the CPS deliberations; nor do we have sufficient information to comment on the case in detail at this stage. However, concern and questions have rightly been raised about the intelligence and operational processes that preceded Mr de Menezes' death and the secret introduction of a ‘shoot-to-kill’ policy that appeared to govern the use of lethal force by the police in this and other cases.
- 13. These concerns echo those of Mr de Menezes’ family and many other families whose relatives have died as a result of fatal shootings by police, or deaths involving other weapons and/or use of force.

### **The introduction of a policy on police use of lethal force without parliamentary scrutiny or public awareness or debate**

- 14. It has been a matter of considerable concern that the public only became aware of the operation of a ‘shoot to kill’ policy in the aftermath of Jean

Charles de Menezes' death. This increases the importance of the IPCC investigation being demonstrably independent and effective. Currently the published guidance on police use of firearms is – Association of Chief Police Officers' (ACPO) Firearms Manual Chapters 1 – 7, which were updated in February 2005. This document includes additional chapters and appendices that are not in the public domain. This guidance stipulates that officers can only shoot '*to stop an imminent threat to life*'. The ACPO manual also states that armed police officers should generally shoot to incapacitate the central nervous system by aiming at the largest part of the body once a decision has been made to discharge their weapons. The new guidance which formed part of *Operation Kratos* reportedly gives police officers the authority to shoot at the head and therefore radically alters the entire framework governing police use of lethal force.

15. In the aftermath of the shooting there was considerable secrecy about *Operation Kratos* and at the time it was reported that it was based on the International Association of Chiefs of Police guidance on suicide bombers, but no further details were in the public domain. It appeared from press reports that some journalists had had sight of this new policy (see for example the 'Daily Telegraph' 25/07/05). The Metropolitan Police Commissioner, Sir Ian Blair has stated that it is the "*least worst way of tackling suicide bombers.....I am not certain the tactic we have is the right tactic, but it is the best we have found so far.*"<sup>3</sup>
16. It is clear that such a fundamental change in the way in which our communities are policed demands both public and parliamentary scrutiny and debate. It is imperative that the guidelines pertaining to *Operation Kratos* (or at least a redacted version) should be made public without further delay. The document 'Suicide Terrorism' that was noted at the meeting of the Metropolitan Police Authority (MPA) in October 2005 is the first public document about the secret policy<sup>4</sup>. The MPA subsequently debated the issue again in February 2006.<sup>5</sup>
17. During the debate on the policy 'Scotland Yard gave a robust defence of its tactics for dealing with suicide bombers, insisting its policy was not "*shoot-to-kill*" but "*shoot-to-incapacitate*".<sup>6</sup> This claim came despite the fact that Jean Charles de Menezes was shot in the head. Evidence heard at inquests into other fatal shootings by police shootings officers have focused on the fact that the police could not shoot to incapacitate because the decision taken to use lethal force could only be lawful if they feared for their lives and to shoot to incapacitate risked the shot person,

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<sup>3</sup> *Death in Stockwell: the unanswered questions.* The Observer on Sunday, 14.08.05

<sup>4</sup> Suicide Terrorism - Report 13 - Metropolitan Police Authority 27 October 2005

<sup>5</sup> Events of July 2005 – MPS response suicide terrorism – update Report 8 23 February 2006

<sup>6</sup>We don't shoot to kill, we shoot to incapacitate, say Met chiefs Richard Alleyne, The Telegraph 28 October 2005

if armed, shooting in response. It is simply a logically unsustainable argument.

