

## Defenceless Castles:

### The use of Grossly Disproportionate force by Householders in light of *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin)

#### Abstract:

On 16 January 2016, the Divisional Court gave judgment in the case of *Collins*. In the judgment, Sir Brian Leveson P provided an authoritative statement as to the meaning of ‘grossly disproportionate’ within the law of self-defence for householders. First introduced in 2013, clarity on the meaning of the phrase has been long awaited by both the academic and the practitioner. The Court’s interpretation of the phrase has disturbed the understanding of many and will cause many editions of upcoming Criminal Law textbooks to be re-written on this point. This paper will examine whether the Divisional Court was correct in its interpretation by attempting to find the true intention of Parliament in drafting the legislation. The paper shall also examine how the householder defences operates in modern practice and its suitability to the law of self-defence.

#### Keywords:

Householders, self-defence, gross disproportionality, intoxication

## Introduction:

This comment is concerned with the Divisional Court's judgment in *Collins*<sup>1</sup> and its effect on the use of self-defence in 'householder cases'.<sup>2</sup>

The article considers the matters and issues that arose in the case itself; namely, the interpretation of 'grossly disproportionate' in the context of householder cases.<sup>3</sup> It is to be noted that although remarks are made as to the correctness of the decision itself, this part of the comment will focus more on whether the Divisional Court has interpreted the provision in accordance with the intention of Parliament. Further, this article also raises questions of concern that were outside the scope of the facts of the case itself; namely, how the defence operates when the householder concerned is intoxicated and whether the defence is appropriate in practice by allowing the defence to be availed for the protection of oneself but not his property.

## Legislative Background:

There are two main justificatory defences within the criminal law: public and private defence. Public defence is concerned with allowing an individual to use force for the prevention of a crime or effecting a lawful arrest, and is provided for on a statutory footing by section 3 of the Criminal Law Act 1967,<sup>4</sup> whereas private defence is concerned with defence of the individual himself or herself, another person or their property and has developed through the common law but is now found largely in statute.<sup>5</sup> It is the private defence of self-defence that we are concerned with.

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<sup>1</sup> *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin), [2016] WLR (D) 13.

<sup>2</sup> Criminal Justice and Immigration Act 2008, s 76(8A).

<sup>3</sup> The comment will focus briefly on the arguments proceeded with under Article 2 of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR) as the author feels such is outside the scope of this particular discussion.

<sup>4</sup> Its relevance can, of course, be questioned in practice as a result of the decision in *R v Duffy* [1967] 1 QB 63 (CCA) in which, despite the enactment of the 1967 Act, the courts continued to talk in terms of the common law rules.

<sup>5</sup> Criminal Justice and Immigration Act 2008, s 76.

## *Criminal Justice and Immigration Act 2008*

The first wave of legislative reform to the notion of self-defence came with section 76 of the Criminal Justice and Immigration Act 2008, which came into force on 14 July 2008. This Act restates the common law on public and private defence. Section 76(9) provides that ‘this section, except so far as making different provision for householder cases, is intended to clarify the operation of the existing defences mentioned in sub-section (2).’ This means that section 76 does not place self-defence on a statutory footing, but rather, provides a ‘gloss’<sup>6</sup> on the common law position. It remains a common law defence and does not change the current test that allows the use of reasonable force, which is still governed by the seminal case of *Palmer v R*<sup>7</sup> and the so called ‘trigger’ and ‘response’ requirements. Indeed, such was made clear by the Court of Appeal in *R v Keane; R v McGrath*,<sup>8</sup> where it was said that section 76 is not an exhaustive statement of the law, but of the basic principles of the common law.

One such basic principle is that a defendant, if voluntarily intoxicated, cannot rely on a mistaken belief induced by intoxication. This common law principle, as laid down in *O’Grady*<sup>9</sup> and affirmed more recently in *Hatton*,<sup>10</sup> has also been placed on a statutory basis by section 75(5), which restates clearly that a defendant may not avail a defence where his mistake was brought about by his voluntary intoxication. A key element of this comment will be to question whether this provision is appropriate and applicable to the ‘householder defence’.

It is important to note that the statutory amendments had no effect on the burden of proof in such cases with the common law decisions of *Lobell*<sup>11</sup> and *Wheeler*<sup>12</sup> maintaining the established approach of the courts, namely that before the issue of self-defence is left to the jury, there must be ‘some evidence’,<sup>13</sup> whether from the prosecution or the defence, which, if accepted, could raise a *prima facie* case of self-defence and that self-defence is not a defence

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<sup>6</sup> Explanatory Notes to the Criminal Justice and Immigration Act 2008, para 532.

<sup>7</sup> *Palmer v R* [1971] AC 814 (PC); approved in *R v Mclnnes* [1971] 1 WLR 1600 (CA).

<sup>8</sup> *R v Keane; R v McGrath* [2010] EWCA Crim 2514, [2011] Crim LR 393 [6] (Hughes LJ).

<sup>9</sup> *R v O’Grady* [1987] QB 995 (CA).

<sup>10</sup> *R v Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr App R 247.

<sup>11</sup> *R v Lobell* [1957] 1 QB 547 (CCA).

<sup>12</sup> *R v Wheeler* [1967] 1 WLR 1531 (CA).

<sup>13</sup> *Lobell* (n 11) 551 (Goddard CJ).

of which ‘any onus rests upon the accused, but are matters which the prosecution must disprove as an essential part of the prosecution case before a verdict of guilty is justified.’<sup>14</sup>

### *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

The subsequent reform came about as a result of section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which inserted, *inter alia*, section 76(6A) into the 2008 Act amending the position on the duty to retreat.<sup>15</sup> This idea of a ‘duty’ to retreat is of extreme practical significance when one considers householders and how significant a factor it would be that a householder has decided not to retreat, for example, to a locked room. This will feature as part of the discussion on the ‘ambit’ of the defence below.

### *Crime and Courts Act 2013*

The most recent legislative reform, and most important for present purposes, is the special provision made for ‘householder’ cases as introduced by the amendments under section 43 of the Crime and Courts Act 2013. This section inserted a new category of self-defence, known as ‘householder’ cases, in sections 76(5A) and (8A)-(8F). In particular, section 43 of the legislation provides:

- (1) Section 76 of the Criminal Justice and Immigration Act 2008 (use of reasonable force for purposes of self-defence etc.) is amended as follows.
  - (2) Before subsection (6) (force not regarded as reasonable if it was disproportionate) insert—  
“(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.”
  - (3) In subsection (6) at the beginning insert “In a case other than a householder case,”.
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Section 43(2) therefore had the effect of introducing a new category of self-defence by providing that force used by householders will not be reasonable if it is ‘grossly

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<sup>14</sup> *Wheeler* (n 12) 1533 (Winn LJ).

<sup>15</sup> Now there is no such duty to retreat, but rather, it will be considered as ‘a factor to be taken into account’ – s 148(3).

disproportionate'. It is this statement, and its link with 'disproportionate' force in section 76(6), that will be the first issue of this comment to consider. An interesting further addition to the statutory reform of the law came about with section 76(8A)(a) which provides that a householder case is a case where 'the defence concerned is the common law defence of self-defence'. An immediate question arises here as to whether a householder is entitled to avail a defence under section 76 in cases where the force used is not for self-defence, but rather for defence of property. The legislation appears to rule out the possibility of any such defence of property being successful for a householder and this will form another key element of this comment.

### Facts:

At around 3am on 15 December 2013, Denby Collins entered the home of B,<sup>16</sup> a 51-year old builder weighing 15.5 stone. He entered through the unlocked front door. It is unclear for what purpose Collins entered the house, whether it be to steal or to harm the occupants; however, he was found to be in possession of the wife's car keys in his hand and her mobile telephone in his pocket. What his intention was may be a critical distinction that will be made clear below. At this time, in the house were B, the householder, his wife, their three children and three friends. Whilst in the home, Collins proceeded upstairs where he was confronted by one of the children, who chased him downstairs into the living room where B, who had drunk a 'considerable quantity of alcohol',<sup>17</sup> had fallen asleep whilst watching TV. B struggled with Collins and forced him, in a headlock, to the floor.

The police officers noted, upon arrival, that Collins was unconscious, his face was purple in complexion and he was not breathing. An ambulance was called where the paramedics managed to revive Collins. As a result of this restraint, Collins suffered serious personal injury from which he is not expected to recover.<sup>18</sup>

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<sup>16</sup> Whose name was anonymised due to the potential proceedings that may be pending against him.

