THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

Trinity Term
[2023] UKSC 24
On appeal from: [2020] EWCA Civ 1301

JUDGMENT

R (on the application of Officer W80) (Appellant) *v* Director General of the Independent Office for Police Conduct and others (Respondents)

before

Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
5 July 2023

Heard on 13 and 14 March 2023

Appellant
David Perry KC
Rosemary Davidson
(Instructed by DAC Beachcroft (London – Walbrook))

Respondent – Director General of the Independent Office of Police Conduct
Tim Owen KC
Michelle Butler
Danny Simpson
(Instructed by Independent Office for Police Conduct Legal Services)

Respondent – Eftehia Demetrio
Phillippa Kaufmann KC
Fiona Murphy
(Instructed by Bhatt Murphy Solicitors)

Respondent – Commissioner of Police of the Metropolis
Jason Beer KC
Robert Cohen
(Instructed by Metropolitan Police Directorate of Legal Services)

Interveners (Written submissions only)
1st Intervener (NPCC)
John Beggs KC
James Berry
(Instructed by Civil Nuclear Constabulary Legal Services)

2nd Intervener (College of Policing)
Jonathan Moffett KC
(Instructed by the Government Legal Department)

3rd Intervener (INQUEST & StopWatch)
Adam Straw KC
Jesse Nicholls
(Instructed by Hickman and Rose Solicitors)

LORD LLOYD-JONES AND LORD STEPHENS (with whom Lord Sales, Lord Leggatt and Lord Burrows agree):

Introduction

1. The issue in this appeal is what is the correct test for self-defence in police disciplinary proceedings.

2. Schedule 2 to the Police (Conduct) Regulations 2012 (SI 2012/2632) ("the 2012 Regulations") provides that police officers shall only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances. The appellant, W80, and the third respondent, the Metropolitan Police Commissioner, submit that the criminal law test applies in police disciplinary proceedings. The first respondent, the Director General of the Independent Office for Police Conduct ("IOPC") and the second respondent, Eftehia Demetrio, (the mother of Jermaine Baker's daughter) submit that the civil law test applies. The first intervener, the National Police Chiefs' Council, submits that the criminal law test applies. The second intervener, the College of Policing, makes no submission as to the test which should be applied. The third interveners, INQUEST and Stopwatch, submit that if the test applicable is relevant to the appeal, the test identified by the Court of Appeal in these proceedings should be applied rather than the criminal law test. We set out the differences between the tests later in this judgment.

3. The Divisional Court (Flaux LJ and Sir Kenneth Parker) [2019] EWHC 2215 (Admin) held that the criminal law test applies. The Court of Appeal (Sir Geoffrey Vos C, Macur and Nicola Davies LJJ) [2020] EWCA Civ 1301; [2021] 1 WLR 418 held that neither the criminal law test nor the civil law test applies but that a tribunal in police disciplinary proceedings should simply apply the test contained in the wording of the use of force standard in the 2012 Regulations, namely whether the force used was necessary, proportionate and reasonable in all the circumstances.

Factual background

4. We gratefully adopt the facts as stated by the Divisional Court in Flaux LJ's judgment delivered on 14 August 2019, as did the Court of Appeal at para 9.

> "4. … 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 in the Crown Court at Wood Green.

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 the Crown Court at Wood Green with three men inside, one of whom was [Mr 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. [W80] opened the front passenger door. [Mr Baker] was sitting in the front passenger seat. [W80] 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, [Mr Baker's] hands moved quickly up towards his chest where he was wearing a shoulder bag. [W80] 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 [W80], 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 [W80] 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 [Mr 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 [Mr 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 [W80] 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 [Metropolitan Police Service ('MPS')] as the 'appropriate authority' under the statutory framework regulating whether to bring misconduct proceedings … 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 [2012 Regulations] which was served on [W80] 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:
>
> o The evidence from the audio recordings that some officers had told Mr Baker to put his hands up.
>
> o 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.

o 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 [Appropriate Authority'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'."

5. Since Flaux LJ's judgment in the Divisional Court, a public inquiry pursuant to section 1 of the Inquiries Act 2005 known as "The Jermaine Baker Public Inquiry" was conducted into the death of Mr Baker by HHJ Clement Goldstone QC, a former Recorder of Liverpool. Public hearings over 31 days considered detailed evidence as to the circumstances in which W80 had shot and killed Mr Baker. The inquiry's report which was published on 5 July 2022 included a narrative conclusion.

6. In relation to the question as to whether Mr Baker did move his hands towards his shoulder bag, the report concluded that he did so "in a way that meant W80 honestly believed he was not complying with the instruction to place his hands on the dashboard"; see para 13.77.

7. The report found, at para 14.7, that because of briefings received, W80 believed that the suspects in the car would be armed with weapons and might try to fight their way out of the Audi vehicle being used for the mission.

8. The report also made findings in relation to W80's belief at the time that he shot Mr Baker. It concluded, at para 13.79, that:

"… when W80 shot Mr Baker, he held an honest and genuine belief that Mr Baker was moving in order to reach for a firearm. As such, W80 perceived that Mr Baker posed a lethal threat. In the circumstances that pertained … I draw the conclusion, on the balance of probabilities, that the perceived threat from the actions and movement of Mr Baker was such that W80 honestly believed that it was reasonably necessary for him to shoot at Mr Baker."

9. The report found that there was no firearm in the shoulder bag. W80's honest and genuine belief that Mr Baker posed a lethal threat was tragically wrong; see para 13.81.

The proceedings below

10. The appellant brought judicial review proceedings challenging the decision of the IOPC dated 1 May 2018 to direct the MPS to bring disciplinary proceedings against him. The basis of his challenge was that the IOPC had erred in applying the civil law test for self-defence in determining whether the appellant had a case to answer on charges of gross misconduct.

11. In a judgment delivered on 14 August 2019, the Divisional Court allowed the appellant's claim for judicial review.

12. The IOPC appealed to the Court of Appeal and in a judgment delivered on 9 October 2020, the appeal was allowed.

13. The appellant now appeals to the Supreme Court.

The law as to the use of force in self-defence

(a) Two limbs to self-defence

14. There are two limbs to self-defence in both criminal proceedings and in civil actions. They can be conveniently described as the trigger and the response.

15. The first limb, the trigger, is a factual question; what did the individual genuinely believe was happening to cause him to use the violence that he did?

16. The second limb, the response, is a question of reasonableness; was the individual's response reasonable in all the circumstances?

(b) Self-defence in criminal proceedings

17. The law governing the reasonable use of force in the context of self-defence in criminal proceedings is now governed by section 76 of the Criminal Justice and Immigration Act 2008. Section 76 enacted in statutory form the common law position which evolved in a line of authority commencing with the House of Lords decision in *R v Morgan* [1976] AC 182.

18. Section 76 in so far as relevant provides:

> " …
>
> (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.
>
> (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 for the purposes of subsection (3), whether or not—
>
> (i) it was mistaken, or
>
> (ii) (if it was mistaken) the mistake was a reasonable one to have made.
>
> …."

19. In relation to the first limb of self-defence in criminal proceedings, it is apparent from section 76(4)(a) that the reasonableness or otherwise of the defendant's belief is relevant to the question of whether the defendant genuinely held it.

20. It is also apparent from section 76(4)(b) that in criminal proceedings a defendant is entitled to rely upon a genuinely held belief regardless of whether or not the belief turns out to be mistaken, and regardless of the reasonableness of the mistake made. Accordingly, in criminal proceedings the necessity to take action in response to an attack, or imminent attack, must be judged on the assumption that the facts were as the defendant honestly believed them to be, whether or not the defendant was mistaken and, if the defendant made a mistake of fact, whether or not it was reasonable for the defendant to have done so; see *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962, at paras 16 and 17.

