Neutral Citation Number: [2020] EWCA Civ 1301

Appeal No: C1/2019/2919
Case No: CO/463/2019

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT
Lord Justice Flaux and Sir Kenneth Parker

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 09/10/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE MACUR
and
LADY JUSTICE NICOLA DAVIES

B E T W E E N

THE QUEEN
(on the application of OFFICER W80)

Claimant/Respondent

and

DIRECTOR GENERAL OF THE INDEPENDENT OFFICE FOR POLICE CONDUCT

Defendant/Appellant

and

(1) THE COMMISSIONER OF POLICE OF THE METROPOLIS
(2) EFTEHIA DEMETRIO
(3) THE COLLEGE OF POLICING

Interested Parties

and

THE NATIONAL POLICE CHIEFS' COUNCIL

Intervener

Mr Tim Owen QC, Mr Danny Simpson, and Ms Michelle Butler (instructed **by IOPC Legal Service Directorate**) for the **defendant/ appellant, IOPC**

Ms Rosemary Davidson (instructed by **Slater and Gordon Lawyers UK**) for the **claimant/respondent, W80**

Ms Philippa Kaufmann QC and Ms Fiona Murphy (instructed by **Bhatt Murphy**) for **Ms Demetrio**

Mr John Beggs QC and Mr James Berry (instructed by **Civil Nuclear Constabulary Legal Services**) for the **National Police Chief's Council**

Mr Jonathan Moffett QC (instructed by the **Government Legal Department**) for the **College of Policing**

Mr Jason Beer QC and Mr Robert Cohen (instructed by the **Metropolitan Police Service's Directorate of Legal Services**) for the **Commissioner of Police for the Metropolis**

Hearing dates: **7th, 8th and 9th July 2020**

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Approved Judgment

Sir Geoffrey Vos, Chancellor of the High Court, delivering the judgment of the Court:

Introduction

1. On 11 December 2015, Armed Police Officer W80 ("W80") was on duty. He shot Mr Jermaine Baker ("Mr Baker") dead in circumstances we shall describe. The Independent Office for Police Conduct's (the "IOPC") independent investigation into Mr Baker's death dated 12 November 2018 recommended that disciplinary proceedings for gross misconduct in using excessive force should be brought against W80. It concluded that a reasonable panel at a misconduct hearing would be likely to find that W80's belief that he was in imminent danger was an honestly held one, but could determine that "W80's honest, but mistaken, belief that his life was threatened was unreasonable". The Commissioner of Police of the Metropolis (the "Commissioner"), as the relevant Appropriate Authority, disagreed with the legal premise on which this conclusion was based and decided not to follow the recommendation. The IOPC thereafter directed the Commissioner to give effect to it pursuant to paragraph 27(3) of schedule 3 to the Police Reform Act 2002 (the "PRA 2002"). W80 brought these proceedings for judicial review of that decision.

2. The Divisional Court (Lord Justice Flaux and Sir Kenneth Parker) quashed the IOPC's decision, holding that "in applying the objective civil law test in determining that there was a case to answer, the IOPC applied the wrong test. It should have applied the criminal law test".

3. The Divisional Court's consideration of the issue and the argument before it centred on the distinction between the criminal and civil law tests for self-defence. We take the view, however, that the focus should have been on the proper meaning of the applicable conduct standard and the Code of Ethics (the "Code") published by the College of Policing (the "College").

4. The Code essentially reproduces the standard of professional behaviour (conduct standard) on the use of force in schedule 2 to the Police (Conduct) Regulations 2012 (the "2012 Regulations"), and adds 4 sub-paragraphs. It provides as follows:-

> "4. **Use of force**
>
> I will only use force as part of my role and responsibilities, and only to the extent that it is necessary, proportionate and reasonable in all the circumstances.
>
> 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".

5. The IOPC and Ms Demetrio, representing Mr Baker's family, contend that the words of the conduct standard are clear. Officers will be guilty of misconduct if they use force which is not "necessary, proportionate and reasonable in all the circumstances". If officers hold an honest, but mistaken, belief as to the danger faced, a disciplinary panel will only find them to be guilty of misconduct if their mistaken belief was unreasonable in all the circumstances. Paragraph 4.4 of the Code ("paragraph 4.4") merely explains that officers must, after force has been used, account for or justify its use based upon their honestly held belief at the time.