<sup>17</sup> *Collins* (n 1) [4] (Sir Brian Leveson P).

<sup>18</sup> According to BBC News, Collins still remains in a coma. --'Denby Collins: Challenge to Householder Defence Law Rejected' *BBC News* (Kent, 15 January 2016) <[www.bbc.co.uk/news/uk-england-kent-35325168](http://www.bbc.co.uk/news/uk-england-kent-35325168)> accessed 19 April 2016.

## Background to the Case:

The preliminary issue in this case concerned whether the Crown Prosecution Service (CPS) ought to charge B with an offence against Collins. The following is taken from the judgment of Sir Brian Leveson P in the Divisional Court and explains the approach taken by the CPS:

[10] ... the lawyer concluded that a jury was likely to find that B honestly believed that it was necessary to use force until the police arrived and also that at least one of the purposes for which B used force was to defend himself, it being "beyond any doubt" that he believed Mr Collins to be a trespasser, and that the 'householder' provisions within s. 76 of the 2008 applied. He went on:

"This means that [B] would be acquitted of any offence of violence unless the prosecution proved that the degree of force used was grossly disproportionate. The use of disproportionate force would not be unlawful."

[11] Analysing the circumstances, he concluded that the method of restraint would be viewed as proportionate and that it would be "very difficult" to prove that the continuation of his restraint up until the police arrived would be viewed as being grossly disproportionate. He went on:

"It is difficult for a person in circumstances such as these to measure precisely what level of force is required, and to reiterate, if that person does no more than seems honestly and instinctively to be necessary that is itself potent evidence that the force used was proportionate. In my view a jury, looking at the facts as [B] perceived them to be, are unlikely to conclude that the continuation of this method of restraint was grossly disproportionate."

As a result, the Claimant submitted two grounds under Judicial Review proceedings to the High Court:

1. a declaration that section 76(5A) was incompatible with Article 2 of the ECHR; and
2. that the CPS had erred in their decision to not prosecute the homeowner.<sup>19</sup>

In summary, the Court found that there was no breach of Article 2 in that the provision under section 76(5A) was compatible with the Claimant's right to life, which included his right to not suffer threats to life.<sup>20</sup>

## The Judgment

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<sup>19</sup> This claim was eventually abandoned by the Claimant and the case dealt solely with the question of Article 2.

<sup>20</sup> *Collins* (n 1) [36] (Sir Brian Leveson P).

In giving the judgment of the Court, Sir Brian Leveson P stated that:

[23] The effect and no doubt purpose, of s. 76(5A) is to allow for a discretionary area judgment in householder cases, with a different emphasis to that which applies in other cases.

[33] ... On a proper construction of s.76(5A), its true meaning and effect is:

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

[34] This represents no more than a refinement to the common law on self-defence. Thus, I do not accept that the construction placed on s.76(5A) by the editors of *Archbold*, 2016 at para. 19-48a (to the effect that force in a householder case is only to be regarded as unreasonable if it was grossly disproportionate) represents an accurate statement of law. The position is better expressed by the editors of *Blackstone*, 2016 at para A3.63 which makes it clear:

The new provision merely affects the interpretation of “(un)reasonable in the circumstances” so that force is not by law automatically unreasonable in householder cases simply because it is disproportionate provided it is not grossly disproportionate.

Sir Brian Leveson, a few paragraphs earlier, noted:

[20] ... s. 76(5A), read together with s. 76(3) and the common law on self-defence, requires two separate questions to be put to the jury in a householder case.<sup>21</sup> Presuming that the defendant genuinely believed that it was necessary to use force to defend himself, these are:

- i) Was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer is “yes”, he cannot avail himself of self-defence. If “no”, then;
- ii) Was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he has a defence. If it was unreasonable, he does not.

On that basis, he concluded (at [70]), section 76(5A):

... does not extend the ambit in law of the second limb of self-defence but, properly construed, provides emphasis to the requirement to consider all the circumstances permitting a degree of force to be used on an intruder in householder cases which is reasonable in all the circumstances (whether that degree of force was disproportionate or less than

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<sup>21</sup> Which needs to be considered disjunctively ([22]).

disproportionate). In particular, it does not alter the test to permit, in all circumstances, the use of disproportionate force .... Neither does the provision offend Article 2 of the ECHR.

Cranston J agreed with the President between [72]-[74].

### Comment

#### *Interpretation of 'grossly disproportionate'*

The result of *Collins* is that Parliament must have intended section 76(5A) to be interpreted so that householders' actions must still be deemed reasonable according to the arbiters of fact before they may rely on the defence.

The decision, itself, is no doubt correct. It makes sense that householders have that extra margin of appreciation in defending themselves, their homes,<sup>22</sup> and their loved ones; however, they ought not to have the ability to act in any way they choose. To state that a householder, so long as they are not acting in a 'grossly disproportionate' manner, is acting reasonably, is absurd and open to abuse. Take, for example, the infamous case of *Martin*<sup>23</sup> where Tony Martin, a Norfolk farmer and householder, was convicted of murder having had his actions, in shooting two intruders as they ran from the home, declared excessive.<sup>24</sup> No reliance, therefore, could be placed on self-defence.<sup>25</sup> *Martin* arose before the 2013 Act introduced the 'householder' defence, however it can be questioned, as Loveless has done: 'would a future Tony Martin now be acquitted of murder?'<sup>26</sup> It is contended that as a result of the decision in *Collins*, Martin would remain, under the new law, unable to rely upon self-defence given that his actions were excessive. In *Martin*, the two intruders were running from the home. They offered no threat or violence to Martin or his family, nor was there any chance they were likely to pose a threat to the health of Martin or his family. The need for self-defence had 'already passed'<sup>27</sup> and even with the greater leniency offered by the 2013 Act, the force used by Martin would still, as a result of *Collins*, be considered excessive and unreasonable.

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<sup>22</sup> Which is debatable given the Act specifically refers only to the use of 'self-defence' in householder cases – s 76(8A) (see below 'Householders and the ambit of the defence').

<sup>23</sup> *R v Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1.

<sup>24</sup> In accordance with *R v Clegg* [1995] 1 AC 482 (HL).

<sup>25</sup> Later replaced with a conviction for voluntary manslaughter after fresh evidence gave rise to the partial defence of diminished responsibility.

<sup>26</sup> Janet Loveless, *Complete Criminal Law* (5th edn, OUP 2016) 446.

<sup>27</sup> *Clegg* (n 24) 493 (Lord Lloyd).



As a result, it is a sensible interpretation of the Act by the Court to require section 76(5) to be read in line with the common law and the restatement of such in section 76(3). Indeed, as Loveless comments, to allow householders to act in a particularly violent way would create a ‘potentially dangerous message: Householders can do whatever they consider necessary to an intruder.’<sup>28</sup>

While the correctness of the decision is not a matter of contention, questions remain as to whether the Divisional Court was accurate in its reasoning.

In order to fully dissect the decision in *Collins*, it would appear that the debate in the interpretation of section 76(5A) focuses on two main questions, namely:

- (i) Was it Parliament’s intention that any force used by a householder, so long as it was not ‘grossly disproportionate’, will be automatically reasonable force for the purpose of the Act?; or
- (ii) Was it Parliament’s intention that any force used by a householder, that fell short of that which was ‘grossly disproportionate’, must still be deemed reasonable by the arbiters of fact in line with the common law position?

In order to answer these questions, we must first contextualise the purpose and aims of the amendment.

Although the Bill to reform the law was first introduced in the House of Lords in May 2012, during their time in opposition the Conservative Party had lobbied for such reform for some time. In 2009, Chris Grayling, then the Shadow Home Secretary, wrote in *The Sunday Telegraph* that ‘prosecutions and convictions should only happen in cases where courts judge the actions involved to be “grossly disproportionate”.’<sup>29</sup> Further, in 2012, Chris Grayling, then the Justice Secretary, wrote in *The Telegraph* how the current laws were uncertain with there being a ‘need to get rid of doubts in this area once and for all.’<sup>30</sup>

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<sup>28</sup> Loveless (n 26).

<sup>29</sup> Chris Grayling, ‘A Tory government would seek to protect the rights of the victim’ *The Sunday Telegraph* (London, 19 December 2009) <[www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-see-to-protect-the-rights-of-the-victim.html](http://www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-see-to-protect-the-rights-of-the-victim.html)> accessed 19 April 2016.