21. Smith, Hogan and Ormerod's Criminal Law, 16th Ed., (2021) para 10.7.1 states the general principles governing self-defence in the criminal law in the following terms:

> "The defences at common law and under s 3 [Criminal Law Act 1967 dealing with arrest and the prevention of crime], as now both also regulated by s 76 [Criminal Justice and Immigration Act 2008], can be conveniently described in terms of trigger and response:
>
> - the trigger being D's belief that the circumstances as he understands them render it reasonable or necessary for him to use force; and
>
> - the response being the use of a proportionate or reasonable amount of force to the threat that D believes he faces.
>
> The general principle is that the law allows such force to be used as is objectively reasonable in the circumstances as D genuinely believed them to be. The trigger is assessed subjectively (what did D genuinely believe); the response objectively (would a reasonable person have used that much force in the circumstances as D believed them to be)."

22. As we have indicated, the statutory approach evolved from a line of authority commencing in 1976 with *R v Morgan*. It is appropriate to refer to some of the cases in this line of authority to demonstrate that the criteria of an honestly held belief in criminal proceedings is not confined to self-defence and to set out certain helpful passages as to self-defence in criminal proceedings.

23. In *R v Morgan,* the House of Lords held that an honestly held belief in consent was a defence to a charge of rape even if there was no reasonable basis for the belief.

24. In *R v Williams (Gladstone)* (1984) 78 Cr App R 276, the Court of Appeal held that an honestly held belief applied in the context of the use of reasonable force to prevent a crime. Lord Lane CJ stated (at p 280):

> "What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted."

He then said this in relation to self-defence (at p 281):

> "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 a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.
>
> Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it."

25. In *Beckford v The Queen* [1988] AC 130, an appeal from Jamaica against a conviction for murder, the Judicial Committee of the Privy Council expressly approved the passage in *Williams (Gladstone)* cited above. Referring to *Morgan*, which Lord

Griffiths described (at p 1145C) as a landmark decision in the development of the common law, he explained, at p 144E:

> "If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully."

26. In *R v Keane* [2010] EWCA Crim 2514; [2011] Crim LR 393, Hughes LJ observed (at para 4) that the law of self-defence is not complicated and represents a universally recognised common sense concept. He then, while disclaiming any intention to provide a comprehensive survey of the law of self-defence, made the following helpful general observations (at para 5):

> "It is however very long established law that there are usually two and sometimes three stages into any enquiry into self-defence. There may be more, but these are the basic building blocks of a large proportion of the cases in which it is raised:
>
> 1. If there is a dispute about what happened to cause the defendant to use the violence that he did, and there usually is such a dispute, then the jury must decide it, attending of course to the onus and standard of proof.
>
> 2. <u>If</u> the defendant claims that he thought that something was happening which the jury may find was not happening, then the second question which arises is what did the defendant genuinely believe was happening to cause him to use the violence that he did? That question does not arise in every case. If it does arise then whether his belief was reasonable or not, providing it is genuinely held, he is to be judged on the facts as he believed them to be unless his erroneous belief is the result of voluntarily taken drink or drugs, in which event it is to be disregarded.
>
> 3. Once it has thus been decided on what factual basis the defendant's actions are to be judged, either because they

> are the things that actually happened and he knew them or because he genuinely believed in them even if they did not occur, then the remaining and critical question for the jury is: was his response reasonable, or proportionate (which means the same thing)? …" (Emphasis as applied by Hughes LJ)

(c) Self-defence in civil actions

27. In *Ashley v Chief Constable of Sussex Police* the Chief Constable faced, inter alia, a civil claim for the tort of battery, arising out of an incident in which a person had been shot and killed by a police officer. Lord Scott (at para 16) adopted from the judgment of Sir Anthony Clarke MR in the Court of Appeal in that case the identification of three possible approaches to the criteria requisite for a successful plea of self-defence, namely:

> (1) The necessity to take action in response to an attack, or imminent attack, must be judged on the assumption that the facts were as the defendant honestly believed them to be, whether or not he was mistaken and, if he made a mistake of fact, whether or not it was reasonable for him to have done so (solution 1).
>
> (2) The necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be whether or not he was mistaken, but, if he made a mistake of fact, he can rely on that fact only if the mistake was a reasonable one for him to have made (solution 2).
>
> (3) In order to establish the relevant necessity the defendant must establish that there was in fact an imminent and real risk of attack (solution 3).

28. Lord Scott referred to the submission that the criteria for self-defence in civil law should be the same as in criminal law and continued (at paras 17 and 18):

> "17. In my opinion, however, this plea for consistency between the criminal law and the civil law lacks cogency for the ends to be served by the two systems are very different. One of the main functions of the criminal law is to identify, and provide punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good

order of society. It is fundamental to criminal law and procedure that everyone charged with criminal behaviour should be presumed innocent until proven guilty and that, as a general rule, no one should be punished for a crime that he or she did not intend to commit or be punished for the consequences of an honest mistake. There are of course exceptions to these principles but they explain, in my opinion, why a person who honestly believes that he is in danger of an imminent deadly attack and responds violently in order to protect himself from that attack should be able to plead self-defence as an answer to a criminal charge of assault, or indeed murder, whether or not he had been mistaken in his belief and whether or not his mistake had been, objectively speaking, a reasonable one for him to have made. As has often been observed, however, the greater the unreasonableness of the belief the more unlikely it may be that the belief was honestly held.

18. The function of the civil law of tort is different. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights. Thus, for instance, the right of freedom of expression may conflict with the right of others not to be defamed. The rules and principles of the tort of defamation must strike the balance. The right not to be physically harmed by the actions of another may conflict with the rights of other people to engage in activities involving the possibility of accidentally causing harm. The balance between these conflicting rights must be struck by the rules and principles of the tort of negligence. As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in

> consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions. To hold, in a civil case, that a mistaken and unreasonably held belief by A that he was about to be attacked by B justified a pre-emptive attack in believed self-defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance. It is one thing to say that if A's mistaken belief was honestly held he should not be punished by the criminal law. It would be quite another to say that A's unreasonably held mistaken belief would be sufficient to justify the law in setting aside B's right not to be subjected to physical violence by A. I would have no hesitation whatever in holding that for civil law purposes an excuse of self-defence based on non existent facts that are honestly but unreasonably believed to exist must fail. This is the conclusion to which the Court of Appeal came in preferring solution 2." (See also Lord Bingham at para 3.)

29. As a result, therefore, the House of Lords concluded that while solution 1 was applicable in criminal proceedings, solution 2 was to be applied in civil proceedings.

(d) Terminology

30. Both the criminal and civil tests of self-defence involve subjective and objective elements.

31. Under the criminal test, the first limb (the trigger) is addressed on the basis of the facts as subjectively understood by the individual. However, if the individual has made a mistake of fact, then the more unreasonable the mistake the less likely it would be that the individual genuinely believed that fact. In this way an objective assessment may inform whether there was a genuinely held subjective belief. So far as the second limb (the response) under the criminal test is concerned, the objective standard of reasonable use of force is to be assessed against the background of the facts as subjectively understood by the individual. There are therefore both objective and subjective elements. Although the criminal test has been termed "subjective", it combines both subjective and objective elements and it is therefore more accurate to refer to it as "the criminal law test".

32. Under the civil test the first limb (the trigger) is addressed on the basis of the facts as subjectively understood by the individual. However, under the civil test if an individual made a mistake of fact he can only rely on that fact if the mistake was a reasonable one to have made. So far as the second limb (the response) under the civil test is concerned, the objective standard of reasonable use of force is to be assessed against the background of the facts as subjectively understood by the individual, subject to the qualification that if an individual made a mistake of fact he can only rely on that fact if the mistake was a reasonable one to have made. Once again, there are both objective and subjective elements. Although the civil test has been termed "objective", it combines both subjective and objective elements and it is therefore more accurate to refer to it as "the civil law test".

Further statutory provisions as to the use of force by police officers

33. We set out further statutory provisions as to the use of force by police officers.

34. Section 117 of the Police and Criminal Evidence Act 1984 empowers police officers to use reasonable force, if necessary, in the exercise of their powers. That section provides:

> "Where any provision of this Act—
>
> (a) confers a power on a constable; and
>
> (b) does not provide that the power may only be exercised with the consent of some person, other than a police officer,
>
> the officer may use reasonable force, if necessary, in the exercise of the power."