18. The official position of the MPA and many others is that *Kratos* should be reviewed following the conclusion of the IPCC investigation, but we consider that the whole policy should be reviewed in the light of existing public concerns. Now that this investigation is concluded, there has been no attempt to put the policy forward for review. Instead, the details of the investigation remain secret apparently for two reasons; firstly, because the CPS are deciding whether any officers should face criminal charges and, secondly, because parts of the report have been classified 'secret' as pertaining to national security. The CPS indicated that it will take at least three months before any decision is made as to whether any officer should be prosecuted. This time estimate will be extended if the CPS advises on further evidence gathering or re-interviewing of officers.
19. If a decision is made to prosecute any officer, even for a crime ancillary to the actual shooting (eg perverting the course of justice by altering the logs), then it may be argued that there will be no disclosure of the report's findings until after a prosecution has taken place. Thus, there could be a delay of up to 18 months before *Kratos* is reviewed. Furthermore, it is not clear which aspects of the report have been classified as 'secret' and whether it will be argued that such a classification should remain, even following the CPS process. Thus it is conceivable that not all the investigation's findings will ever be put in the public domain and, thus, a meaningful debate may be prevented.
20. It is believed that *Operation Kratos* does not even comply with the minimum human rights protections embedded in the Israeli legislation where it is required that before a soldier shoots he/she must have grounds to believe the suspect has explosives on him and only after attempts, if possible, are made to disarm. If this is correct then, the guidance the police relied on in putting into effect *Operation Kratos* may itself be unlawful'

### **The role of the military**

21. We are also concerned to learn more of the role played by army officers in the intelligence operation that led to the shooting. The fact that military personnel were on the streets of London without public knowledge is alarming. Although they have been interviewed as part of the investigation it is not clear who is responsible for their conduct. The involvement of the military in such cases must be the subject of proper scrutiny.

## **Events following the shooting**

### **The public statements of the Metropolitan Police Commissioner**

22. The Commissioner of the Metropolitan Police has been perceived, as a result of his public comments in the aftermath of the shooting, as undermining rather than upholding the rule of law in relation to police officers for the following reasons. His suggestion in February 2005<sup>7</sup>, reported again in August 2005, that police officers who shoot an individual in their line of duty should be granted immunity from prosecution for murder in some circumstances amounts to a call for police officers to be above the law. The Commissioner's comment<sup>8</sup> that an incident like this may happen again, is alarming, carrying as it does the implication that we must accept the deaths of innocent civilians as one of the risks of policing London. This comment also of course runs the risk of pre-judging the outcome of the IPCC investigation and appears to argue that a shoot to kill policy is necessary and justified whatever the consequences, despite the fact that it increases the risk of loss of life in cases where the use of fatal force is not 'absolutely necessary', contrary to all international human rights standards.
23. As the family solicitor's said 'From the beginning the most senior of police officers and government ministers including the Prime Minister, claimed the death of Jean Charles to be an unfortunate accident occurring in the context of an entirely legitimate, justifiable, lawful and necessary policy'.<sup>9</sup>

### **The failure to correct misinformation about Jean Charles de Menezes**

24. The Commissioner of the Metropolitan Police has since accepted on the record that it was ill-judged of him not to act to correct the inaccurate information initially placed into the public domain regarding Jean Charles de Menezes after he was shot. This included that he had been wearing a bulky jacket and had vaulted the ticket barrier supposedly fleeing the police. This kind of misinformation has been a feature of other contentious deaths in custody where there have been concerted attempts by the authorities to attempt to tarnish the reputation of the deceased in order to deflect attention away from official incompetence or wrong doing.
25. The Metropolitan Police or indeed the IPCC should have issued an early statement simply correcting the erroneous initial impressions. This would not have undermined or compromised the IPCC's investigation in

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<sup>7</sup> (Independent on Sunday Met seeks immunity for armed police - Sophie Goodchild 26 February 2005).

<sup>8</sup> The Telegraph More Innocents could be shot – Ben Fenton and John Steele 25 July 2005

<sup>9</sup> Press Statement Birnberg Peirce & Partners 17 August 2005

any way. In fact it would have assisted it by sending out the correct factual scenario to potential witnesses.