<sup>30</sup> Chris Grayling, ‘How I’m fulfilling my promise on new rights for householders’ *The Telegraph* (London, 24 November 2012) <[www.telegraph.co.uk/news/politics/9700895/Chris-Grayling-How-Im-fulfilling-my-promise-on-new-rights-for-householders.html](http://www.telegraph.co.uk/news/politics/9700895/Chris-Grayling-How-Im-fulfilling-my-promise-on-new-rights-for-householders.html)> accessed 19 April 2016.

It was as a result of public distress caused by the prosecution of several householders,<sup>31</sup> most notably Tony Martin,<sup>32</sup> and, as Child and Ormerod argue, ‘inaccurate media comments’<sup>33</sup> that led to the introduction of the Crime and Courts Bill to the House of Lords. The campaign group, Liberty, were strong in their criticisms of Mr Grayling stating that his comments were ‘simply misleading’<sup>34</sup> and that the purpose upon which the Act was based was ‘grim, headline chasing at its very worst.’<sup>35</sup>

As a result of the public outcry in this area, many Conservative backbenchers took the opportunity to argue for a fundamental reform of this area. For example, Priti Patel, Conservative MP, argued in *The Sunday Telegraph* that:

Homeowners must be allowed to use force to defend themselves, their family and property from burglars. It is the burglar who is in the wrong for violating the home of their victim and families need greater legal protection so they can be confident defending themselves.

It’s time the criminal justice system stopped treating criminals like victims and victims like criminals.<sup>36</sup>

Indeed, an ICM poll in 2010 for *The Sunday Telegraph*<sup>37</sup> suggested that 79 per cent of all voters would support changing the legal test from ‘reasonable force’ to ‘grossly disproportionate’ force.<sup>38</sup> The campaign was furthered by the presence of numerous celebrities who backed the proposal to reform the law, including Myleene Klass, the broadcaster and musician, who was told by police that when confronted by intruders, she should not have waved a knife at them on her property.<sup>39</sup>

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<sup>31</sup> In 2005, the DPP, Ken Macdonald QC, provided a list of examples of cases which resulted in no prosecutions being brought and those where prosecutions were brought. See Ken Macdonald, ‘Homeowners and self-defence - DPP issues further details of cases’ *CPS Latest News* (13 January 2005) <[www.cps.gov.uk/news/latest\\_news/106\\_05/](http://www.cps.gov.uk/news/latest_news/106_05/)> accessed 19 April 2016.

<sup>32</sup> *Martin* (n 23).

<sup>33</sup> John Child and David Ormerod, *Smith & Hogan's Essentials of Criminal Law* (OUP 2015) 594.

<sup>34</sup> Liberty, *Liberty's Report Stage Briefing on the Crime and Courts Bill in the House of Commons* (March 2013) 10. <[www.liberty-human-rights.org.uk/sites/default/files/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf](http://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf)> accessed 19 April 2016.

<sup>35</sup> *ibid.*

<sup>36</sup> Patrick Hennessy, ‘Conservative MPs demand greater rights for householders against burglars’ *The Sunday Telegraph* (London, 8 September 2012) <[www.telegraph.co.uk/news/politics/9530564/Conservative-MPs-demand-greater-rights-for-householders-against-burglars.html](http://www.telegraph.co.uk/news/politics/9530564/Conservative-MPs-demand-greater-rights-for-householders-against-burglars.html)> accessed 19 April 2016.

<sup>37</sup> Which had just launched a “Right to Defend Yourself” campaign. Patrick Hennessy and Melissa Kite, ‘Tories back new rights to help home owners protect themselves from burglars’ *The Sunday Telegraph* (London, 19 December 2009) <[www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html](http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html)> accessed 19 April 2016.

<sup>38</sup> Patrick Hennessy, David Barrett and Rebecca Lefort, ‘Overwhelming support for campaign to protect householders who confront intruders’ *The Sunday Telegraph* (London, 16 January 2010) <[www.telegraph.co.uk/news/politics/7004471/Overwhelming-support-for-campaign-to-protect-householders-who-confront-intruders.html](http://www.telegraph.co.uk/news/politics/7004471/Overwhelming-support-for-campaign-to-protect-householders-who-confront-intruders.html)> accessed 19 April 2016.

<sup>39</sup> *ibid.*

Further, in 2009, the then Lord Chief Justice, Lord Judge, made clear that burglary is a personal offence which can have stark effects on the householder of the property. In particular, Lord Judge stated in *R v Saw* that:

... burglary of a home is a serious criminal offence. The principle which must be grasped is that when we speak of dwelling house burglary, we are considering not only an offence against property, which it is, but also, and often more alarmingly and distressingly, an offence against the person.<sup>40</sup>

Such an approach makes sense in that ‘there is a longstanding, almost intuitive, belief that our homes should be our castles. The concept suggests impregnability and defiance against intrusion.’<sup>41</sup> Indeed it was Sir Edward Coke in 1628 who stated that our homes should be our safest ‘place of refuge’,<sup>42</sup> where above all householders should enjoy secure tranquillity and untroubled peace.

It must be appreciated that cogent arguments were also made against law reform. Significantly, Paul Mendelle, QC, then the chairman of the Criminal Bar Association, said that a change to allow “disproportionate” force would encourage vigilantism.<sup>43</sup> In particular, he is quoted as saying:

The law should always encourage people to be reasonable, not unreasonable; to be proportionate, not disproportionate,’ adding that ‘the present law worked perfectly well and was well understood by juries.’<sup>44</sup>

Indeed ten years earlier, Dennis had warned of the dangers of extending the householders right to use force in self-defence too far. In particular, he stated:

If an Englishman should be allowed to kill in defence in his castle--as some appear to claim--then the aggressive armed burglar can be safely despatched, but so also can the ten-year-old boy found stealing apples from the kitchen.<sup>45</sup>

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<sup>40</sup> *R v Saw and others* [2009] EWCA Crim 1, [2009] 2 Cr App R (S) 54 [6].

<sup>41</sup> *ibid* [6] (Judge CJ).

<sup>42</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown. And Criminal Causes* (E. and R. Brooke, Bell-Yard, near Temple-Bar 1628) 83.

<sup>43</sup> According to Cheng and Hoekstra, ‘Stand Your Ground’ laws in US states have failed to deter violent burglaries, and instead, have produced an 8 per cent increase in homicides. Cheng Cheng and Mark Hoekstra, ‘Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?: Evidence from Expansions to Castle Doctrine’ (2013) 48(3) JHR 821, 823.

<sup>44</sup> Frances Gibb, ‘Fears of ‘licence to kill’ as Tories bid to change self-defence law’ *The Times* (London, 25 January 2010) <[www.thetimes.co.uk/tto/news/uk/article1946724.ece](http://www.thetimes.co.uk/tto/news/uk/article1946724.ece)> accessed 19 April 2016.

<sup>45</sup> Ian Dennis, ‘What should be done about the law of self-defence?’ [2000] Crim LR 417, 417.

The necessity of the amendment was also questioned by Sadiq Khan, then the Shadow Justice Secretary, who stated that whilst the Opposition would not oppose the new Clause, also questioned the need for the change to the law, arguing:

It is widely accepted by those at the coal face that the law on self-defence works pretty well and it is unclear in many quarters why the law would need strengthening.<sup>46</sup>

Indeed, the necessity for the amendment and the draughtsmanship of this legislation can be brought into question on two grounds. First, it can be questioned whether there really a need for such an amendment to the existing legislation. It could be argued that juries are capable of answering the question as to whether conduct was disproportionate by use of section 76(6) in accordance with section 76(3) under the 2008 Act. Further, regardless of their direction on ‘disproportionate’ force and ‘grossly disproportionate’ force by the trial judge, the jury remain likely to rally behind a defendant who has battered an intruder and sympathise with him despite the extent of the intruder’s injuries. Secondly, it might be asked whether the true purpose of the amendment was to introduce clarity to the law on householder protection and to allow for greater latitude in such cases, as was argued by the Government, or whether its apparent political appeal was the real driver for reform. As noted above, there was a great deal of public outcry on this matter and the Government was keen to exhaust the flames created by the media driven claim of a rise in householder prosecutions. To consider this amendment without regard to the political context it came about in would be naïve.