35. Section 3 of the Criminal Law Act 1967 provides in relation to the use of force by police officers:

> "3 Use of force in making arrest, etc.
>
> (1) 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.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

The Taylor report

36. Before we set out the statutory provisions under which the Secretary of State for the Home Department ("the SSHD") may make regulations as to the conduct of the police, we note that in 2004 the then SSHD commissioned a review of the arrangements for dealing with police misconduct and unsatisfactory performance. The review, was carried out by William Taylor, CBE QPM (a former Commissioner of the City of London Police). Mr Taylor published his report, entitled "Review of Police Disciplinary Arrangements Report" in January 2005 ("the Taylor report"). The recommendations contained in the report were accepted by Ministers and, in response to those recommendations, the SSHD made regulations in 2008 dealing with the conduct of the police. The regulations made in 2008 are the Police (Conduct) Regulations 2008 (SI 2008/2864) ("the 2008 Regulations") and we will turn to them in detail below. The report provides the context for the interpretation of those, and subsequent, regulations.

37. The review of police disciplinary arrangements which the then SSHD requested Mr Taylor to carry out was to be "fundamental"; see para 1.3.1 of the Taylor report. The need for a fundamental review was because "[there] had been calls for reform from a number of stakeholders who expressed serious concerns about the current arrangements and their appropriateness for a modern police service"; see para 1.3.1 of the Taylor report.

38. We consider that the Taylor report's recommendations did herald a "fundamental" change in relation to police conduct and disciplinary arrangements. The report recommended a significant shift away from a court martial model of disciplinary arrangements, involving blame and sanction, to an employment model, with an emphasis on learning and development for the individual officer and the organisation; see paras 0.10 and para 4.2.15 of the Taylor report. As a part of that shift, the report recommended that the new misconduct procedures should be based on the Advisory, Conciliation and Arbitration Service ("ACAS") principles. The adoption of those principles would mean that "the conduct arrangements can benefit from the

experience of employment law and good employment relations practice, …"; see page 5 and recommendation 2(ii). Moreover, those principles would involve the use of "procedures to encourage workers to improve, where possible, rather than just as a way of imposing a punishment"; see para 4.2.12. The Taylor report stated at para 4.2.13 that:

> "The emphasis of the current regulations is seen by most observers as very much on sanction or punishment rather than recognising that in a learning organisation the focus needs to be on improvement. …. Discipline systems which promote learning can help improve the productivity of the workforce while maintaining good morale among personnel."

The report also recognised that, when circumstances required it, sanction had a part in the disciplinary arrangements, but recommended that improvement will always be an integral dimension of any outcome; see page 5 of the report, recommendation 2(iii). The report considered that, even in the case where an individual has been dismissed, there can be learning opportunities for the Police Service.

39. In addition to this fundamental shift, the Taylor report endorsed another fundamental principle, namely building public confidence in the disciplinary process so as to contribute to public confidence in the police.

The wider context in 2008

40. The Taylor report is not the only context which aids the interpretation of the 2008 Regulations. In addition, there was both judicial and legislative focus in 2008 prior to the 2008 Regulations being made on 5 November 2008 on the difference between the criminal law test and the civil law test in relation to self-defence.

41. First, on 23 April 2008, the House of Lords delivered judgment in *Ashley v Chief Constable of Sussex Police*. As has been explained in paras 27-29 above, a central issue in the appeal was whether the criteria for a successful plea of self-defence in a civil action should be the same as the criteria in criminal proceedings. The court concluded that there is no reason in principle why the same test should apply in civil actions as obtains in a criminal trial, since the ends of justice which the two rules respectively exist to serve are different.

42. Second, on 8 May 2008, Parliament enacted section 76 of the Criminal Justice and Immigration Act 2008 (see para 17 above) which made detailed provisions as to the law of self-defence in criminal proceedings.

The relevant statutory provisions and the relevant guidance

(a) The complex web of regulations, a code of ethics, and statutory guidance

43. It is necessary to set out in some detail the relevant statutory provisions relating to police conduct, together with the regulations made by the SSHD, guidance given by the SSHD and the Code of Ethics issued by the College of Policing. Before doing so, it is appropriate to state that the only relevant statutory provision as to the standard of professional behaviour in relation to the use of force by W80 on 13 December 2015 is contained in the 2012 Regulations, made by the SSHD. The standard in those regulations replicated the standard in regulations made by the SSHD in 2008. Accordingly, the task is to determine the true interpretation of the standard in the 2008 Regulations seen in the context of the Taylor report and the wider judicial and legislative context in 2008.

(b) Regulation of the conduct of police officers

44. The SSHD has the power to make regulations as to the conduct of members of police forces and as to the maintenance of discipline by virtue of section 50 of the Police Act 1996. Section 50 in so far as relevant to this power provides:

> "(1)…, the Secretary of State may make regulations as to the government, administration and conditions of service of police forces.
>
> (2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to … (e) the conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline; …
>
> …

> (8) Any statutory instrument containing regulations under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament."

45. Several regulations relevant to the issues in this appeal have been made under section 50(1) of the Police Act 1996 as to the conduct of members of police forces and as to the maintenance of discipline.

46. First, on 10 March 1999, the Police (Conduct) Regulations 1999 (SI 1999/730) ("the 1999 Regulations") were made by the SSHD and came into force on 1 April 1999. The 1999 Regulations set an appropriate standard for police officers by reference to a Code of Conduct in Schedule 1. Paragraph 4 of Schedule 1, under the heading of "Use of force and abuse of authority" provided that:

> "Officers must never knowingly use more force than is reasonable, nor should they abuse their authority."

If a report, complaint, or allegation was received by the chief officer of the force concerned that the conduct of a member of the police force did not meet the appropriate standard, for instance in relation to the use of force, then disciplinary proceedings could be commenced in relation to that member of the police force.

47. Second, on 8 March 2004, the Police (Conduct) Regulations 2004 (SI 2004/645) ("the 2004 Regulations") were made by the SSHD and came into force on 1 April 2004. The 2004 Regulations revoked the 1999 Regulations subject to transitional provisions; see regulation 2. The 2004 Regulations also set an appropriate standard for police officers by reference to a Code of Conduct which was now contained in Schedule 1 to the 2004 Regulations. Paragraph 4 of Schedule 1 of the 2004 Regulations, under the heading of "Use of force and abuse of authority", was in identical terms to the same paragraph in the 1999 Regulations. Again, disciplinary proceedings could be commenced if a member of the police force did not meet the appropriate standard.

48. Third, on 5 November 2008, the 2008 Regulations were made by the SSHD and came into force on 1 December 2008. The 2008 Regulations revoked the 2004 Regulations subject to transitional provisions; see regulation 2.

49. We have indicated that the Taylor report provides the context for the interpretation of the 2008 Regulations and for subsequent regulations. This is also apparent from the explanatory memorandum to the 2008 Regulations which states

that those regulations were in response to the recommendations in the Taylor Review. Under "Policy background" to the 2008 Regulations the explanatory notes state:

> "7.5 The Taylor Review proposed that the new misconduct procedures should be based on ACAS principles which would modernise the system and make it easier for individual officers and the police service generally to learn lessons and improve the service to the public. One of the key points to emerge was the need to shift the emphasis and culture in police misconduct matters towards an environment focussed on development and improvement as opposed to one focused on blame and punishment.
>
> 7.6 … the Conduct Regulations will create a conduct … environment for police officers that more closely reflect those which operate in normal employment practice.
>
> 7.7 The new procedures … are intended to encourage a culture of learning and development for individuals and/or the organisation. Sanction has a part, when circumstances require this, but improvement will always be an integral dimension of any outcome (even in the case where an individual has been dismissed there can be learning opportunities for the Police Service)."