26. INQUEST is concerned that this response forms part of a common institutional response to many contentious deaths in custody, which seeks to deflect blame from state agents. There is a pattern where there is an attempt by the authorities to demonise the person who has died in order to justify and explain away the death and create an idea of an ‘undeserving’ victim. Many families have described how they felt that instead of the death of their loved one being investigated it was their private life and that of their relative that was subjected to the most scrutiny with the intention to discredit the character of the deceased and to deflect attention away from the actions of those who may be responsible.
27. It occurred for example in the cases of Richard O’Brien (1994), Shiji Lapite (1994), Roger Sylvester (1999), Harry Stanley (1999) and Mikey Powell (2003)<sup>10</sup>. This pattern further underlines the importance of a robust and immediate independent investigation as there is an obvious risk that if police officers who may be biased towards protecting their own, have conduct of the early stages of an investigation, their approach may taint this process.
28. The matter of misinformation is now the subject of formal complaint by the family and second IPCC inquiry, named ‘Stockwell 2’. The original complaint included criticism of the police for failing to correct misinformation put out to the media. However, the IPCC in accepting the complaint, said it could not cover this latter aspect because the IPCC itself was responsible for an instruction that the police should not comment further in any way on the shooting. However, even if the reasons for such an instruction were sound, the IPCC should have given consideration to putting out a statement correcting some of the most obvious misinformation still in the public domain about Jean Charles de Menezes’ conduct and demeanour (such as vaulting the barrier and wearing a bulky jacket. Instead, it was only as a result of a leak to ITN, that the family and the public were made aware of the fact that he had done nothing at all to arouse suspicion.

#### **The failure to involve the IPCC immediately after the death**

29. It is now a matter of record that Sir Iain Blair sought to prevent the early involvement of the IPCC<sup>11</sup> in the investigation into Jean Charles de Menezes death. This is despite his clear statutory duty to facilitate that

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<sup>10</sup> We cannot take them at their word - ‘police sources’ routinely vilify victims and excuse police actions Simon Hattenstone 18 August, 2005 The Guardian

<sup>11</sup> Letter to John Gieve 21 July 2005

very involvement pursuant to the Police Reform Act 2002 ('the Act'). The statutory guidance which was in draft form at the time of the shooting said; '*Forces should refer complaints or incidents as soon as practicable but certainly within 24 hours. The IPCC provides a 24-hour on-call facility to the police service.*'<sup>12</sup> It is a matter of considerable concern that this changed by the time the guidance was finally issued in December 2005 but still requires forces to refer incidents in a timely manner.<sup>13</sup>

30. It is a matter of great disappointment to us that the Commissioner would seek to frustrate the purpose of the Police Reform Act 2002 and the IPCC, given that an important purpose of both was to address long standing concerns regarding the way deaths in custody had been investigated by the police. This concern grows when one considers that by his actions the Commissioner was seeking to remove any kind of independent and external scrutiny of a death arising from the first application of an approved 'shoot to kill' policy in this country.
31. Whatever occurred in relation to the Commissioner's initial understanding of the event operational control did not pass to the IPCC for 5 days, 3 of them working days.
32. One of the most long standing complaints we receive from families of those who lose their lives in custody is that deaths in custody that have involved the use of force are not investigated on the basis that a potential crime may have been committed. This has been a major cause of lack of confidence in the police complaints system. The task for the IPCC in the aftermath of a police shooting is clear: to immediately begin an independent, effective, accountable, prompt, public and inclusive investigation so that the rule of law is seen to be upheld and applied equally to all citizens including those in the police uniform. Without this there can be no hope of public confidence, not least in the aftermath of the introduction of a secret shoot to kill policy.
33. The fact that the IPCC was unable to take immediate control of the crime scene or indeed to have any input at all during the first crucial hours and days of the investigation, means that there will always be a suspicion that there has been a cover up. We now know (according to recently leaked information) that the police debriefed at 8pm on the day of the shooting and that at least one log was altered. The family remain deeply suspicious about missing CCTV evidence from the underground

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<sup>12</sup> IPCC draft statutory guidance 06 December 2004 – published, distributed for public consultation and awaiting final approval at the time of the shooting.