As discussed above, section 43 had the effect of introducing a new concept into the law of self-defence, namely ‘grossly disproportionate’ force. This gave greater leeway, or as the Court described it in *Collins* ‘a discretionary area of judgment’,<sup>47</sup> to the householder in defending themselves. This had the result that householders were to be treated differently from all other cases involving non-householders.

The aims of the Bill were to offer greater protection to householders and to make a statement that householders have a right to defend themselves. In such a situation, they are to be considered the victim; not the intruder. Indeed at the Second Reading in the House of Commons, Theresa May stated that the aim of the amendment was to ‘ensure that the law is on the side of people who defend themselves when confronted by an intruder in their home.’<sup>48</sup> On

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<sup>46</sup> Legal Aid, Sentencing and Punishment of Offenders HC Bill (2011-12), 2nd Sitting: House of Commons (1 November 2011) cl 859.

<sup>47</sup> *Collins* (n 1) [23] (Sir Brian Leveson P).

<sup>48</sup> Crime and Courts HL Bill (2012-13), 2nd Reading: House of Commons (14 January 2013) cl 641.

that basis, could it be said with authority that Parliament did intend that actions taken by a householder would be considered reasonable, so long as it was not ‘grossly disproportionate’? We shall return to this question at a later stage.

Turning to the academic literature on this point, Monaghan comments that as a result of the amendment, householders will ‘*only* use more than reasonable force if the force used was *grossly* disproportionate.’<sup>49</sup> Likewise, Child and Ormerod comment that ‘Householders, then, may employ ‘disproportionate’ force in defence of themselves... as long as that force was not ‘grossly disproportionate’.’<sup>50</sup> Neither of these statements include a view or interpretation that the conduct must still be declared reasonable according to the arbiters of fact. Further, Herring argues that ‘the defendant’s use of force will *only* be unreasonable if it is ‘grossly disproportionate.’<sup>51</sup>

This is furthered once more by Dobinson and Elliott who argue that:

Under s. 76 of the 2008 Act, as amended, disproportionate force in a householder case will now be reasonable in the circumstances as the householder believes them to be and will *only* be unreasonable if grossly disproportionate.<sup>52</sup>

There is, then, obviously no surprise that practitioners were in the same boat as their academic counterparts. This is demonstrated by the stark contrast in opinions expressed by the editors of Archbold and Blackstone’s, as Sir Brian Leveson noted in his judgment.<sup>53</sup>

For sake of clarity, the editors of Archbold stated that:

What was intended presumably was that force used in a householder case is *only* to be regarded as unreasonable if it was grossly disproportionate,<sup>54</sup>

whilst the editors of Blackstone’s contended:

Thus it seems now that a householder who uses what is in fact regarded as disproportionate (as opposed to grossly disproportionate) force in self-defence may be found nevertheless to have used reasonable force in the circumstances as he believed them to be. It should also be noted, however, that s. 76(5A) does not actually dictate this result in every case; it simply says that grossly disproportionate force is not reasonable, rather than saying that disproportionate force (falling short of grossly disproportionate) is automatically

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<sup>49</sup> Nicola Monaghan, *Criminal Law Directions* (4th edn, OUP 2016) 385 (emphasis added).

<sup>50</sup> Child and Ormerod (n 33).

<sup>51</sup> Jonathan Herring, *Criminal Law* (7th edn, OUP 2016) 636 (emphasis added).

<sup>52</sup> Ian Dobinson and Edward Elliott, ‘A Householder’s Right to Kill or Injure an Intruder under the Crime and Courts Act 2013: An Australian Comparison’ (2014) *J Crim L* 80, 94 (emphasis added).

<sup>53</sup> *Collins* (n 1) [34] (Sir Brian Leveson P).

<sup>54</sup> James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 2016* (Sweet & Maxwell 2016) para 19-48a (emphasis added).

reasonable. The fundamental test still remains that in s. 76(1)(b), i.e. whether the force used was 'reasonable in the circumstances'. The new provision merely affects the interpretation of '(un)reasonable in the circumstances' so that force is *not by law automatically unreasonable* in householder cases simply because it is disproportionate, provided it is not grossly disproportionate.<sup>55</sup>

With this understanding of the academic commentary, and taking into account the political context of the amendment, we can now turn our attention back to the questions asked towards the start of this commentary with the aim of finding whether it was Parliament's intention that any force used by a householder, so long as it was not 'grossly disproportionate', would automatically be deemed as 'reasonable force' for the purpose of the Act. It appears that the use of the word 'grossly' adds something to the underlying proportionality requirement. It is difficult enough for a jury to contemplate the notion of 'reasonableness',<sup>56</sup> however, it appears even more complex for a jury to appreciate the distinction between disproportionate and grossly disproportionate. Other than a basic understanding that the word 'grossly' allows the householder to go 'one step further' than a non-householder in self-defence, what does the word actually mean? Sir Brian Leveson made clear in his judgment at [18] that:

The standard remains that which is reasonable... The test in the statute is not whether the force used was proportionate, disproportionate or grossly disproportionate.

As the defendant argued before the Court, there is a clear distinction between the tests in sections 76(5A) and 76(6). Given such a clear distinction of wording between 'disproportionate' and 'grossly disproportionate' force, surely Parliament had intended to alter the common law in respect of householders? This would reflect the aims and objectives of the amendment as outlined above. Likewise, such would complement the understanding of the academic opinion on the subject prior to the decision in *Collins*. Frankly, on the face of the statute, it appears that if the force is deemed not to be grossly disproportionate, then it is reasonable. Parliament has set out to specifically provide a unique defence for householders, and householders alone. *Prima facie*, on the wording of the statute, householders can use reasonable force, unreasonable force, disproportionate force and excessive force, so long as it is not grossly disproportionate force. Indeed, one could further this with the argument that if Parliament had intended section 76(5A) to operate in accordance with the common law, they would have said so. In fact, Allen argues that 'It may be that Parliament intended some different

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<sup>55</sup> David Ormerod (ed), *Blackstone's Criminal Practice 2016* (OUP 2016) para A3.63 (emphasis added).

<sup>56</sup> Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-defence: Anglo-Australian Perspectives' (2013) 77 J Crim L 433.

test to apply'.<sup>57</sup> This would provide support to the Archbold interpretation of 'grossly disproportionate' given that there was the necessity to presume the intention of Parliament. With a lack of express statement as to what is the case, surely Parliament could not have intended it? This can be supported by reference to the Explanatory Notes accompanying the Crime and Courts Act 2013, which states:

Subsection (2) inserts new subsection (5A) of section 76. This provides that in a "householder case", the level of force used by householders when defending themselves from trespassers (or people they believe to be trespassers) will not be regarded as having been reasonable in the circumstances as they believed them to be if that level of force was grossly disproportionate in those circumstances. In other words, it *could* be reasonable for householders to use disproportionate force to defend themselves from burglars in their homes.<sup>58</sup>

The Explanatory Note is not clear on what interpretation should be given to this sub-section. Indeed no express statement is made to indicate that the force used must, nevertheless, still be reasonable in the eyes of the arbiters of fact. Without such an express statement, can it be said to be the intention of Parliament? A key word that can be drawn from the Explanatory Note; however, is that of 'could'. The use of 'could' appears quite intentional on the part of Parliament given its conditional nature and is a strong indicator that Parliament did intend for householders to be restricted in their actions, albeit with a greater latitude of judgment. This is opposed to the use of a more conclusive term, such as 'will' or 'shall'. Had Parliament used more conclusive wording in the Note, it could be said with authority that Parliament intended householders to use whatever force they wished, so long as it was not grossly disproportionate. However, that does not appear to be the case.

Despite the use of 'could' in the Explanatory Note, what is clear as a result of the decision in *Collins*, is that we now have four concepts to use to determine how a householder's potential actions may be treated, namely:

- (a) reasonable;<sup>59</sup>
- (b) proportionate;
- (c) disproportionate; and
- (d) grossly disproportionate.<sup>60</sup>

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<sup>57</sup> Michael Allen, *Textbook on Criminal Law* (13th edn, OUP 2015) 203.

<sup>58</sup> Explanatory Notes to the Crime and Courts Act 2013, para 488 (emphasis added).

<sup>59</sup> According to s 76(3).

<sup>60</sup> Defined by Clare Montgomery QC, counsel for the Claimant, as having 'gone completely over the top'.