6. W80, the Commissioner, the National Police Chiefs' Council (the "NPCC") and the Divisional Court all took a different view. They regarded paragraph 4.4 as providing a clear pointer to the application of the criminal law test for self-defence. An officer would only be guilty of misconduct in the circumstances of this case if his belief that he was in imminent danger was not an honestly held one, or if he had used more than the minimum amount of force necessary. Once it was determined that the officer held an honest belief that he was in imminent danger, there could be no inquiry in misconduct proceedings as to whether that belief was a reasonable one to have held in all the circumstances. Thus, in this case, once the Director of Public Prosecutions (the "DPP") had decided (as she did) not to prosecute W80, there was no possibility of misconduct proceedings being successful, because the applicable tests were the same.

7. We have, therefore, to determine whether the Divisional Court was right to quash the IOPC's decision. The question is whether or not the IOPC was justified in concluding that, on the basis of the applicable conduct standard and the provisions of the Code, it was open to a reasonable disciplinary panel to make a finding of misconduct if W80's honest, but mistaken, belief that his life was threatened was found to be unreasonable. The IOPC submits that this conclusion was soundly based in law. W80 submits that it was not.

8. We have had the benefit of submissions from an intervener and an interested party who were not before the Divisional Court, the NPCC and the College. The NPCC produced evidence from Mr Simon Chesterman ("Mr Chesterman"), which we summarise at [25]-[29]. The College produced evidence about the history and intended effect of the Code, which we summarise at [30]-[32].

Factual background

9. We can take the factual background from Flaux LJ's judgment as follows:-

> "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 at Wood Green Crown Court.

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

6. On 11 December 2015, the Audi was parked in a side road close to Wood Green Crown Court with three men inside, one of whom was [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 [DPP] 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 [PRA 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:

- The evidence from the audio recordings that some officers had told Mr Baker to put his hands up.

- The evidence of the positioning of the track wound to Mr Baker's wrist indicates his hand was likely to have been positioned with the palm side facing towards the windscreen, raised approximately to the level of his neck.

- The evidence that you shot Mr Baker at a very early stage of the interception and almost immediately after opening the front passenger door.

The [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"."

The relevant statutory background and the relevant guidance

10. The IOPC (as successor to the IPCC) is required by section 10 of the PRA 2002 to make arrangements for the investigation and handling of complaints made about the conduct of persons serving with the police and to ensure that public confidence is established and maintained in the process. Part 2 of the PRA 2002 governs complaints and misconduct. The complaints procedure is set out in schedule 3 to the PRA 2002 ("schedule 3").

11. Where death or serious injury results from police action, then pursuant to section 12(2C) and paragraph 21A of schedule 3, and when there is an indication that a criminal offence has been committed or standards of professional behaviour have been breached, an investigation into misconduct by an individual officer will take place. Following such a "conduct" investigation, the IOPC may recommend or direct disciplinary proceedings under paragraphs 27(3) or (4) if it determines that the subject has a case to answer for misconduct or gross misconduct. If the IOPC determines that a criminal offence may have been committed and considers that it is appropriate for the matter to be considered by the DPP, it must notify the DPP and send the DPP a copy of the report and notify the Appropriate Authority of that determination (paragraph 23 of schedule 3).

12. Regulation 3(1) of the 2012 Regulations defined "misconduct" as a breach of the Standards of Professional Behaviour, and "gross misconduct" as a breach so serious that dismissal would be justified. A "death or serious injury matter" ("DSI") is defined as when, at or before the time of the death or serious injury, the deceased or injured person had contact of whatever kind, and whether direct or indirect, with a person serving with the police who was acting in the execution of his duties, and there is an indication that the contact may have caused or contributed to the death or serious injury (see sections 12(2A) and (2C) of the PRA 2002).

13. The 2012 Regulations were made by the Secretary of State for the Home Department (the "SSHD") pursuant to section 50 of the Police Act 1996 ("PA 1996"). Schedule 2 to the 2012 Regulations contains the Standards of Professional Behaviour which apply to and regulate the conduct of police officers. The use of force standard, which is central to

this appeal, provides, as we have said, that "[p]olice officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances".

14. Section 39A of the PA 1996 confers power on the College, with the approval of the SSHD, to issue and revise codes of practice for chief officers of police, to which they must have regard in discharging any function to which the code relates. The SSHD is, save in circumstances not relevant to this case, required to lay any code of practice, or revision, issued by the College before Parliament.