<sup>13</sup> 'Forces should refer complaints or incidents as soon as practicable and no later than the end of the working day following the day when it becomes clear to the force that it should be referred. The IPCC provides a 24-hour on-call facility to the police service.' IPCC Making the new police complaints system work better – statutory guidance December 2005

station and tube train and this is only what they know about so far. The IPCC were not even present at the post mortem examination.

### **The treatment of the de Menezes family**

**34. We have specific concerns about:**

- a. The family were not informed about the death until over 30 hours following the shooting. There is no conceivable reasonable explanation for this delay. The police knew where he lived (since they had followed him from his home). He was carrying identification on him and a mobile phone.
- b. Members of the family were effectively made homeless by the securing of Jean Charles' residence, placed inaccessibly in a hotel by the police and the telephones in their rooms ordered to be cut off by the police so they could not contact Brazil.
- c. That the first post mortem examination was conducted on behalf of the coroner on 23 July 2005 before the family were informed of the death. The family only subsequently discovered that the Police Federation (representing the officers involved in the shooting), had instructed a second pathologist to attend the first post mortem.
- d. The pathologist instructed by the coroner included in his post mortem report the uncorrected misinformation about the circumstances of the death. Experienced pathologists who conduct post mortems into cases of deaths in custody including police shootings have been more cautious about including untested police versions of the events leading to a death in their report prior to the outcome of any investigation. The same pathologist, Dr Shorrock, is currently the subject of a GMC investigation regarding a separate matter;
- e. Although lawyers instructed by the family in the UK advised that a second post mortem should be conducted, the immediate family in Brazil were persuaded that this was not necessary as Jean Charles was 'entirely innocent'. It is not clear whether police liaison officers in conjunction with the Brazilian consulate played a role in influencing this decision.
- f. The trip by Metropolitan Police officials to the family in Brazil was carried out with no consultation or contact with the family solicitors;
- g. There was an apparent attempt to imply that the cousins living in London were not legitimate representatives of the family;

- h. The failure to disclose the IPCC report to the family following conclusion of the investigation. Initially an offer was made by the IPCC to go to Brazil to tell the family in a private consultation about some of the report's findings, but that the family in England should not be given any information.

## The Legal Issues raised by the Shooting

- 35. There is no reason why the existing law, and in particular section 3 of the Criminal Law Act 1967 (see below), should not provide adequate protection against the threat of suicide bombers. Kratos must be compliant with that law and Article 2 ECHR, or it will otherwise be unlawful.
- 36. We set out here the relevant law to the police use of lethal force and deaths resulting from its use and then discuss in the section headed Detailed Analysis our view of its application in this case and in the context of what is known about *Operation Kratos*.

## SUMMARY<sup>14</sup>

### *Murder*

- 37. Subject to any available defences, a person is guilty of murder if he or she unlawfully causes the death of another person intending to kill or to cause serious bodily harm. A person does not unlawfully cause death if he or she has a justification for doing so. The killing of another person, even if intentional, in defence of one's self or another is justified provided that:
  - 1) there was an honest, even if mistaken, belief that there was a need to resort to force; and
  - 2) the degree of force used was reasonable in the circumstances as the defendant believed them to be.
- 38. Whether the degree of force was reasonable is for a jury to decide. A jury can conclude that the force employed was unreasonable even though the defendant honestly believed that it was proportionate to the threat he or she faced.
- 39. Further, section 3 Criminal Law Act 1967 provides:

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<sup>14</sup> On 20 December 2005 the Law Commission published its provisional proposals for reforming the law of murder (Consultation Paper 177). The consultation period ends on 13 April 2006. The Paper sets out a detailed analysis of the law in this area.

*"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."*

40. Section 3 applies to the prevention of crime and effecting, or assisting in, the lawful arrest of offenders and suspected offenders. There is an obvious overlap between self-defence and section 3 CLA. However, section 3 only applies to crime and not to civil matters.
41. If there is evidence to support self-defence, the burden falls on the prosecution to rebut it beyond reasonable doubt.