On that basis, might it be said with affirmation that Parliament intended this outcome? According to Sir Brian Leveson, as made clear at [18], the test is solely one of reasonableness. However, when a jury is confronted with the question of whether the householder's actions are lawful; they are to consider and decrypt each of those four statements in an attempt to acquit or convict a householder. Indeed as Wake argues:

Perplexed jurors will be required to engage in mental gymnastics in order to determine whether the defendant's conduct is to be regarded as reasonable, disproportionate or grossly disproportionate.<sup>61</sup>

In addition, Miller states that:

Widening the scope with regard to what homeowners can do to intruders only extends the permitted violence – it does not clarify the law further. It is still within the court's discretion to judge what is 'grossly disproportionate' rather than 'reasonable'.<sup>62</sup>

This view is supported by the apparent remit of section 76(5A). It applies only to householders; therefore no person who batters an intruder in the garden will be entitled to rely upon the extra leeway of 'gross' disproportionality.<sup>63</sup> This may require, especially if there is uncertainty as to which defence is being relied upon, the jury to be directed by the judge as to numerous different standards to apply regarding the issue of reasonable force depending on whether the force the householder used was for the purpose of householder self-defence, personal self-defence or prevention of a crime.

Whether this is the test in law, as intended by Parliament, is irrelevant to its apparent operation in practice given the potential sympathy on part of a jury. The key issue, then, is whether it was Parliament's intention that any force used by a householder, providing it fell short of that which was 'grossly disproportionate' must still be deemed reasonable by the arbiters of fact in line with the common law. Much like the argument made above that had Parliament intended section 76(5) to operate in the manner decided in *Collins*, they would have said so, Parliament was not necessarily concerned, in their amendment, with force that falls below 'grossly disproportionate'. The real intention of Parliament appears to be to accord 'a greater degree of

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<sup>61</sup> Wake (n 56) 440.

<sup>62</sup> Sophie Miller, 'Grossly Disproportionate: Home Owners' Legal Licence to Kill' (2013) 77 J Crim L 299, 304.

<sup>63</sup> Which, it is predicted, will lead to many cases contesting whether or not the individual was acting as a 'householder' in the near future. As Allen comments (n 57) 'fine hairs will have to be split to determine whether the defendant was within, or partly within, his dwelling when he used force on the intruder.'



latitude in relation to the degree of force used...<sup>64</sup> It was not to grant a full right to use whatever force they wished. This was the argument expressed by Clare Montgomery QC in the Divisional Court, namely that ‘on its true construction’<sup>65</sup> section 76(5A) does not preclude a householder being regarded as having acted unreasonably where the degree of force used was disproportionate. Such was made very clear in a Ministry of Justice Circular,<sup>66</sup> where section 76(5A) was explained in the following terms (at [10]):

The provision does **not** give householders free rein to use disproportionate force in every case they are confronted by an intruder. The new provision must be read in conjunction with the other elements of section 76 of the 2008 Act. The level of force used must still be reasonable in the circumstances as the householder believed them to be (section 76(3)). Section 76(7) says if people only do what they honestly and instinctively thought was necessary for a legitimate purpose, this will be strong evidence that only reasonable action was taken for that purpose.<sup>67</sup>

This begs the question as to why the Reviewing Officer of the CPS did not consider this Circular in his decision to not prosecute<sup>68</sup> and why Clare Montgomery QC did not refer to such in her submissions to the Court. Naturally, the Circular is not a binding source of authority; however, it is contended that it would have assisted greatly in the process of statutory interpretation taken by Sir Brian Leveson. However, despite the lack of submission on the Circular, Sir Brian Leveson was still able to reach the conclusion that householders are not in a position where they may act in an unreasonable fashion. In particular he states (at [61]):

The effect of s. 76(5A) is not to give householders *carte blanche* in the degree of force they use against intruders in self-defence. A jury must ultimately determine whether the householder’s action was reasonable in the circumstances as he believed them to be.

The Circular, alongside the Explanatory Note, represents strong evidence of Parliamentary intent. With a firm, clear and unambiguous statement in [10] to the effect that householders do not have a free rein, or ‘*carte blanche*’, it could be concluded that this was indeed the will of Parliament.

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<sup>64</sup> *Collins*, (n 1) [32].

<sup>65</sup> *Collins*, (n 1) [17].

<sup>66</sup> MoJ, Circular 2013/02, Use of force in self-defence at place of residence (MoJ, London 2013) (original emphasis).

<sup>67</sup> This Circular is furthered by the Legal Guidance supplied by the CPS which restates the message of para 10 of the Circular. CPS ‘Legal Guidance: Self-Defence and the Prevention of Crime’ *CPS Legal Guidance* <[www.cps.gov.uk/legal/s\\_to\\_u/self\\_defence/](http://www.cps.gov.uk/legal/s_to_u/self_defence/)> accessed 19 April 2016.

<sup>68</sup> Given that the Circular is addressed to the DPP and the Chief Crown Prosecutors.

### *The householder and intoxication*

In light of the above, a further important question arises. How will the idea of gross disproportionality, and the interpretation of such by the Divisional Court, work when one is presented, in practice, with a householder who is intoxicated? A belief, which is genuinely held, may be a mistaken one.<sup>69</sup> However, where the mistake is attributable to voluntarily induced intoxication, no defence is available.<sup>70</sup> Sir Brian Leveson, in his judgment did state:

[30] ... There is much to be said for the proposition that those who go about in public (or anywhere outside their own homes) must take responsibility for their level of intoxication: thus by s. 76(5) of the 2008 Act, a defendant cannot rely on any mistaken belief attributable to intoxication that was voluntarily induced. Why that should be so in the defendant's own home in circumstances where he is not anticipating any interaction with a trespasser is, perhaps, a more open question but that remains part of the test even in a householder case.

The householder in *Collins* had drunk a 'considerable quantity of alcohol'; however, except for [30], intoxication was not a matter dealt with by the Court. Despite this, it does open the question as to what the situation will be when an intoxicated householder is confronted by an intruder. Section 76(5) is clear that a defendant cannot rely on 'any mistaken belief attributable to intoxication that was voluntarily induced.' Is this provision appropriate for householders who have the right to consume alcohol, to whatever lengths, in their own home? To be confronted by an intruder and be punished for the level of alcohol in their system appears to be a significant infringement of an individual's right to consume alcohol in their own home. Any restriction on an individual's ability to consume alcohol within their own home is likely to raise a question as to the potential infringement of their Article 8(1) right to Private and Family Life and it is doubtful that any interference with that right could be justified.

This argument is particularly persuasive given the levy in recent years on alcohol prices in public houses and restaurants. According to *The Independent*<sup>71</sup> in 2012, a weekly average of £7.80 was spent on wine, beer and spirits bought from an off-licence or supermarket. This figure is up 50p from 2011. This figure is to be compared with that of purchases in licensed

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<sup>69</sup> Criminal Justice and Immigration Act 2008, s 76(4)(b)(i).

<sup>70</sup> Criminal Justice and Immigration Act 2008, s 76(5); *R v O'Grady* [1987] QB 995 (CA); *R v Goode* [2014] EWCA Crim 90.

<sup>71</sup> Jonathan Brown, 'Stay-at-home drinking and socialising on the rise as Britons avoid paying premium of being served food or drink in pubs and bars' *The Independent* (London, 12 December 2013) <[www.independent.co.uk/news/uk/home-news/stay-at-home-drinking-and-socialising-on-the-rise-as-britons-avoid-paying-premium-of-being-served-9001375.html](http://www.independent.co.uk/news/uk/home-news/stay-at-home-drinking-and-socialising-on-the-rise-as-britons-avoid-paying-premium-of-being-served-9001375.html)> accessed 19 April 2016.

premises, which averaged at £7.40. Further, research conducted by Sheen<sup>72</sup> has concluded that in 2012, 34 per cent of all alcohol (by volume of pure alcohol) was sold in the ‘on-trade’.<sup>73</sup> This has decreased from nearly half (47 per cent) of alcohol sold in the on-trade in 2000. According to Sheen, consumers in the UK have shown a shifting preference to purchasing alcohol in the off-trade<sup>74</sup> to consume at home. With this in mind it makes little, if any, sense to say that a householder cannot raise the defence on the basis that any mistake was induced by voluntary intoxication. This is even more so when one applies sections 76(5) and 76(5A) alongside section 76(7)(a), which provides that ‘a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action’. Taken together, it appears nonsensical that a householder be informed that they may not avail a defence due to their voluntarily intoxicated state; but they may not have been able to weigh up the niceties in the given case.