15. The Code was issued by the College under s 39A of the PA 1996. Consequently, it only has statutory force insofar as it relates to a chief officer's discharge of their functions. The Preamble to the Code, however, sets out an expectation that other police officers and police civilian staff, whether engaged on a permanent, temporary, full-time, part-time, casual, consultancy, contracted or voluntary basis, and also all forces not funded by the Home Office and any other policing organisations outside the remit of the Code will use the Code to guide their behaviour at all times. We have already set out the full text of paragraph 4 of the Code concerning the use of force at [4] above.

16. The College's Briefing Note on the Code described it as "the foundation document for promoting, reinforcing, and supporting the highest personal standards from everyone working in the policing profession. It is expected to underpin and strengthen all existing integrity and accountability arrangements".

17. The relevant Home Office Guidance: Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures (the "HOG") 2014 was issued by the SSHD under s 87(1) of the PA 1996. It reinforces the expectation stated in the Preamble to the Code, that "every person working in policing will adopt the Code…". Paragraph 1.4 of the HOG describes the Code as the framework that underpins the standards of professional behaviour as set out in the 2012 Regulations, and which should inform any assessment or judgment of conduct when deciding if formal action is to be taken. Consequently, as the IOPC has rightly acknowledged, it is bound to have regard to the Code in determining whether an officer has a case to answer in respect of misconduct or gross misconduct.

18. Paragraph 1.8 of the HOG directs that, when these standards of professional behaviour are being applied in any decision or misconduct meeting/hearing, they shall be applied in a reasonable, transparent, objective, proportionate and fair manner. Due regard shall be paid to the nature and circumstances of a police officer's conduct, including whether his or her actions or omissions were reasonable at the time of the conduct under scrutiny. Paragraph 1.17 of the HOG confirms that, in relation to the Use of Force Standard, "police officers may only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances". No other gloss is provided. The HOG has been laid before Parliament; it expressly does not provide "a definitive interpretation of the relevant legislation", which is recognised as "a matter for the courts".

19. It will be noted, however, that the Divisional Court seems to have regarded the Code and the HOG as posing insuperable obstacles to finding a breach of the Use of Force Standard by reference to the civil law objective test. The Divisional Court specifically cited paragraph 1.34 of the Home Office Guidance issued in 2008 (prior to the existence of the College or the publication of the Code), which was not repeated in the HOG issued in 2014. That paragraph 1.34 provided that: "[i]t is for the police officer to justify his or

her use of force but when assessing whether this was necessary, proportionate and reasonable, all the circumstances should be taken into account and especially the situation which the police officer faced at the time. Police Officers use force only if other means are or may be ineffective in achieving the intended result".

20. We agree that the Code and the HOG are the primary reference points for police officers and employees with respect to the professional standards which they are mandated by the 2012 Regulations to follow. They cannot, however, be seen in isolation from other guidance issued by the College. For that reason, we deal now with two documents published by the College that specifically address the use of firearms by police officers: the non-statutory, now updated *Armed Policing Authorised Professional Practice* (the "APAPP"), first published in October 2013, and the *Code of Practice on Armed Policing and Police Use of Less Lethal Weapons* (the "Armed Policing Code of Practice"), which was issued after the events in issue in this case in January 2020.

21. The "post-deployment" section of the APAPP advises that the initial account taken from a police officer who has used force should "… consist only of the officer's individual recollection of events. Key police witnesses should independently record what they honestly perceived, i.e. what they think that they saw, heard, and then did. The purpose of the personal initial account is to record the perceived threats and risks that led to the decision to use force, before this recollection can be affected or potentially altered". The APAPP expressly links this advice to paragraph 4.4 of the Code by saying under the heading "Integrity" that: "[t]he Code of Ethics states that accountability, honesty, integrity and openness are key policing principles". It then repeats paragraph 4.4 in full before warning that "[p]olice officers should ensure that all activity, including that which relates to the separation of key police witnesses and recording of accounts, is transparent and capable of withstanding scrutiny ...".

22. The Armed Policing Code of Practice (in 2020) provided that "[w]hen police are required to use force to achieve a lawful object … all force used must be reasonable in the circumstances. If the force used is not reasonable or proportionate, the officer is open to criminal or misconduct proceedings".