### ***Manslaughter***

42. Manslaughter can be committed in one of four ways:
  - 1) Conduct that the defendant knew involved a risk of killing, and did kill, is manslaughter ("reckless manslaughter");
  - 2) Conduct that was grossly negligent given the risk of killing, and did kill, is manslaughter ("gross negligence manslaughter");
  - 3) Conduct, taking the form of an unlawful act involving a danger of some harm, that killed, is manslaughter ("unlawful and dangerous act manslaughter");
  - 4) Killing with the intent for murder but where a partial defence applies.
43. The term "involuntary manslaughter" is used to describe a manslaughter falling within (1) – (3) while (4) is referred to as "voluntary manslaughter".
44. In the context of police shootings, only 'gross negligence manslaughter' will normally be relevant. The elements of the offence of gross negligence manslaughter were made clear by the House of Lords in *Adomako* [1995] 1 AC 171. They were:
  - a. that a duty of care was owed;
  - b. that that duty had been broken;
  - c. that the breach of the duty of care amounted to gross negligence; and
  - d. that the negligence was a substantial cause of the death of the victim.
45. However, 'gross negligence' requires something beyond even serious mistakes and errors of judgement. The problem, in practice, is that the CPS requires expert evidence to be available to a jury that deals with the third element and in police shooting cases the expert is invariably

required to be a senior British police officer familiar with firearms policies.

## DETAILED ANALYSIS

### Murder

46. Recent decisions of the higher courts have emphasised that the law of self defence requires two separate but related questions to be answered by a tribunal of fact. In *Shaw v. R.* [2002] 1 Cr. App. R. 10, PC at [19], Lord Bingham, delivering judgment on behalf of the Board, noted that

“[It] was necessary for the trial judge to pose two essential questions (however expressed) for the jury's consideration:

- (1) Did the appellant honestly believe or may he honestly have believed that it was necessary to defend himself?
- (2) If so, and taking the circumstances and the danger as the appellant honestly believed them to be, was the amount of force which he used reasonable?”

47. Similarly in *R. v. Martin (Tony)* [2002] 1 Cr. App. R. 27, CA at [5 and 6], Lord Woolf, LCJ held:

“In judging whether the defendant had only used reasonable force, the jury has to take into account all the circumstances, including the situation as the defendant honestly believes it to be at the time, when he was defending himself. It does not matter if the defendant was mistaken in his belief, as long as his belief was genuine. Accordingly, the jury could only convict Mr Martin if either they did not believe his evidence that he was acting in self-defence or they thought that Mr Martin had used an unreasonable amount of force. These were issues which were ideally suited to a decision of a jury”.

48. The judgment of the House of Lords in *R. v. Clegg* [1995] 1 A.C. 482, settles that

- a. The use of excessive force in purported self defence is murder and not manslaughter (p. 496);
- b. There can be no difference between the position of a soldier or a police officer acting in the course of his duty, on the one hand, and an ordinary member of the public on the other (pp. 496-498).
- c. The reduction of what would otherwise be murder to manslaughter in a particular class of case is a matter for the legislature and not the courts (p. 500).

49. The CPS must decide in many police shooting cases if there is some evidence upon which a reasonable jury, properly directed, could be sure

to the criminal standard that the officer(s) concerned did not honestly and reasonably believe that it was necessary to shoot the victim to defend themselves or others from attack.