Sir Brian Leveson begins [30] appearing to favour the intoxicated householder by questioning whether a householder is to be expected to strictly consider the alcohol they intake on the basis that they may be faced with an intruder. It is unfortunate that Sir Brian Leveson concluded [30] by stating that section 76(5) remains the same test for householders who consume alcohol in their own home. Quite frankly, it is absurd to suggest that a householder must regulate their alcohol intake on the off-chance they may be confronted by an intruder. The reason for refusing a defence in non-householder cases is quite clear: it is one of policy. Lord Lane CJ in *O’Grady* made clear that:

On the one hand the interest of the defendant who has only acted according to what he believed to be necessary to protect himself, and on the other hand that of the public in general and the victim in particular who, probably through no fault of his own, has been injured or perhaps killed because of the defendant's drunken mistake. Reason recoils from the conclusion that in such circumstances a defendant is entitled to leave the Court without a stain on his character.<sup>75</sup>

It could be argued that individuals who go to their local public house for a quiet drink, like householders, do not expect to be engaged in some form of physical altercation; yet, section 76(5) still operates to prevent the defence from being availed. The distinction between householder and non-householder cases was recently evaluated by Bleasdale-Hill who

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<sup>72</sup> David Sheen (ed), *Statistical Handbook: A Compilation of Drinks Industry Statistics* (Brewing Publications Limited 2013) 32.

<sup>73</sup> Licenced premises such as pubs, bars and restaurants.

<sup>74</sup> Off-licenced premises such as supermarkets and shops.

<sup>75</sup> *O’Grady* (n 9) [19].

considered the theoretical underpinnings of the right to use defensive force by householders and non-householders. In particular, Bleasdale-Hill criticises the amendments introduced by the 2013 Act and compares the principles of autonomy, consequentialism, forfeiture theory and social-legal order protection when applied to householder and non-householder cases. She concludes that:

To such criticisms we can add the absence of a sound theoretical basis for amending the law such that the level of force can be greater in one sphere than in another: only the theory of individual autonomy comes close to offering such justification, and that theory does not offer a sound basis on which the force used might justifiably be disproportionate within a dwelling.<sup>76</sup>

However I contend, it does make sense that the defence cannot be raised in circumstances where the individuals are voluntarily putting themselves into a position whereby they know or ought to know that trouble may erupt, especially in a public house or a nightclub. That is the nature of intoxication. However, can it be said with reason that it is a sensible approach for the law to take to curtail the right and freedom of a householder, under Article 8, to engage in the consumption of alcohol on the basis that any mistaken belief in force used will not allow them to use a defence? It is the author's contention that it cannot. Parliament has expressly granted an extra margin of leeway for householders through section 76(5A) and the new 'grossly disproportionate' test; however, has suffered a major oversight in continuing the application of section 76(5) to householder cases. This oversight may, at some point in the near future, result in a challenge under the ECHR on the grounds of lack of legal certainty. Article 5, which provides for the right to liberty and security, may provide grounds for legal challenge due to the nature of the householder defence when combined with mistake induced by voluntary intoxication. Specifically, in Article 5, the phrase 'prescribed by law' has been interpreted to ensure that all criminal laws should have:

... sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail.<sup>77</sup>

I would argue that the current operation of the householder defence, in accordance with section 76(5), does not grant an individual sufficient precision in understanding their rights, obligations and consequences of their actions. This can be furthered and strengthened by the operation of

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<sup>76</sup> Lydia Bleasdale-Hill, "Our home is our haven and refuge - a place where we have every right to feel safe": justifying the use of up to "grossly disproportionate force" in a place of residence' (2015) Crim LR 407, 418.

<sup>77</sup> *The Sunday Times v The United Kingdom* (1979) 2 EHRR 254, para 49.

Article 7 which grants the right to ‘no punishment without law’. This phrase has been interpreted in the case of *SW v The United Kingdom* to require that:

... an offence must be clearly defined in the law. ...this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable.<sup>78</sup>

As above, I contend that the householder defence falls short of its obligation under Article 7 given that there is not a clear statement in law as to the consequences of a householder’s actions should they mistakenly attack an intruder due to their voluntarily intoxicated state.

Reed and Bohlander offer an interesting example to question this point:

... a student at drama school decides to pay a surprise visit to his parents during half term, accompanied by two of his classmates. He arrives at his parents’ home to find that they are out. The student and his friends make themselves at home and, to pass the time, decide to rehearse some scenes from Julius Caesar, their play for that term. The parents arrive home a little later and, as they pull into their driveway, they are surprised to see a light on in the living room. The father walks quietly to the window and is shocked to see his son lying on the floor with two strange men standing over him, both holding knives. He bursts into the house and attacks the two ‘assailants’ with a handy golf club.<sup>79</sup>

In that case the householder is likely to be able to rely on the householder defence. As required by section 76(8A), the father would be (a) a householder who is acting in defence of his son; (b) the force was used while in the house; (c) the father is not a trespasser and (d) he believes that the assailants, at that present time, are trespassers. Therefore, despite his mistake, that appears both honest and reasonable,<sup>80</sup> the father will be able to rely upon the householder defence. However, should the householder in this case have been intoxicated, any mistake made on his part, that was attributable to voluntarily induced intoxication, would prevent him from relying upon the householder defence. With such lack of legal clarity, it is my contention that a challenge under the ECHR is viable should a householder, who is intoxicated, be refused the ability to raise the defence in law. Indeed, as Reed and Bohlander contend, such a disparity is ‘illogical and indefensible.’<sup>81</sup>

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<sup>78</sup> *SW v The United Kingdom* [1995] 21 EHRR 363, para 35.

<sup>79</sup> Alan Reed and Michael Bohlander, *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Routledge 2014) 140.

<sup>80</sup> Criminal Justice and Immigration Act 2008, s 76(4); *R v Gladstone Williams* [1987] 3 All ER 411 (CA).

<sup>81</sup> Reed and Bohlander (n 79).

How do we proceed then? Dingwall offers an interesting opinion in his critique of the *Hatton*<sup>82</sup> decision. He states:

...the law on intoxicated mistake and self-defence could be brought into line without any great difficulty. Case law has established which offences are to be regarded as requiring a 'specific' intent and which only require a 'basic' intent. All one would need to do is state that an intoxicated mistake in self-defence should be considered with regard to offences requiring a 'specific' intent - such as murder - but should not be considered if the offence is one of 'basic' intent.<sup>83</sup>

It remains to be seen whether such an approach could be made to work in respect of householder cases. It is acknowledged that such is a sensible path to take in non-householder cases, as it would reflect the common law principle of *Majewski*<sup>84</sup> that intoxication is not a defence to basic intent offences; however, we are concerned here with a special category of defendants – householders. These are individuals who have the right to consume alcohol within their own homes without fear of interference with such a lawful right. To confine householders to the same standard as non-householders would demonstrate a lack of understanding of the purpose for the householder defence. A householder has the right to defend himself or others when confronted with an intruder. Allowing the effects of voluntarily induced intoxication to be 'determinative'<sup>85</sup> on whether a defendant can avail the defence is both nonsensical and impractical in the criminal law. As Dingwall concludes, this 'central premise is flawed and further consideration of the issue is warranted.'<sup>86</sup> I concur and argue that refusing to avail a householder a defence simply because they were intoxicated at the time and made a mistake as a result of such intoxication is impractical. It will result in the restriction of freedom on the part of the householder and such knowledge is likely to cause unrest with the general public. As such, it is hoped that this debate will be addressed and clarified by the higher courts in the near future.

*The householder and the ambit of the defence:*

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<sup>82</sup> *Hatton* (n 10).

<sup>83</sup> Gavin Dingwall, 'Intoxicated mistakes about the need for self-defence' (2007) 70 MLR 127, 136.

<sup>84</sup> *Majewski v DPP* [1977] AC 443 (HL).

<sup>85</sup> Dingwall (n 83) 136.

<sup>86</sup> Dingwall (n 83) 138.