50. There were significant changes in terminology in the 2008 Regulations as compared with the 1999 and 2004 Regulations as follows:

> (a) The 2008 Regulations do not refer to an "appropriate standard" by reference to a Code of Conduct but rather define misconduct and gross misconduct by reference to "Standards of Professional Behaviour" contained in the Schedule; see regulation 3 of the 2008 Regulations and the Schedule to those regulations.
>
> (b) The relevant Standard of Professional Behaviour in relation to the "Use of Force" differed significantly from the equivalent provisions contained in Codes of Conduct scheduled to the 1999 and 2004 Regulations. The most important difference is that the word "knowingly" is omitted from the standard in the

2008 Regulations. The new Standard of Professional Behaviour in relation to the use of force provides:

> "Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances."

(c) The 2008 Regulations use the terms "misconduct" and "gross misconduct". "Misconduct" means a breach of the Standards of Professional Behaviour and "gross misconduct" means a breach of the Standards of Professional Behaviour so serious that dismissal would be justified; see regulation 3. A misconduct hearing means a hearing to which the officer concerned is referred and at which he may be dealt with by disciplinary action up to and including dismissal; see regulations 3 and 19.

51. Fourth, on 18 October 2012, the 2012 Regulations were made by the SSHD and came into force on 22 November 2012. The 2012 Regulations revoked the 2008 Regulations, subject to transitional provisions; see regulation 2. Misconduct was again defined by reference to "Standards of Professional Behaviour" rather than by reference to a Code of Conduct. Those standards were now contained in Schedule 2 to the 2012 Regulations, which were in identical terms to the standards contained in the Schedule to the 2008 Regulations. As consideration of the other Standards of Professional Behaviour may aid the true construction of the standard in relation to the use of force, we set out all the standards in Schedule 2 of the 2012 Regulations, which were the relevant standards in force at the time Officer W80 shot Mr Baker.

> "**Honesty and Integrity**
>
> Police officers are honest, act with integrity and do not compromise or abuse their position.
>
> **Authority, Respect and Courtesy**
>
> Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.

Police officers do not abuse their powers or authority and respect the rights of all individuals.

Equality and Diversity

Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly.

Use of Force

Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.

Orders and Instructions

Police officers only give and carry out lawful orders and instructions.

Police officers abide by police regulations, force policies and lawful orders.

Duties and Responsibilities

Police officers are diligent in the exercise of their duties and responsibilities.

Confidentiality

Police officers treat information with respect and access or disclose it only in the proper course of police duties.

Fitness for Duty

> Police officers when on duty or presenting themselves for duty are fit to carry out their responsibilities.
>
> **Discreditable Conduct**
>
> Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty. Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.
>
> **Challenging and Reporting Improper Conduct**
>
> Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour."

52. Fifth, on 6 January 2020, the Police (Conduct) Regulations 2020 (SI 2020/4) ("the 2020 Regulations") were made by the SSHD and came into force on 1 February 2020. The 2020 Regulations revoked the 2012 Regulations. The revocation was subject to transitional provisions, the effect of which in relation to the disciplinary proceedings in respect of W80 is that the 2012 Regulations continue to have effect; see regulation 3. Misconduct was again defined by reference to "Standards of Professional Behaviour". Those standards are now contained in Schedule 2 to the 2020 Regulations which standards are in identical terms to the standards contained in the Schedule to the 2008 Regulations except for an additional sentence under the heading of "Duties and Responsibilities". The standard in relation to the "Use of Force" remains the same.

(c) Regulations to establish procedures for the taking of disciplinary procedures

53. The SSHD's power to make regulations under section 50 of the Police Act 1996 includes the power to make regulations to establish procedures for the taking of disciplinary procedures. Section 50(3) in so far as relevant provides:

> "Without prejudice to the powers conferred by [section 50], regulations under [section 50] shall—

(a) establish, or

(b) make provision for the establishment of, procedures for the taking of disciplinary proceedings in respect of the conduct, efficiency and effectiveness of members of police forces, including procedures for cases in which such persons may be dealt with by dismissal."

In accordance with the power to make regulations under section 50(1) and (3), procedures were established in the 1999, 2004, 2008, 2012, and 2020 Regulations.

54. Regulation 5(1) of the 2012 Regulations provides that the "Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct". The appropriate authority in relation to W80 is "the chief officer of police of the police force concerned"; see regulation 3(1). The 2012 Regulations apply as the allegation of gross misconduct came to the attention of Commissioner of Police of the Metropolis following the IPCC Report dated 23 November 2016. Accordingly, the procedures which apply in relation to the allegation of gross misconduct against W80 are contained in the 2012 Regulations. Key aspects of the procedure in the 2012 Regulations are as follows:

(a) The officer concerned is entitled to legal representation of his choice and is required to be present at a misconduct hearing, although the Chair has the power to proceed in the officer's absence. The officer's legal representative may address the panel in order to put the case of the officer concerned; sum up that case; respond on the officer's behalf; make representations concerning any aspect of the proceedings; and (with the leave of the Chair) put questions to witnesses.

(b) Neither the civil nor criminal rules of evidence apply. The Chair has wide discretion to allow "any document to be considered" whether or not it has been previously disclosed, and hearsay evidence is not excluded.

(c) There is no right to call witnesses. The officer and the appropriate authority are required to exchange, and where possible agree, lists of witnesses prior to the hearing, but it is for the Chair to decide whether it is necessary in the interests of justice for any of the witnesses to attend the misconduct hearing to give evidence.

(d) When an officer is served with a written notice of investigation, they are informed that they do not have to say anything, but it may harm their case if they do not mention when interviewed or when providing any information under regulations 16(1) or 22(2) or (3) something which they later rely upon in any misconduct proceedings. Where the officer later relies on a fact at the misconduct hearing that he could reasonably have been expected to mention earlier, the misconduct panel has a discretion – analogous to that applicable in criminal proceedings under section 34 of the Criminal Justice and Public Order Act 1994 – to draw such inferences as "appear proper".

(e) The outcome of a misconduct hearing is required to be determined on the balance of probabilities. The panel must review the facts of the case and decide whether the conduct of the officer concerned amounts to misconduct, gross misconduct or neither.

(d) Code of Ethics

55. Section 39A(1) of the Police Act 1996, under the heading "Codes of practice for chief officers" provides that:

> "[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."

Section 39A(5) provides that "[the] Secretary of State shall lay any code of practice issued by the College of Policing under this section … before Parliament". If a code is issued by the College of Policing in accordance with this procedure, then section 39A(7) provides that "[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".

56. In July 2014, the College of Policing issued, with the approval of the SSHD, a code of ethics entitled a "Code of Ethics: A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales"

("the Code of Ethics"). The Code of Ethics was laid before Parliament in accordance with section 39A(5).

57. Before setting out those parts of the Code of Ethics in relation to the use of force, it is appropriate to set out parts of the code which suggest that it is of universal application to all police officers to always guide their behaviour so that if an officer complies with the code, then there would be compliance with the Standards of Professional Behaviour in the 2012 Regulations. Thereafter, it is appropriate to set out other parts of the Code of Ethics which recognise that the code is of more limited application.

58. The universal application of the Code of Ethics can be taken from the following:

(a) The Chief Executive of the College of Policing, Chief Constable Alex Marshall, stated in his introduction to the Code of Ethics that it "sets out the principles and standards of behaviour we expect to see from police professionals" and that it "applies to every individual who works in policing, whether a warranted officer, member of police staff, volunteer or someone contracted to work in a police force".

(b) Paragraph 1.1.3 of the preamble to the Code of Ethics stated that:

> "The Code of Ethics sets out the principles and standards of behaviour that will promote, reinforce and support the highest standards from everyone who works in policing in England and Wales."

(c) Under the heading of "Scope of the Code" it is stated that:

> "1.3.1 The scope of the Code of Ethics extends beyond its statutory basis as a code of practice.
>
> 1.3.2 The expectation of the public and the professional body is that every person working in policing will adopt the Code of Ethics.

1.3.3 This includes all those engaged on a permanent, temporary, full-time, part-time, casual, consultancy, contracted or voluntary basis."