50. Where the strength of the evidence depends upon the assessment of credibility of witnesses and the findings on the evidence as a whole by the jury, save exceptionally, the case must be left for them to decide and cannot be withdrawn from the jury merely because the judge does not consider it credible (although there may be cases on the borderline between tenuous and capable of belief where it will not be unlawful for the judge to withdraw a case in the light of his view of the evidence as a whole). It is always entirely a matter for the jury to decide whether and to what extent they accept the evidence of expert witnesses.
51. The problem with Kratos is that it appears to create a presumption about what amount of force is required (shooting to kill – i.e. aiming for the head) when the officer honestly believes the person is a ‘suicide bomber’. This is a direct challenge to the law of murder, not least because it begs the question whether shooting the suspect in the head is lawful even if the officer has unreasonably formed the belief that (a) the suspect is a ‘suicide bomber’ who is (b) presenting an imminent threat.
52. Article 2 ECHR declares everyone’s right to life, but allows, for these purposes, exceptions when deprivation of life results from the use of force which is “no more than absolutely necessary...in defence of any person from unlawful violence”. The scope of this exception was reviewed by the European Court of Human Rights in McCann v. United Kingdom, (1997) 21 E.H.R.R. 97. Having noted the law of self defence under the Gibraltar constitution - under which deprivation of life must be “reasonably justifiable” as opposed to “absolutely necessary” as provided for under Article 2(2) - the Court pointed out

“While the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts, there is no significant difference in substance between the two concepts”.

53. In applying the principles to the facts in McCann, the Court held (at para. 200):

“The Court accepts that the soldiers honestly believed, in the light of the information that they had been given...that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives....[T]he use of force by agents of the State in pursuit of one

of the aims delineated in Article 2(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. It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.” (emphasis added)

54. Killings NOT based on honest perceptions based on ‘good reasons’ may therefore be legal under domestic law, but contrary to Article 2.15 ECHR case law since McCann has maintained the requirement that where fatal force is used in compliance with Article 2(2) any mistaken belief of fact must be held for good reasons.<sup>16</sup> If domestic law continues to allow the lesser standard of honest but unreasonable belief English criminal law will arguably fail to meet the requirements of Article 2 ECHR.
55. Fiona Leverick (see below) has argued that, where such victims are entirely innocent, there is a duty on individuals as far as possible or reasonable in the circumstances to reflect before acting.
56. Arguably, therefore, a firearms officer who is informed that a suspect is (for example) carrying a bomb on their person and therefore must be shot in the head, in accordance with *Kratos*, will not have ‘good reason’ to shoot the suspect in the head if that officer ignores the evidence of his or her own eyes and/or fails to assess the evidence before him or her prior to firing the fatal shot(s). This must particularly be the case because *Kratos* requires the officer to make a key decision NOT to shoot at the torso of the suspect but at the head, increasing the chances of the shot(s) being fatal. In short, were the English courts to decide that *Kratos* has a neutral impact on the law of homicide then, depending on the particular facts of that case, this might entail a breach of article 2 ECHR.

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<sup>15</sup> See B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice*, (1<sup>st</sup> Edition, 2001), 18-25; A. Ashworth, *Principles of Criminal Law* (4<sup>th</sup> ed., 2003), pp 137-149 and F. Leverick, *Is English self-defence law incompatible with Article 2 of the ECHR?* [2002] Crim. L.R. 347. For the alternative view, that the English law of self-defence requires no amendment under the *Human Rights Act*, see R. Buxton, *The Human Rights Act and Substantive Criminal Law* [2000] Crim. L.R. 331; and J.C. Smith, *The Use of Force in Public or Private Defence and Article 2* [2002] Crim. L.R. 958. The latter article by Professor Smith is a response to the above referred to article by Fiona Leverick. She in turn replied in [2002] Crim. L.R. 963.

<sup>16</sup> *Andronicou* 1998 and *Gul* 2002.

## **Gross Negligence Manslaughter**

57. Professor Smith has argued that if a doctor or electrician makes a fatal mistake that can lead to prosecution then why shouldn't a defender, or more specifically a police officer?
58. A criminal sanction therefore exists but has seemingly never been put to use in the situation where someone kills in self defence but does so negligently. There is no reason or explanation for this singling out of self defence for professionals who kill negligently.
59. If the law of self defence to murder allows for unreasonable mistakes, the criminal law must include such cases within gross negligence manslaughter. The decision must be for the jury not the CPS and should not rely on experts at all. All the same problems in relation to the existence of *Kratos* which arise when considering 'lawful self defence' in the context of a murder charge arise in this context too.
60. The above is quite separate from gross negligence associated with the planning and management of a police operation that results in the use of fatal force, where a jury could well be assisted by expert evidence. However, in this area the IPCC must locate truly independent expert witnesses, probably from abroad, who can assist juries in cases of police shootings. In particular, the existence of *Kratos* must give heightened concern about compliance with the duty of care. That is, where those in charge of an operation know the (increased) risks to the suspect created by *Kratos*, mistakes may be regarded as being 'gross' even though that might not be the case in a less dangerous context. Fewer mistakes must be acceptable under the criminal law where greater risks are knowingly being taken.