The final point worth consideration is the particular scope of the householder defence when applied in practice. Dobinson and Elliott comment that:

The amendments are not only vague in terms of “disproportionate” force, but also in terms of the circumstances of a so-called “householder case”.<sup>87</sup>

Although its practicality can be questioned, section 76(8)(a) is, in fact, clear in its wording providing that the householder defence is concerned only with ‘the common law defence of self-defence.’ This is expanded upon in section 76(10)(b) where it states that ‘references to self-defence include acting in defence of another person’. Accordingly, a defence may only be availed in such cases where the householder<sup>88</sup> is acting in defence of themselves or others; or as the Ministry of Justice Circular describes it ‘to protect themselves or their loved ones’.<sup>89</sup> Straightforwardly then, defence of property does not fall within the remit of a ‘householder’ case. This is made clear in the Ministry of Justice Circular at [16], where it states:

They [the householder] cannot seek to rely on the defence if they were acting for another purpose, such as protecting their property...<sup>90</sup>

Allen substantiates and furthers this by adding that the defence may also not be used in cases of ‘prevention of crime, or arrest of an offender’.<sup>91</sup> The question to ask, therefore, is “How does one determine who is a householder for the purposes of the Act?”

Before one can even answer this question, an initial question arises as to who determines whether the defendant is a householder for the purposes of the Act. Is it a question of fact or law? Self-defence, traditionally, has been a defence left for the jury to determine as a matter of fact.<sup>92</sup> If, therefore, this was a matter of law left to the jury, then they would be tasked with two roles. The first would be to ask themselves whether the defendant is a ‘householder’. This would be a matter of law. Dependent on that answer, the jury would then have to consider whether his force was disproportionate or grossly disproportionate, in the circumstances. This would be a matter of fact. Allowing the jury to decide matters of law is likely to lead to inconsistent, unfair and potentially prejudicial results given their lack of legal knowledge and experience. Indeed, one can make an interesting comparison with the former law in relation to

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<sup>87</sup> Dobinson and Elliott (n 52) 96.

<sup>88</sup> Which has recently been defined quite broadly by the Court of Appeal in *R v Day (Edina)* [2015] EWCA Crim 1646 as not just the owner of a property, but also a person in lawful occupation of the property.

<sup>89</sup> MoJ Circular (n 66) [11].

<sup>90</sup> *ibid* [16].

<sup>91</sup> Allen (n 57) 203.

<sup>92</sup> *Palmer* (n 7).

sexual offence cases where the jury were left to give consent its 'ordinary meaning',<sup>93</sup> (a question of law) before then considering whether consent was present in the particular case (a question of fact). Glanville Williams appreciated the danger of this and critically stated that this was 'one more manifestation of the deplorable tendency of the criminal courts to leave important questions of legal policy to the jury'.<sup>94</sup> Allowing the jury to decide a matter of law was clearly an unsuitable fitting for the law of sexual offences<sup>95</sup> and, I contend, would be the same for the law of self-defence. It is hoped, therefore, that whether or not the defendant is a householder is a matter of law for the judge in the instant case who will direct the jury accordingly.

From that, we may now return to the original question, namely "How does one determine who is a householder for the purposes of the Act?" The main issue that arises at this point is whether the answer is to be found by taking a subjective or an objective approach. Taking a subjective approach, the judge (or jury) would have to put themselves in the shoes of the defendant and ask themselves whether this particular defendant, on these particular facts, believed that he was acting in the defence of himself or another. On the other hand, to take an objective approach would require the judge (or jury) to look at all the circumstances of the case and decide whether, objectively, this defendant was acting in defence of himself or another.

When asking whether a regular defendant (i.e. a non-householder) was acting in self-defence, the jury take both a subjective and an objective approach, asking:

Was the [force] within the conception of necessary self-defence, judged by the standards of common sense bearing in mind the position of the appellant at the moment of the [attack], or was it a case of angry retaliation or pure aggression on his part?<sup>96</sup>

I contend the same approach would be suitable in deciding the question asked here. A defendant need not know the technicalities of the law and what circumstances will (and will not) avail him a defence; however, it is imperative that if a defendant believes that he is acting to protect himself or another from an intruder, he ought to benefit from the protection afforded with the householder defence. Such would be the case unless there is clear evidence, on an objective basis, that the defendant could not have believed that he, or some other person, was in any form of danger. A mixed objective and subjective approach would be an appropriate manner for

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<sup>93</sup> *R v Olugboja* [1982] QB 320 (CA).

<sup>94</sup> Glanville Williams, *Textbook of Criminal Law* (1<sup>st</sup> edn, Stevenson & Sons: London 1978) 551.

<sup>95</sup> Now the meaning of consent has been put onto a statutory basis by the Sexual Offences Act 2003, s 74.

<sup>96</sup> *R v Shannon* (1980) 71 Cr App R 192 (CA) 197 (Ormrod LJ).



determining the question at hand and would continue the method of operation adopted in non-householder self-defence law.<sup>97</sup>

It may be useful at this stage to return to the *Collins* case and ask whether the householder defence could have been availed of, had charges been brought. We are aware from the facts that Collins was confronted by one of the children as he was making his way up the stairs. In running back down the stairs, Collins met the angry householder who placed him in the devastating headlock. What was the householder thinking at the time? Was he concerned for the safety of himself or of his family? Or, was he concerned with protection of his property?

We are aware that Collins proceeded up the stairs however, was the householder aware that Collins had been up the stairs? It is most certainly relevant to the question to ask whether Collins was aware as such would amount to reliable evidence that the householder did indeed fear harm to his family given that his wife, three children and three friends were asleep upstairs. However, such is not clear on the facts. On the contrary, the householder in placing Collins in the headlock noticed that he had the householder's wife's car keys in his hand. If this had been the reason the householder attacked Collins, then that clearly could not allow for the householder defence to be raised given that the householder was acting in protection of his property or in prevention of a crime. This point can be furthered by asking whether the householder kept Collins in the headlock for 6 minutes because he had discovered the wife's keys in the intruder's hand. It is appreciated that the householder may have initially restrained Collins in protection of himself or his family; however, it cannot be discounted that the householder may have continued to hold Collins within the headlock as a result of discovering the car keys within his hand. This would demonstrate that the householder was acting in defence of property and not self-defence or defence of others. In light of this, would the relevant tribunal find that the householder was acting in self-defence out of fear of harm to his wife or children or are they likely to find he was acting in defence of his property or for the prevention of crime? Given that no charge was brought and the application for judicial review was abandoned on that ground, it is difficult to say what the outcome would have been. No doubt a judge would have been likely to give the householder the benefit of the doubt and allow him to avail the defence; however, it is questionable as to whether that was the intention of the Act and whether that is the best operation of the law in practice.

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<sup>97</sup> *Palmer* (n 7).

Looking more closely at the intention behind the Act, it may, of course, be the case as stated earlier that the judge directs the jury on both gross disproportionality and standard disproportionality. This will be the effect of such a distinction between defence of oneself and defence of property and can be highlighted by considering the following example given in the Ministry of Justice Circular as a case that may demonstrate a householder successfully raising the defence:

A householder is woken during the night by the sound of breaking glass downstairs. His wife and children have also woken up and are very frightened. The householder goes downstairs to investigate and meets an intruder armed with a knife in the hallway. The intruder had broken a glass panel in the front door to enter the property. A scuffle ensues and the householder wrestles the knife from the intruder's hand and it drops to the floor. Having dropped his weapon and with the mother and children screaming upstairs, the intruder realises he has met his match and turns to flee through the open door. With adrenaline pumping and heart pounding, the householder instinctively punches the intruder on the back of the head as he leaves. He falls awkwardly and is knocked unconscious.<sup>98</sup>

Indeed, it is conceded that the Circular makes clear such an example is exactly that: an example and each jury would have to come to its own view on the case.<sup>99</sup> However, it is interesting to dissect the specific facts chosen in the example and question what tests the jury would be asked to consider.<sup>100</sup>

Firstly, the intruder is armed with a knife. In such a case, it is clear that any person using force against an intruder would be acting in defence of themselves or others given the potential harm that could be caused by the weapon carried by the assailant. Indeed, such a potentially violent circumstance would justify a pre-emptive strike on part of the householder.<sup>101</sup> The jury would therefore be asked to consider the householder defence. Would such a statement be as easy to make if the intruder was unarmed, as in *Collins*? I contend that it is most likely not. Without the presence of additional evidence, the jury may be asked to consider either the householder defence or the non-householder defence, or both.