23. The IOPC relied also on the "*Guidance on outcomes in police misconduct proceedings*", which was issued by the College in 2017 pursuant to section 87 of the PA 1996. We did not find it of much assistance, but part 4 admittedly deals with the assessment of seriousness of proven conduct for the purpose of determining outcome requiring an evaluation of culpability, harm, and aggravating and mitigating features.

24. We have not found it necessary to compare the position of military discipline regimes or the position in Scotland or Northern Ireland, all of which rely upon differently expressed regulations, codes, and guidance. Moreover, the relevant 2012 Regulations and the HOG have since been re-issued, but we have not found any differences relevant to what we have to determine.

The evidence of Mr Chesterman

25. Mr Chesterman is the Chief Constable of the Civil Nuclear Constabulary (the "CNC") and has been the National Armed Policing Lead for the NPCC for 12 years. He has been a police officer for more than 36 years. He is responsible for armed policing policy and practice, national standards and training, tactics, and the weaponry and equipment

available to about 10,000 armed officers, including the CNC, the Ministry of Defence and the British Transport Police. He has been involved in many firearms operations.

26. Armed officers are recruited from volunteers within the police service. Since 2015, more than 1,000 armed officers have been recruited in response to the Government's agreement to increase their number. Recruitment and retention is, however, said to be challenging with, he says, "the most common reason for not applying being concerns about what would happen in the event they have to discharge their firearm in terms of the risk of being criminally prosecuted and/or dismissed".

27. Armed officers will undergo quarterly reaccreditation training. One of the mandatory modules is the applicable "legal framework". They are trained that the "criminal law test for self-defence focusing on their "honestly held belief" applies to their decision making", and are not instructed that the civil law test for self-defence will apply for the purpose of misconduct proceedings. Mr Chesterman notes that the APAPP refers to the criminal law test under "Common Law; Self-defence: Reasonable force", but makes no reference to the civil law test for self-defence applying for the purpose of misconduct hearings, "simply refer[ring] officers … to the relevant Standards of Professional Behaviour, including Use of Force".

28. Mr Chesterman says that the "national understanding among armed officers, firearms commanders and tactical advisors" with whom he has regular dealings is that the criminal law test is applicable in misconduct proceedings following on from the discharge of a firearm which has or may have resulted in death or serious injury. He is concerned that applying the civil law test for self-defence would seriously affect an armed officer's mindset when making a split-second decision: "If the starting point is that the officer honestly believes there to be an immediate threat to life, to import into the officer's decision making a further requirement that their honestly held belief also has to be objectively reasonable would add a dangerous layer of complexity and hesitation … [which] … could seriously increase the risk to the public and officers".

29. Mr Chesterman acknowledges that "it is only right that armed officers' actions should be subject to thorough and independent scrutiny of whether their actions are lawful", but there are "compelling reasons for the criminal law test for self-defence to continue to apply in police misconduct proceedings". Specifically, he believes that public confidence in armed policing operations would be undermined by police officers being more hesitant to discharge their firearms for fear that dismissal will follow an adverse determination, and by problems with recruitment and retention.

The position of the College

30. The College is not a statutory body, but a company limited by guarantee which is wholly owned by the SSHD. It was established in 2012 to act as the professional body for police officers and civilian police staff of all ranks and grades. The College has various statutory functions in relation to the issuing of guidance and the giving of advice deriving predominantly from the PA 1996. It does not act as regulator. It is the Director General of the IOPC who is vested with the authority to secure, keep under review, ensure public confidence in and make recommendations for the modification of arrangements with respect to the handling of complaints in relation to police officers. We are satisfied, and all the parties agree, that Flaux LJ was in error in describing the College as the "regulator now appointed by statute" in [71].

31. The College does not have any particular role or special authority in relation to the making of regulations relating to "the conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline". The College submits that it is clear from the text of the Code, read in its statutory context, that it does not purport to lay down the test that should be applied in police misconduct proceedings when determining whether there has been a breach of the use of force standard. The College considers there to be a clear structure to paragraph 4 of the Code: paragraphs 4.1 and 4.2 identify the police officers and other staff for whom the standard is likely to be relevant; paragraph 4.3 elaborates upon what level of force is envisaged by the standard, and paragraph 4.4 indicates what is expected of a police officer after the use of force. That is why the officer must account for their use of force based on their honest understanding of the situation at the time when the force was used ("justify it based upon your honestly held belief"). In this respect, paragraph 4.4 is consistent with the guidance given on the first standard of honesty and integrity and it is consistent with the guidance given in the APAPP.