## **Concluding Comment**

61. Deaths in custody have been a source of tremendous pain and anger for citizens throughout this country, not least Londoners. The revelation that a secret 'shoot to kill' policy is now in operation in this jurisdiction elevates those concerns to a new level and carries with it the potential to place the relationship between the police and the communities they serve under extreme strain. Public confidence in the police – so essential if they are to carry out the job that we need them to do – must not be undermined by any suggestion that the rule of law should not apply in relation to police officers.
62. Since 1995 there have been 26 fatal police shootings, eight of which have been men from black and minority ethnic (BME) communities. Jean Charles de Menezes death forms part of that figure and once more raises serious questions about the disproportionate number of young BME men who die following the use of force by police.

63. Equally voices of concern and criticism must not be silenced by the legitimate concerns regarding public safety. The two interrelate and are not mutually exclusive. The stark fact remain that an innocent man was shot dead by the police as a result of a dramatic extension of police powers, of which Parliament or the public were not even aware, let alone have had an opportunity to question or debate. The role of politicians and their constituents is to scrutinise and ultimately make informed decisions regarding the policy framework in which police make such vital operational decisions. It is undemocratic and sets a very worrying precedent for the police to be allowed to perform those functions unchecked. INQUEST will continue to raise critical concerns, insist on rigorous scrutiny of police conduct and support the family of Jean Charles de Menezes in their quest for justice.

**INQUEST/INQUEST LAWYERS GROUP/POLICE ACTIONS LAWYERS  
GROUP MARCH 2006**

## Appendix A

### Police Shootings – 1995 to date

8 of 27 shootings of people from black and minority ethnic groups 30%

10 of 27 shootings by Metropolitan Police 37%

Shading indicates INQUEST involved in case – more detail can be provided if necessary. See INQUEST website [www.inquest.org.uk](http://www.inquest.org.uk)

Number	Name	Ethnicity	Date	Area	Force	Inquest Verdict
1	Phillip Marsden	UK White	19/12/05	Meir, Stoke-on-Trent	Staffordshire	Awaited
2	Craig King	UK White	11/09/05	Ashton under Lyme	Greater Manchester	Awaited
3	Jean Charles de Menezes	Brazilian	22/07/05	Stockwell Tube Station	Metropolitan	Awaited
4	John Scott	UK White	16/07/05	Stocksfield, Northumbria	Northumbria	Awaited
5	Azelle Rodney	Black Caribbean	30/04/05	Burnt Oak, London	Metropolitan	Awaited
6	Simon Murden	UK White	02/03/05	Hull	Humberside	Awaited
7	Nicholas Palmer	UK White	12/05/04	Brigstock Road, Thornton Heath	Metropolitan	Awaited
8	Phillip Prout	UK White	04/05/04	Launceston, Cornwall	Devon & Cornwall	Lawful Killing
9	Keith Larkins	UK White	06/06/03	nr Heathrow Airport	Metropolitan	Lawful Killing + narrative
10	Colin O'Connor	UK White	23/01/03	A6 nr. Clophill	Bedfordshire	Awaited
11	Fosta Errol Thompson	Black Caribbean	16/08/02	St Werburgh's, Bristol	Avon & Somerset	Lawful Killing
12	Jason Gifford	UK White	24/06/02	Aylesbury, Bucks	Thames Valley	Suicide
13	Michael Malsbury	UK White	14/11/01	Harrow	Metropolitan	Suicide
14	Steven Dickson	UK White	01/11/01	Cadnor, Derbyshire	Derbyshire	Lawful Killing
15	Derek Bennett	Black Caribbean	16/07/01	Brixton	Metropolitan	Lawful Killing