(d) The introduction to the Code states on page (v) that:

"[The Code] applies to every individual who works in policing, whether a warranted officer, member of the police staff, volunteer or someone contracted to work in a police force."

(e) Under the heading "Responsibilities" and the subheading "Everyone" the preamble states at para 1.4 that:

"1.4.1 You are responsible for your own professional behaviour and, to ensure that you are able to deliver the highest standards possible, you must have a good understanding of the contents of this Code.

1.4.2 You are expected to use the Code to guide your behaviour at all times – whether at work or away from work, online or offline."

59. The parts of the Code of Ethics which recognise that the code is of more limited application are as follows:

(a) Para 1.3.1 of the Code of Ethics correctly recognises that the statutory basis of the Code of Ethics is limited. This is a reference to section 39A(1) of the Police Act 1996 which states that the College of Police may only issue a code of practice which relates to the discharge of their functions by chief officers of police.

(b) Para 1.2.2 of the Code of Ethics, under the heading of "Statutory basis of the Code" states that:

"As a code of practice, the legal status of the Code of Ethics:
… relates specifically to chief officers in the discharge of their functions."

(c) In the introduction to the section of the Code of Ethics headed "Standards of professional behaviour", it is stated, at para 3.1.2, that "in misconduct proceedings against police officers, the formal wording of the [2012 Regulations] will be used".

60. The Code of Ethics, at pages 4 and 8, repeats the Standard of Professional Behaviour in relation to the use of force in the same terms as set out in Schedule 2 of the 2012 Regulations. However, at page 8 the Code of Ethics continues by stating that:

> "4.1 This standard is primarily intended for police officers who, on occasion, may need to use force in carrying out their duties.
>
> 4.2 Police staff, volunteers and contractors in particular operational roles (for example, custody-related) may also be required to use force in the course of their duties.
>
> 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."

61. Mr Stern QC, who appeared on behalf of the appellant before the Divisional Court, submitted that para 4.4 of the Code of Ethics applied the criminal law test in relation to the use of force. He contended that the fact that the paragraph stated that an officer would have to "justify [the use of force] based upon [his] honestly held belief at the time that [he] 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. Mr Stern also submitted that the answer as to whether the criminal law test or the civil law test should be applied was to be found in a trilogy of materials consisting of the 2012 Regulations, guidance issued by the SSHD in 2014 and the Code of Ethics. The Divisional Court agreed, at para 67, that para 4.4 of the Code of Ethics does mean what Mr Stern submitted that it meant and held, at para 66, that "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".

(e) Guidance concerning disciplinary proceedings

62. We turn to another potential aid to the interpretation of the Standard of Professional Behaviour in relation to the use of force in the 2012 Regulations relied on by the appellant before the Divisional Court. This further potential aid is the guidance as to the discharge of the Director General of IOPC's disciplinary function issued by the SSHD under section 87(1) of the Police Act 1996.

63. Section 87(1) of the Police Act 1996 provides that the SSHD "may issue guidance as to the discharge of their disciplinary functions to [amongst others] the Director General of the Independent Office for Police Conduct".

64. Section 87(3) provides that "[it] shall be the duty of every person to whom any guidance under this section is issued to have regard to that guidance in discharging the functions to which the guidance relates".

65. Section 87(4) provides that "[a] failure by a person to whom guidance under this section is issued to have regard to the guidance shall be admissible in evidence in any disciplinary proceedings or on any appeal from a decision taken in any such proceedings".

66. The guidance issued by the SSHD under section 87 of the Police Act 1996, which was effective on 13 December 2015 when W80 used lethal force on Mr Baker, was the "Home Office Guidance. Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures. Revised July 2014" ("the 2014 Guidance"). The 2014 Guidance was issued to, amongst others, the Director General of IOPC.

67. In the introduction to the 2014 Guidance, at para (b), all those who were responsible for administering the procedures described in the guidance, including the Director General, were reminded "that they are required to take its provisions fully into account when discharging their functions".

68. The 2014 Guidance was part of the trilogy of material relied on by Mr Stern before the Divisional Court in support of a criminal law test. It was submitted that para 4.4 of the Code of Ethics applied the criminal law test and that the 2014 Guidance by expressly referring to the Code of Ethics required the Director General to take the code and therefore the criminal law test, fully into account when deciding on disciplinary proceedings in respect of W80.

69. It is correct that the 2014 Guidance stated, at para 1.2, that "[the] standards [of Professional behaviour] should be read and applied having regard to the Code of Ethics". Also, at para 1.4, that "[the] Code of Ethics should inform any assessment or judgement of conduct when deciding if formal action is to be taken under the [2012 Regulations]". Furthermore, at para 1.12, that "[the] Code of Ethics goes into greater detail about the expectations underlying each of [the standards of professional behaviour as they are set out in Schedule 2 to the [2012 Regulations]". However, we also note that the introduction to the guidance stated, at para (b), that "[this] guidance is not a definitive interpretation of the relevant legislation. Interpretation is ultimately a matter for the courts".

The judgments of the lower courts

(a) The judgment of the Divisional Court

70. In the Divisional Court, Flaux LJ, with whom Sir Kenneth Parker agreed, considered that 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, he might well have been persuaded that, in police misconduct proceedings, the question 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 (at para 65).

71. However, Flaux LJ considered that the 2014 Guidance and the Code of Ethics posed insuperable obstacles to the court's ruling that the question whether the Use of Force Standard of Professional Behaviour had been breached was to be determined by reference to "the civil law objective test". The Code of Ethics sets out the details of the Standards of Professional Behaviour. Whilst, in Flaux LJ's view, para 4.4 of the Code of Ethics may not be as clearly drafted as it might be, it is concerned with the way in which an officer would be required to account for his or her use of force. What is required to justify the use of force is an "honestly held belief at the time" and this was "clearly a reference to the first limb of the criminal law test" (paras 66, 67). Accordingly, the IOPC had applied the wrong test in determining whether there was a case to answer and the decision was quashed (para 78).

(b) The judgment of the Court of Appeal

72. The Court of Appeal took a very different approach from that of the Divisional Court. It considered (at para 38) that the difference between the criminal and civil tests for self-defence was not an issue in the case. It noted (at para 42) that the Standards of Professional Behaviour required of police officers are statutory and contained in the 2012 Regulations. The relevant statutory requirement is that "police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances". Although that standard is elaborated upon and explained by the Code of Ethics, the Code of Ethics cannot alter the standard itself.

73. The Court of Appeal (at para 47) did not agree with Flaux LJ that the 2014 Guidance and the Code of Ethics posed insuperable obstacles to the court ruling that the issue was to be determined by reference to "the civil law objective test". In its view, para 4.4 of the Code of Ethics did not address the question of "the criminal law subjective test" versus "the civil law objective test" for self-defence. It simply gave guidance as to how the officer was to seek to justify his use of force, namely by reference to his honestly held belief at the time. That belief will then be judged by the disciplinary panel according to whether the force used was "necessary, proportionate and reasonable in all the circumstances".

74. The Court of Appeal considered (at para 48) that while the justification provided by officers under para 4.4 of the Code of Ethics is to demonstrate (if they can) that there has not been a breach of the applicable standard, it did not follow that para 4.4 was making a reference to the first limb of the criminal law test. Para 4.4 refers to the accounts that officers must give of their use of force, which must be based on their "honestly held belief at the time". Those words cannot override the plain words of the standard itself that provides that officers "only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances".

75. The Court of Appeal then continued (at paras 49-51):

> "49. There was much time spent on the other objective parts of a conduct investigation. It was said that, in determining whether an officer's belief was indeed honestly held, the reasonableness of that belief will be relevant. It was only because in this case the investigator determined that the belief was indeed honestly held that the objective element was removed. All that is true, but it does not demonstrate that there can be no misconduct wherever an officer uses proportionate force based on an honest belief that he was in danger. If the officer makes an honest mistake, …, the disciplinary panel must still determine whether the use of

force was, in the words of the standard 'reasonable in all the circumstances'. In many cases, of course, an honest mistake is also likely to be found to have been reasonable in all the circumstances, but there will be some cases where it will not. It is not our task to speculate on the numerous different situations that might occur.