Secondly, the intruder has broken glass in order to trespass. In such a case it may again, be an easy statement to make that a householder would be using force in defence of himself or others given the violence predicated by the intruder in breaking in. As such, the jury are likely to be

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<sup>98</sup> MoJ Circular (n 66) [16].

<sup>99</sup> *ibid.*

<sup>100</sup> Specifically in light of all of the relevant circumstances as the householder believed them to be (Criminal Justice and Immigration Act 2008, ss 76(3) and 76(8)).

<sup>101</sup> *Beckford v The Queen* [1988] AC 130 (PC) 144: 'a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike' (Lord Griffiths).

asked to consider the householder defence. Suppose then, that the intruder simply walks into the house through an unopened door, as in *Collins*, could such an easy statement be made as to the defence of oneself or another in that case? Again, I argue not and the jury are unlikely to have a clear direction on the approach to take.

Lastly, the reaction of the wife and children is also a relevant concern. A householder who is not only startled by the presence of an intruder, but is also witness to the fear of his loved ones, whether they be expressed through screams or tears, is naturally going to act in a manner consistent with self-defence and the defence of others. Such protection is a natural human emotion to a fear of violence or threat of violence, especially to loved ones. In this case, it is likely that the judge would allow the defence to go before the jury. What then in a case where the householder lives alone and does not fear for his own safety? In such a case, it cannot be said that the householder is acting in self-defence, unless the facts were to demonstrate potential violence to the householder. Indeed, such was the situation in *Collins* as detailed above in that we are not aware in what capacity the householder was using the force. If used out of the protection of his children, a defence would be available. If, however, force was used to prevent Collins from stealing the wife's car keys, no defence would be available.

What this example shows is the difficulty the courts may face if confronted with a situation of a dissimilar nature in practice. Should the intruder not carry a weapon, nor pose any threat to the householder, would a judge err in directing the jury to consider the householder defence? Most certainly, a prosecutor may have an issue with such a direction where he or she believes the proper direction to be one of a non-householder. Such would be an obvious conclusion given the benefit of the more stringent test to the case for the Crown.

Further, what of the ability to retreat?<sup>102</sup> If the householder and his loved ones had the ability to retreat to a locked room, in the example, where they can be assured in their safety, should a defence be available to the householder if he chooses to not retreat? Section 76(6A) makes clear that the duty to retreat is merely a 'factor' to be taken into account;<sup>103</sup> however, can it be said that a householder is acting in defence of himself or his loved ones when the option of a safe retreat is available? I would contend not. Unless there is clear evidence that the householder believes, despite the safe refuge, that he or his family remain in danger, I argue

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<sup>102</sup> For an interesting discussion on the duty to retreat in different jurisdictions, see: Mark Dsouza, 'Retreat, Submission, and the Private Use of Force' (2015) 35(4) OLJ 727.

<sup>103</sup> *Duffy v Chief Constable of Cleveland* [2007] EWHC 3169 (Admin).

that he would not be acting in self-defence, but rather in protection of property. Confronting an intruder who poses no threat to himself or his family given the availability of a safe refuge is a clear illustration of a wish to defend his home and not himself. One could go further than this and argue that such is an illustration that the householder wishes to exact revenge upon the intruder, as opposed to protect himself and his family. Indeed *R v Rashford* is clear in that:

The mere fact that a defendant went somewhere to exact revenge from the victim did not of itself rule out the possibility that in any violence that ensued, self-defence was necessarily unavailable as a defence. It must depend on the circumstances.’<sup>104</sup>

One could argue that the householder in *Collins*, in fact, was acting in revenge. As noted above, the householder continued to hold Collins within the headlock after discovering his wife’s keys within Collins’ hand. Further, as made clear at [5] of the judgment, the householder was heard to say “I’ll fucking kill you” and shouting to the telephone receiver to tell the police to get to the house now “... or else I’ll break his fucking neck”. Although the CPS Reviewing Officer concluded that such language was more likely to have been ‘highly emotional outbursts’,<sup>105</sup> it cannot be mistaken that the householder could have been acting vehemently in revenge for Collins breaking in and was no longer acting in defence of himself or another. Despite the provision in section 76(6A) and the statement in *Rashford*, I contend that any such force used by a householder would fall outside the scope of the householder defence, given the availability of a safe place of refuge, a lack of need for protection of oneself or another and the considerable desire for revenge. In such a case, the judge ought to direct the jury to consider the ordinary test of reasonableness under section 76(3) with no reference to the householder defence in section 76(5A).

It appears, therefore, that Parliament has made yet another oversight in enacting the householder defence, this time, without proper consideration of the ‘duty’ to retreat and its applicability to such cases. If there is an ability to safely retreat in the house, I contend there ought to be a ‘duty’ to retreat. At the very least, an ability to safely retreat ought to be a ‘cast-iron method’<sup>106</sup> of determining whether the householder was acting in protection of himself or his property. The same applies with the question of desire for revenge.

In any event, however, it is likely that a judge would give the householder the benefit of the doubt and direct the jury to consider the householder defence, especially given the arguably

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<sup>104</sup> *R v Rashford* [2005] EWCA Crim 3377, [2006] Crim LR 547 [19] (Dyson LJ).

<sup>105</sup> *Collins* (n 1) [5].

<sup>106</sup> *R v Bird* [1985] 1 WLR 816 (CA) 820 (Lane CJ).

tenuous manner of determining who is and who is not a householder and the fact that the focus ought to be on what the householder ‘instinctively and honestly thought was necessary’<sup>107</sup> in the circumstances. This furthered by Herring who argues that a jury are likely to be sympathetic to a householder who acted in ‘the emergency of the moment’.<sup>108</sup> Despite this, however, it is submitted that care must be taken to ensure that the intention of Parliament is followed and that only those defendants who are truly, whether subjectively, objectively, or both, acting in self-defence or defence of another, can avail the defence. Whether such a distinction will be easy to make in practice, especially when one considers the duty to retreat and the desire for revenge, remains to be seen.

### What’s next for the householder defence?

Did the Divisional Court correctly interpret the legislation in line with the intention of Parliament? It would appear that we have our answer and can respond to this question in the affirmative. A jury must be directed to take account of the householder’s actions to the same extent that they would a non-householder, namely whether the force used was nevertheless reasonable in the circumstances. With the clear statement in the Ministry of Justice Circular, the use of ‘could’ in the Explanatory Note and the continued application of the common law from *Palmer*, it can be argued that parliamentary intentions are clear and were appropriately followed by the Court in *Collins*.

This article also discussed the appropriateness of section 76(5) and whether its application to the law of householders defence is suitable. There is the potential that Article 8 ECHR could be infringed if Parliament were to say that a householder must regulate their alcohol intake within their own homes on the basis that no defence can be availed if a mistake was induced by voluntary intoxication. It would be, it is argued, absurd to suggest that householders regulate their consumption of alcohol. There is no, or no legitimate, reason behind such a move given that householders will not expect there to be an intruder, nor ought they expect there to be an intruder.

Lastly, the scope and ambit of the defence was discussed. At present, the householders defence may only be availed were the force was used in defence of oneself or another, as opposed to

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<sup>107</sup> *R v Hichens* [2011] EWCA Crim 1626, [2011] 2 Cr App R 26 [27] (Gross LJ).

<sup>108</sup> Herring (n 51).

defence of property. Such distinction may be easy to draw in theory, but in practice when a householder is confronted with an intruder, can such an easy divide be drawn between the two cases? Most certainly, the householder is unlikely to know in what context they were using force against the intruder and the arbiter of law is also unlikely to be able to truly draw the line between defence of oneself or property. Further, it is likely to be difficult in practice to firmly draw the line between householders acting in self-defence or defence of others and acting in defence of property when one considers the impact of the law on the 'duty' to retreat and its application to householders and the desire for revenge on part of the householder. With this in mind, it has been suggested that the most likely outcome will be that a judge in the particular case grants the benefit of the doubt to a householder and allows the defence to be put to the jury.

The family of Collins are considering an appeal against the decision, in respect of Article 2, to the Court of Appeal.<sup>109</sup> The outcome is awaited with some anticipation. It is doubtful, however, that the Court of Appeal will disagree with the interpretation of the Divisional Court given the clear Parliamentary intentions made express in the Ministry of Justice Circular and the application of the common law.

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<sup>109</sup> BBC News (n 18).