32. The College intended paragraph 4.4 in the Code simply to give guidance to police officers as to how they will be expected to explain their behaviour if they have used force. The College does not consider that there is a material difference between the Code and the draft Code of Ethics upon which a public consultation took place.[1]

The Divisional Court's reasoning

33. Flaux LJ explained his reasons at [65]-[75]. He began by saying that seeking to categorise misconduct proceedings as either criminal or civil in nature was not a profitable exercise, and that misconduct proceedings were essentially *sui generis*. As we have said, we agree.

34. He then said that "[u]ntrammelled by any authority, statutory or otherwise", he might have been persuaded that the "civil law objective test" applied, because "such a test would better accord with the purpose of police misconduct proceedings", namely to "promote adherence to standards of conduct that the public might reasonably expect from police officers and to maintain public confidence in policing".

35. Then at [66] Flaux LJ said that the HOG and the Code posed insuperable obstacles to that conclusion. His reason was that the Code of Ethics "is intended to and does set out the details of those Standards of Professional Behaviour". As we shall explain, we do not agree with the premise. At [67], Flaux LJ explained the reasons for the premise as follows:

> "Whilst [4.4] of the [Code] may not be as clearly drafted as it might be, I cannot accept the submissions of [counsel for the IOPC] that somehow the accounting by an officer for the use of force is not concerned with whether he or she is guilty of misconduct. This paragraph is part of the details of the relevant Standard of Professional Behaviour, Use of Force, breach of which may well lead to misconduct proceedings. The principal context in which an officer will have to "justify it [the use of

[1] Which provided that "[i]t will be for you to justify your use of force, and show that it was proportionate, lawful, necessary and reasonable. In assessing your use of force, the circumstances facing you at the time will be taken into account".

> force]" is in justifying his or her conduct so as to demonstrate that there has not been a breach of that standard. What is required to justify the use of force is an honestly held belief at the time, clearly a reference to the first limb of the criminal law test. If it had been intended to apply the civil law objective test, the provision would have been bound to say something like: "justify it based upon your honestly and reasonably held belief at the time that you used the force".

36. Flaux LJ then explained why he could not accept counsel for the IOPC's submission "as to why, if [4.4] of [the Code] does mean that the test is the criminal law test, somehow that is wrong in law". We do not repeat that reasoning since, as will appear, we do not think it relevant to the outcome of this appeal.[2]

37. Flaux LJ concluded, as we have said, that the criminal law test was "to be applied in determining whether there is a case to answer, from which it follows that the IOPC applied the wrong test and its decision must be quashed".

The authorities on the criminal and civil tests for self-defence

38. We take the view that the difference between the criminal and civil tests for self-defence is not an issue in this case. In deference, however, to the arguments of the parties that focused closely on that difference, we set out here the essentials of the most important authorities they cited.

39. In *Ashley v. CC of Sussex Police (Sherwood intervening)* [2008] 1 AC 962, Lord Scott of Foscote at [17]-[18] described the criminal and civil tests. He said at [17] that the presumption of innocence and the principle that no one should be punished for the consequences of an honest mistake explained why a person who honestly believed he was "in danger of an imminent deadly attack and responds violently in order to protect himself from that attack" should be able to make a plea of self-defence as an answer to a criminal charge. Nonetheless, the greater the unreasonableness of the belief the more unlikely it may be that the belief was honestly held.[3] In *R v. Keane* [2010] EWCA Crim 2514, Hughes LJ restated the criminal law test at [5] in terms that emphasised that an objective assessment of the force used must also be made.

40. Lord Scott said at [18] that the function of the civil law of tort was to protect people's conflicting rights, and to strike a balance between them. He held 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".

Discussion

41. Although this is an important case, there seemed at times to be a complete disconnect between the arguments of the parties. W80 and the authorities adopting his arguments submitted that the general understanding of police had always been that the criminal

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2 But see *R (On the application of Erenbilge) v. IPCC* [2013] EWHC 1397 (Admin), *R (Duggan) v. North London Assistant Deputy Coroner* [2017] EWCA Civ 142; [2017] 1 WLR 2199 at [76], *Da Silva v. United Kingdom* (2016) 63 EHHR 12 at [275].