50. Finally, in this connection, we would point out that the Code itself is deliberately written in plain language and is specifically intended for the use of police officers, staff, contractors and the public. The [claimant's] submissions seek to introduce a technical meaning which is not apparent on the face of paragraph 4 of the Code. Neither the 2012 Regulations, the HOG nor the Code make express reference to the criminal test for self-defence. It would, we think, be quite inappropriate to read such a test into a simply drafted and readily comprehensible standard, without clear words. The public would reasonably expect the standards of conduct to apply without any gloss. The [claimant's] submissions would prevent public scrutiny of the serious situation that arose in this case. The investigation by the IOPC is privately undertaken, whereas a misconduct hearing is conducted in public.

Conclusions

51. For the reasons we have given, we do not think that the Divisional Court was right to quash the IOPC's decision. The IOPC was justified in concluding that it was open to a reasonable panel at a misconduct hearing to make a finding of misconduct if W80's honest, but mistaken, belief that his life was threated was found to be unreasonable. That conclusion was soundly based in law on the proper and plain meaning of the 2012 Regulations and the Code. The assessment of the disciplinary panel in misconduct or gross misconduct proceedings is not to be made by reference to any imported test relating to self-defence."

76. In the result, therefore, the Court of Appeal applied a standard which it found in the 2012 Regulations, namely whether the use of force had been necessary, proportionate and reasonable in all the circumstances.

The true interpretation of the Standard of Professional Behaviour in relation to the use of force

(a) The appellant's principal arguments on this appeal

77. Mr David Perry KC, who now appears on behalf of the appellant, submitted that the test applied by the Court of Appeal was wrong in principle and that it was necessary to decide whether the criminal law test or the civil law test applied.

78. In his oral submissions Mr Perry accepted, in our view correctly, that the governing Standard of Professional Behaviour in relation to the use of force is contained in the 2012 Regulations which is in identical terms to the standard in the 2008 Regulations. Accordingly, the task of determining whether the standard as to the use of force applied the civil or criminal law test depends on the true construction of the 2008 Regulations.

79. Mr Perry also conceded in his oral submissions, again in our view correctly, that the Code of Ethics issued in 2014 and the 2014 Guidance do not affect the true interpretation of the standard as to the use of force contained in the 2008 Regulations.

80. The focus of Mr Perry's oral submissions was that the task of determining the true interpretation of the standard as to the use of force in the 2008 Regulations is aided by consideration of the appropriate standard contained in the 1999 and 2004 Regulations. He submitted that the appropriate standard for police officers in the Code of Conduct scheduled to those regulations applied the criminal law test in respect of the first limb of self-defence. The Code of Conduct in those regulations provided:

> "Officers must never knowingly use more force than is reasonable, nor should they abuse their authority."

81. Mr Perry submitted that the use of the word "knowingly" meant that a police officer would have to account for his use of force by reference to what he knew at the time whether or not he was mistaken. Accordingly, prior to 2008, the test in relation to the first limb was the criminal law test. Mr Perry's key point was that there was nothing in the Taylor report to indicate that the standard was to move from a criminal law test in relation to the first limb of self-defence to a civil law test. Furthermore, if there was a change then it went unnoticed in that the various training manuals for police officers published after 2008 gave no indication that the test was the civil law test.

82. Mr Perry also submitted that, if the Standard of Professional Behaviour in the 2008 Regulations as to the use of force was interpreted as not moving from the appropriate standard in the 1999 and 2004 Regulations, then there would be coherence between the 1999, 2004, 2008 and 2012 Regulations and para 4.4 of the Code of Ethics issued in 2014, in the adoption of a criminal law test.

83. Mr Perry also submitted, albeit faintly, that some assistance as to the true interpretation of the 2008 and 2012 Regulations could be obtained from article 2 of the European Convention on Human Rights ("the ECHR") and from the decisions of the Strasbourg court in *McCann v United Kingdom* (1996) 21 EHRR 97 and *Da Silva v United Kingdom* (2016) 63 EHRR 12.

84. It was also submitted on behalf of the appellant that whether the criminal law test should be applied under the 2008 and 2012 Regulations in England and Wales could be informed by consideration of the test applied under Regulations in Northern Ireland and in Scotland.

(b) The standard as applied by the Court of Appeal

85. In formulating our judgment and in particular this part of our judgment, we have found great assistance from an article by Assistant Professor Richard Martin entitled "When Police Kill in the Line of Duty: Mistaken Belief, Professional Misconduct and Ethical Duties After *R. (W80)*" [2021] Crim LR 662 at p 666.

86. We consider that the route taken by the Court of Appeal gives rise to a number of difficulties.

87. First, although the test adopted by the Court of Appeal is superficially attractive in that it reflects the wording of the 2012 Regulations and permits all relevant circumstances to be taken into account, it gives rise to a fundamental problem in principle. It requires the necessity, proportionality and reasonableness of the use of force to be assessed in all the circumstances. However, this is not possible without first identifying the circumstances against which the use of force is to be evaluated and the test does not explain how the circumstances are to be identified. As we have seen, in *Keane* the Court of Appeal (at para 5) emphasised that it is necessary as a preliminary step to decide on what factual basis a defendant's actions are to be judged. The criminal and civil law have, therefore, developed frameworks against which the use of force is to be assessed. If the criminal and civil standards are abandoned for the purpose of police disciplinary proceedings, as the Court of Appeal in this case

proposed, there is no principled basis on which to approach cases of mistaken belief. Furthermore, the open test proposed by the Court of Appeal in this case could require a tribunal to make the assessment in the light of inconsistent and incompatible circumstances.

88. Whether the use of force in any given situation is necessary or proportionate or reasonable or not can only be assessed by reference to a defined set of circumstances. The question arises in an acute form where the officer using force has made a mistake of fact. As Mr Perry, on behalf of W80, expressed it in his written case, where an officer was mistaken as to the threat he or she faced it is impossible for the decision-maker to judge the use of force by reference to both the circumstances that existed (no threat) and the circumstances as the officer believed them to be (threat). Similarly, if the circumstances are to include the subjective mistaken understanding of the officer, the criminal and civil tests define the relevant circumstances in different ways. The criminal law test requires questions of necessity, proportionality and reasonableness to be addressed in the context of the circumstances as the officer mistakenly but honestly believed them to be, even if that belief was unreasonable. The civil law test requires such questions to be addressed in the context of the circumstances as the officer mistakenly but honestly believed them to be, provided that the belief was reasonable. Necessity, proportionality and reasonableness cannot be assessed against both sets of circumstances simultaneously because they are incompatible. The identification of what are all the relevant circumstances is necessarily a pre-condition to the assessment.

89. Secondly, there is force in the criticism made by Mr Perry of para 49 of judgment of the Court of Appeal. That makes the point that even if an officer uses proportionate force based on an honest but mistaken belief that he or she was in danger, use of force could still constitute misconduct because the disciplinary tribunal must still decide whether the use of force was "reasonable in all the circumstances". It is, of course, correct that the tribunal would be required to go on to consider this further question. However, the approach of the Court of Appeal elides the question whether the officer's mistake was reasonable with the question whether the use of force was reasonable in all the circumstances. The Court of Appeal's analysis cannot assist with the approach that the tribunal should take if it concludes that the use of force was reasonable and proportionate when judged against the officer's honestly held belief but that the belief was not reasonable in all the circumstances.

90. Thirdly, not only would the Court of Appeal's approach require the decision-maker to engage in an impossible intellectual exercise, for the reasons stated at paras 87 and 88 above, but it would also result in uncertainty and inconsistency in its application. An approach which simply requires all factors to be taken into account in

the evaluation of the necessity, proportionality and reasonableness of the use of force fails, in particular, to provide any guidance as to the weight, if any, to be given to an honest but unreasonable mistake as to the threat. In the absence of the structural framework provided by either the criminal or the civil law test, it would be open to different decision makers to take different and inconsistent approaches. There is a danger that the evaluation of the use of force would descend into purely impressionistic evaluation resulting in inconsistency and injustice. It would also introduce great uncertainty into the law to the detriment of all involved in such disciplinary proceedings. In this area of the law, it is of paramount importance that the governing legal principles should be clear and readily comprehensible.