Number	Name	Ethnicity	Date	Area	Force	Inquest Verdict
16	Andrew Kernan	UK White	12/07/01	Wavertree, Liverpool	Merseyside	Lawful Killing
17	Patrick (Kieron) O'Donnell	Irish	30/10/00	Upper Holloway	Metropolitan	Lawful Killing
18	Kirk Davies	UK White	24/09/00	Pinderfields Hosp, Wakefield	West Yorkshire	Lawful Killing
19	Harry Stanley	Scottish	22/09/99	Hackney	Metropolitan	2 <sup>nd</sup> inquest Oct 2004 – Unlawful Killing – overturned in High Court – awaiting CPS decision on criminal charges
20	Derek Bateman	UK White	22/06/99	Dorking, Surrey	Surrey	Lawful Killing
21	Antony Kitts	UK White	10/04/99	Falmouth	Devon & Cornwall	Lawful Killing
22	Michael Fitzgerald	Irish	26/02/98	Bedford	Bedfordshire	Lawful Killing
23	James Ashley	UK White	15/01/98	St. Leonard on Sea	Sussex	Failed prosecution
24	David Howell	UK White	20/11/96	Birmingham	West Midlands	Lawful Killing
25	Diarmud O'Neill	Irish	23/09/96	Hammersmith	Metropolitan	Lawful Killing
26	James Brady	UK White	24/04/95	Newcastle Upon Tyne	Northumbria	Open
27	David Ewin	UK White	16/03/95	Barnes High Street	Metropolitan	Hung jury

## **Appendix B**

### **About INQUEST, INQUEST Lawyers Group and the Police Actions Lawyers Group**

INQUEST is unique in working directly with the families of those who die in all forms of state custody - in which we include deaths in prison, young offender institutions, immigration detention centres, police custody or while being detained by police, or shot by police or following pursuit, and those detained under the Mental Health Act.

We have accrued a unique and expert body of knowledge on issues relating to deaths in custody and seek to utilise this towards the goal of proper post-death investigation and the prevention of custodial deaths. INQUEST has been at the forefront of working alongside bereaved people to bring the circumstances of the deaths into the public domain and under public scrutiny and to hold the relevant authorities to account. We have reported our concerns about custodial deaths and their investigation at a national and international level

#### **INQUEST Lawyers Group**

The INQUEST Lawyers Group supports and advances the work of INQUEST in three main ways:

- It is a national group of lawyers that provides preparation and legal representation at Coroner's Inquests for bereaved people;
- It promotes and develops knowledge and expertise in the law and practice of inquests, provides training, and acts as a forum for the exchange of ideas and experience;
- It campaigns for law reform and for public funding to cover legal costs for bereaved people at inquests.

INQUEST and the INQUEST Lawyers Group also publish the journal *Inquest Law* three times a year which informs practitioners about recent legal and policy developments relating to the inquest system, the investigation of sudden deaths and related areas.

#### **Police Action Lawyers Group**

PALG is comprised of solicitors, barristers and legal executives who represent complainants against the police throughout England and Wales. Established in 1991, PALG grew out of a desire to share information & expertise, and to ensure that complainant lawyers did not feel they were working in isolation. Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of complainants against

virtually every force in England and Wales. As a group we have also been in a position to liaise with other organisations representing complainant interests, including INQUEST, Liberty, Justice and MIND. We have also developed a lobbying role, particularly in relation to the police complaints system. To that end our members have attended before Select Committees, met with Ministers, provided guest speakers for conferences and prepared regular briefings. PALG members have been involved with numerous notable police complaint cases and inquiries, including a number of cases involving police shootings. Many of our members are also active within the INQUEST Lawyers Group.