3 See *Beckford v. The Queen* [1988] A.C. 130 per Lord Griffiths at 145, in which the Privy Council approved *R v. Williams (Gladstone)* (1984) 78 Cr. App. R 276.

test of self-defence applied in misconduct proceedings, officers were trained on that basis, and that any other outcome would have a chilling effect on the willingness and ability of armed officers to do their job. Conversely, it was said that public scrutiny and accountability demanded that a public misconduct hearing should decide whether, in a situation of this kind, an officer's honest belief was reasonable. Both arguments are compelling, but somewhat miss the point.

42. The standards of professional behaviour required of police officers are statutory. They are, as we have said, contained in schedule 2 of the 2012 Regulations. The relevant statutory requirement is that "[p]olice officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances". That standard is elaborated upon and explained by the Code, but the Code cannot alter the standard itself. The question is not, as the respondent would have it, whether the standard, as explained by the Code, is more consistent with either the civil or the criminal test of self-defence. Those tests are, of course, important, but they do not dictate the proper meaning of the standard.

43. Moreover, the meaning of the standard is not to be judged by specific reference to the facts of this case. There are a multitude of situations to which the standard applies, as paragraphs 4.1 and 4.2 of the Code make clear. It applies to police officers, police staff, volunteers and contractors. It applies where force of any kind is used, for example in arresting citizens, restraining them and taking them into custody. It applies where lethal force is used, but not only in that situation.

44. Paragraph 4.3 of the Code makes clear, as is required in both the criminal and civil tests for self-defence, that only the minimum amount of force necessary to achieve the required result should be used. But even that indication does not in our judgment mean that paragraph 4.4 must be regarded as automatically pointing to the imposition of the criminal test for self-defence. Paragraph 4.4 is not well drafted, as Flaux LJ pointed out. It provides that an officer "will have to account for any use of force, in other words justify it based upon [their] honestly held belief at the time". It is noteworthy that, as recorded in footnote 1 above, the previous draft of paragraph 4.4 of the Code, upon which the College consulted, provided that "[i]t will be for you to justify your use of force, and show that it was proportionate, lawful, necessary and reasonable. In assessing your use of force, the circumstances facing you at the time will be taken into account". The College's Briefing Note suggested that the reason for the change was to provide "[c]learer structure and wording". There was no suggestion that it was intended to import the first part of the criminal test for self-defence.

45. In addition, other paragraphs of the Code do clearly impose additional tests or requirements as Mr Jason Beer QC, leading counsel for the Commissioner, pointed out. Paragraph 5.3 overlays the standard that officers "only give and carry out lawful orders and instructions", with the clear indication that it is not misconduct to refuse to follow an order that is reasonably believed to be unlawful. Paragraph 6.4 adds to the standard that officers are "diligent in the exercise of their duties and responsibilities" a test as to whether membership of an association creates a conflict of interest and duty. Likewise, paragraph 7.5 makes clear that the generally expressed confidentiality standard requires officers to ensure that nothing they publish online can reasonably be perceived by the public as discriminatory. It would have been easy for the Code to say expressly that it would not be misconduct for proportionate force to be used where the officer honestly believed that he was threatened, even if that belief was unreasonable. It did not do so.

Instead, paragraph 4.4 says that the officer "will have to account for any use of force", and then explains that phrase by saying that it means: "justify it based upon your honestly held belief at the time".

46. As the College submitted, paragraph 4.4 is consistent with the APAPP and, properly understood in its context, "gives guidance to a police officer as to how he or she will be expected to explain his or her behaviour if he or she has used force: his or her explanation must be honest and it must be based on what he or she knew at the time".

47. We cannot, therefore, agree with Flaux LJ when he said at [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". Paragraph 4.4 does not address the question of the criminal law subjective test versus the civil law objective test for self-defence. It simply gives guidance as to how the officer is 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".

48. We agree with Flaux LJ when he said at [67] that the justification provided by officers under paragraph 4.4 is so as to demonstrate (if they can) that there has not been a breach of the applicable standard. It does not, however, follow that paragraph 4.4 is making a reference to the first limb of the criminal law test. Paragraph 4.4 is referring 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, as we have said, override the plain words of the standard itself that provide that officers "only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances".

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, as Ms Davidson put the case, 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 respondent'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 respondent'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 threatened 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.

52. We will accordingly allow the appeal and set aside the order of the Divisional Court. The IOPC's Direction to the Metropolitan Police to issue a Notice of Referral to Misconduct Proceedings under regulation 21 of the 2012 Regulations was not issued in error.

53. 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.