91. Accordingly, we reject the approach adopted by the Court of Appeal. We consider that in disciplinary proceedings the two-limb approach must be applied in relation to the use of force in self-defence and to other occasions on which force is used by police officers, such as in effecting an arrest, restraining an individual or in preventing crime.

92. The question remains as to whether the test, under the first limb, is the criminal law or the civil law test.

(c) Conclusion in relation to the true construction of the standard in the 2008 and 2012 Regulations as to the use of force

93. The Standard of Professional Behaviour in the 2008 and 2012 Regulations does not expressly state whether the criminal law test or the civil law test applies in police disciplinary proceedings in relation to the use of force. We conclude that the civil law test is the correct test. We do so for several reasons.

94. First, the Standards of Professional Behaviour set out in the schedule to the 2008 Regulations and in Schedule 2 of the 2012 Regulations (see para 51 above) are each framed as statements of objective fact. For instance, "[police] officers … act with integrity …". Accordingly, the appellant's submission that the standard in respect of the use of force should incorporate the criminal law test is inconsistent with the degree of objectivity sought to be achieved under all the other Standards of Professional Behaviour set out in the 2008 and 2012 Regulations.

95. Second, the word "knowingly" which had featured in the appropriate standard for police officers in relation to the use of force contained in the 1999 and 2004 Regulations was omitted from the 2008 Regulations and subsequent regulations. It is

correct, as Mr Perry submits, that including the word knowingly in the appropriate standard as to the use of force meant that for many years the criminal law test applied. It is also correct, again as Mr Perry submitted, that the Taylor report did not expressly consider whether the test was to move from a criminal law test to a civil law test. However, the word "knowingly" was deliberately omitted in the 2008 Regulations. We consider this to be a strong textual indicator that the test to be applied in the 2008 Regulations and in the 2012 Regulations was the civil law test. Furthermore, this textual indicator gains additional support when seen in the context of the focus in 2008, both legislative and judicial, on the difference between the criminal law and the civil law test; see paras 40-42 above. In that wider context the omission of the word "knowingly" has particular significance.

96. Third, the purpose of the disciplinary arrangements in the 2008 Regulations puts the true interpretation of the standard in respect of the use of force by police officers beyond doubt. If the purpose of the disciplinary arrangements is simply blame and punishment of individual police officers, then the criminal law test would accord with that purpose. However, the Taylor report recommended a fundamental shift to disciplinary arrangements based on an employment model with an emphasis on also achieving learning and development for the individual officer and for the organisation. That recommendation was implemented in the 2008 Regulations. Other fundamental purposes of the disciplinary arrangements in the 2008 Regulations are to maintain public confidence in (a) the disciplinary process and (b) in the police.

97. The purpose of achieving learning and development for the individual officer and for the organisation requires the application of the civil law test so that the reasonableness of mistakes can be subject to a disciplinary process. If the test was the criminal law test, then where, as here, it is accepted that the individual officer's belief was genuine and honest, the disciplinary process would be precluded from contributing to learning and development in relation to the reasonableness of mistakes. Quite simply, the criminal law test conflicts with the fundamental purpose of the disciplinary process being to contribute to learning and development for the individual officer concerned or for the organisation as to the reasonableness of mistakes.

98. We would add that if a mistake is unreasonable then the remedy may be education for the individual police officer by way of retraining or for the organisation to show that the lesson has been learned by the police officer being moved to another position to prevent repetition of the unreasonable mistakes. Of course, sanctions still have a part in the disciplinary process.

99. The purpose of maintaining the public's confidence in the disciplinary process is also better served by the application of the civil law test. If the test is the criminal law test, then where, as here, it is accepted that the individual officer's belief was genuine and honest, there would be no scrutiny through the disciplinary process of the reasonableness of mistakes by police officers.

100. Finally as regards the purpose of the disciplinary arrangements, the purpose of maintaining confidence in the police is furthered by the application of the civil law test. The civil law test would not preclude the disciplinary process from considering the reasonableness of mistakes thereby enabling the disciplinary process to protect members of the public from police officers who make unreasonable mistakes. The importance of public confidence in policing was emphasised by Lord Carswell in *R (Green) v Police Complaints Authority* [2004] UKHL 6; [2004] 1 WLR 725 at para 78:

> "Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded."

Citizens should not feel that unreasonable mistakes made by the police are left unchecked or that the police are not held accountable for such mistakes.

101. Fourth, the true interpretation of the Standard of Professional Behaviour as to the use of force in the 2008 Regulations cannot be informed by the Code of Ethics published six years later by the College of Policing in 2014. Indeed, the College of Policing did not even exist in 2008. In addition, the scope of the Code of Ethics is limited to the discharge of their functions by chief officers and the Code of Ethics expressly provides that in "misconduct proceedings … the formal wording of the [2012 Regulations] will be used"; see para 59 above.

102. Fifth, we reject Mr Perry's submission that the Standard of Professional Behaviour as to the use of force in the 2008 and 2012 Regulations should be interpreted in a way to achieve coherence with the 1999 and 2004 Regulations and with para 4.4 of the Code of Ethics issued in 2014. We accept that the 1999 and 2004 Regulations applied the criminal law test. We also accept that para 4.4 of the Code of Ethics incorporates the criminal law test into the code. We disagree with the intervention on behalf of the College of Policing that para 4.4 of the Code of Ethics simply gives guidance to officers as to how they will be expected to explain their

behaviour if they use force. We also disagree with the Court of Appeal at para 47 that paragraph 4.4 "does not address the question of the criminal law subjective test versus the civil law objective test for self-defence". Rather, in agreement with the Divisional Court at para 67, we consider that para 4.4 of the Code of Ethics does incorporate into the code the criminal law test so that "[w]hat is required to justify the use of force [according to the code] is an honestly held belief at the time …". As explained by Flaux LJ if "it had been intended to apply the civil law objective test, [para 4.4 of the code] 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'."

103. However, the search for coherence cannot override the true interpretation of the 2008 and 2012 Regulations nor can it ignore the fundamental shift brought about in the 2008 Regulations. We consider that para 4.4 of the Code of Ethics is wrong and misleading as it does not reflect the test contained in the 2008 and 2012 Regulations. The appellant's search for coherence is simply another way of impermissibly relying on the Code of Ethics, issued in 2014, as an aid to the true interpretation of the 2008 Regulations.

104. Sixth, the true interpretation of the Standard of Professional Behaviour as to the use of force in the 2008 Regulations cannot be altered by the 2014 Guidance. We accept, for instance, that there is an obligation on the Director General of IOPC to have regard to the 2014 Guidance which obligation includes informing any assessment or judgment of conduct by reference to the Code of Ethics when deciding if formal action is to be taken under the 2012 Regulations, see para 69 above. However, the obligation to have regard to the 2014 Guidance cannot mean that the Director General can disapply the 2012 Regulations or that he should be informed by para 4.4 of the Code of Ethics which is wrong and misleading. Finally, the 2014 Guidance expressly provides that it "is not a definitive interpretation of the relevant legislation"; see paras 62-69 above.

105. Seventh, we reject the submission that the test to be applied in England and Wales under the 2008 or 2012 Regulations is informed by the different provisions governing or relating to police disciplinary proceedings in Northern Ireland and in Scotland.

106. The regulations currently in force in Northern Ireland are the Police (Conduct) Regulations (Northern Ireland) 2016 (SI 2016/41(NI)). These regulations were made by the Department of Justice (a Department in the devolved administration) in exercise of the powers conferred by sections 25, 26 and 59(8) of the Police (Northern Ireland) Act 1998. The standard of conduct in relation to the use of force is found in article 4 of the

Code of Ethics as scheduled to the regulations. The appellant refers in particular to article 4.4 which provides that:

> "A police officer shall discharge a firearm only where the officer honestly believes it is absolutely necessary to do so in order to save life or prevent serious injury, unless the discharge is for training purposes or the destruction of animals. (Sourced from: European Court of Human Rights: *Andronicou and Constantinou v Cyprus* (1997) 25 EHRR; Article 9 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.)"

Mr Perry submits, and we agree, that this reflects the criminal law test in relation to disciplinary proceedings in Northern Ireland concerning the discharge of a firearm. However, there is no requirement for a consistent approach throughout the United Kingdom. We consider that the regulation in force in Northern Ireland can cast no light on the interpretation of the standard applicable in England and Wales.

107. The regulations currently in force in Scotland are the Police Service of Scotland (Conduct) Regulations 2014 (SI 2014/68) which list at Schedule 1 the 'Standards of Professional Behaviour'. The 'use of force' standard states: "Constables use force only to the extent that it is necessary, proportionate and reasonable in all the circumstances". It appears that the Scottish regulations have simply followed the example of the 2008 and 2012 Regulations in England and Wales. Once again, the Scottish regulations are of no assistance in the interpretation of the regulations in respect of England and Wales.

108. Eighth, we reject the submission that the test to be applied in England and Wales is informed by article 2 of the European Convention on Human Rights ("the ECHR").

109. Article 2 of the ECHR provides that everyone's right to life shall be protected by law. Article 2(2) provides in relevant part:

> "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
>
> … In defence of any person from unlawful violence; ..."

110. It is now established that the criminal standard of self-defence in domestic law is compatible with article 2 (*Da Silva v United Kingdom*, (2016) 63 EHRR 12, paras 244 – 256). The Grand Chamber of the European Court of Human Rights stated (at paras 251-252):

> "251. It is clear both from the parties' submissions and the domestic decisions in the present case that the focus of the test for self-defence in England and Wales is on whether there existed an honest and genuine belief that the use of force was necessary. The subjective reasonableness of that belief (or the existence of subjective good reasons for it) is principally relevant to the question of whether it was in fact honestly and genuinely held. Once that question has been addressed, the domestic authorities have to ask whether the force used was 'absolutely necessary'. This question is essentially one of proportionality, which requires the authorities to again address the question of reasonableness: that is, whether the degree of force used was reasonable, having regard to what the person honestly and genuinely believed.
>
> 252. So formulated, it cannot be said that the test applied in England and Wales is significantly different from the standard applied by the Court in the *McCann* judgment and in its post-*McCann* case-law. Bearing in mind that the Court has previously declined to find fault with a domestic legal framework purely on account of a difference in wording which can be overcome by the interpretation of the domestic courts, it cannot be said that the definition of self-defence in England and Wales falls short of the standard required by art. 2 of the Convention." (footnotes omitted).

111. The fact that the criminal law standard in the law of England and Wales complies with article 2 of the ECHR does not cast any light on the issue which falls for decision on this appeal, which is whether domestic law should apply a different or higher standard for the purpose of police disciplinary proceedings. It is clear that the application of the civil standard in police disciplinary proceedings would not give rise to any violation of article 2 of the ECHR. Furthermore, it would not give rise to any violation of article 6 of the ECHR. As a result, the Strasbourg jurisprudence does not assist in relation to the present issue.

112. We conclude that the test to be applied in disciplinary proceedings in relation to the use of force by a police officer in self-defence is the civil law test. The IOPC applied the correct test when directing the MPS to bring disciplinary proceedings against the appellant. Accordingly, the appeal should be dismissed.

Further issues

(a) Training

113. In the final paragraph of its judgment in the present case (para 53) the Court of Appeal observed:

> "We might mention in closing the suggestion that our conclusion is unfair because W80's training has been conducted on the basis that the criminal test for self-defence will apply in misconduct hearings. It will be more appropriate to make this point in mitigation, if that becomes necessary."

114. We should make clear that we express no opinion in relation to the merits of the incident which resulted in the killing of Mr Baker. We agree with the Court of Appeal that the fact that an officer's training may have been conducted on the mistaken basis that the criminal law test applies in police disciplinary proceedings is not of itself a matter capable of affecting the substance of the justification of self-defence. However, we consider that the training which an officer has received may be capable of affecting the claimed justification. It will be possible that an officer's training will be relevant to the trigger issue, namely whether the circumstances as the officer understood them to be rendered it reasonable or necessary for him to use force, or to the response issue, namely whether his response involved the use of a proportionate or reasonable amount of force to the threat that the officer believed he faced. This will be a matter to be decided having regard to the particular circumstances of a given case. Furthermore, the training an officer has received may have an important bearing on the decision whether his conduct constitutes misconduct or gross misconduct under the Conduct Regulations. As a result, the relevance of training is not necessarily limited to mitigation.

(b) Intelligence

115. In his speech in *Ashley* Lord Scott observed (at para 20) that, while he would dismiss the Chief Constable's appeal against the adoption by the Court of Appeal of

solution 2, it had not been contended that solution 3 might be the correct solution in a civil case. He nevertheless thought that that solution had a good deal to be said for it. If there was in fact no risk or imminent danger from which an assailant needed to protect himself, Lord Scott had difficulty in seeing on what basis the right of the victim not to be subjected to physical violence could be defeated on the ground of mistake made by the assailant, whether or not reasonably made. It was in this context that he observed:

> "If the mistake were attributable in some degree to something said to [the assailant] by a third party, particularly if the third party owed a duty to take care that information he gave was accurate, the rules relating to contributions by joint or concurrent tortfeasors might come into play."

However, as solution 3 had not been contended for and had not been fully argued, it was not open to the House to conclude that it was the correct solution. Accordingly, he regarded the point as remaining open.

116. In the present proceedings, it has not been suggested by any party that solution 3 should apply to issues of self-defence in police disciplinary proceedings. However, this passage in the judgment of Lord Scott in *Ashley* does identify an issue of considerable importance in the context of police disciplinary proceedings. Given that the applicable test of self-defence will be the civil law test, to what extent may an officer who has used force rely on intelligence provided to him in advance by a third party when seeking to justify his conduct? What will be the position of an officer who has acted on intelligence which subsequently proves to have been defective?

117. An analogous issue arose in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 where Lord Hope set out (at p 298 B-E) the subjective and objective tests in relation to an arrest under section 12(1) of the Prevention of Terrorism (Temporary Provision) Act 1984. He stated:

> "My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the

> application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.
>
> This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based upon information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."
>
> (See also *Logan v The Chief Constable of the Police Service of Northern Ireland* [2017] NIQB 70 at paras 24-31; *Betaudier v Attorney General of Trinidad and Tobago* [2021] UKPC 7 at paras 11-14.)

118. Under the civil law test of self-defence, the necessity, proportionality and reasonableness of the officer's conduct will be assessed having regard to his honest and reasonable belief as to the situation which confronted him. His conduct must be assessed on the basis of the information of which he was aware at the time. To employ Lord Hope's expression, the application of the test does not require the tribunal to look beyond what is in the mind of the officer. An officer acting on the basis of

defective intelligence would not necessarily be acting unreasonably in doing so provided he had no reason to suspect that the information was unreliable. Thus, for example, if it were subsequently established that the intelligence was false and its source thoroughly unreliable, this would not have any bearing on the reasonableness of the officer's conduct unless he had reason to doubt its reliability at the time of acting. Professional standards within police forces depend on the ability of officers to rely on properly communicated intelligence, save in circumstances, which are likely to be most exceptional, where they have reason to doubt its reliability.

(c) Urgent need for clarity

119. Finally, we express our concern at the proliferation of legislation and guidance in relation to the use of force by police officers which has resulted in unnecessary complexity and in obscuring the fundamental principles which must be applied. This is an area of the law of vital importance to the public and to the police. It is essential that the public and the police should be informed in straightforward terms of the law which applies. We hope that it will now be possible to recast legislation and guidance so as to achieve this result.

Overall conclusion

120. We would dismiss the appeal.