

CRIME AND COURTS BILL
SUPPLEMENTARY EUROPEAN CONVENTION ON HUMAN RIGHTS
MEMORANDUM

1. The Home Office and Ministry of Justice published an ECHR memorandum on Introduction of the Crime and Courts Bill in the House of Lords on 10 May 2012. A supplementary memorandum was published on 22 June 2012 in respect of a Government amendment providing for the transfer of immigration and nationality judicial reviews in England and Wales from the High Court to the Upper Tribunal. A further supplementary memorandum was published on 23 October 2012 covering the Government's community sentencing and Deferred Prosecution Agreement amendments. This further supplementary memorandum addresses Government amendments in relation to householder self-defence.
2. The Government has tabled an amendment to the Crime and Courts Bill (inserting new clause *'Use of force in self-defence at place of residence'*) to change the law in relation to self defence. The new clause would amend section 76 of the Criminal Justice and Immigration Act 2008 ("the 2008 Act").
3. The Government is satisfied that this amendment is compatible with the Convention rights.
4. The law currently provides that a person may use such force as is reasonable in the circumstances as they genuinely believed them to be for the purposes of self-defence, defence of another, defence of property, prevention of crime or lawful arrest.
5. Section 76 of the 2008 Act applies where the question arises whether the degree of force used against a person was reasonable in the circumstances. It put part of the common law on self-defence (including defence of others) and the defences provided by section 3(1) of the Criminal Law Act 1967 (use of force in prevention of crime or making arrest) on a statutory footing.
6. Under section 76(3) the question whether the degree of force used by the defendant (D) is reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be. The reasonableness or otherwise of the claimed belief as to the existence of any circumstances is relevant to the question whether the defendant genuinely held the belief. If, however, it is determined that D did genuinely hold the belief he can rely on it whether or not the belief was mistaken or, if it was mistaken, whether or not the mistake was reasonable (section 76(4)).
7. Under the current law, the degree of force used may never be regarded as reasonable in the circumstances as D believed them to be if it was

disproportionate in those circumstances (section 76(6)). The degree of force refers to the type and amount of force used (section 76(10)(c)).

8. Although not express on the face of the statute, the degree of force used could include force which results in death.
9. Section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amends section 76 of the 2008 Act. Once commenced, it will further codify the common law: by expanding the list of defences to which section 76 of the 2008 Act applies to include the common law defence of defence of property; and by adding a new subsection (6A) to section 76 of the 2008 Act to make clear the existing common law position that a person is not under a duty to retreat but the possibility that they could have retreated is an element in the consideration of whether the degree of force used by that person was reasonable in all the circumstances as that person believed them to be.
10. New clause (*'Use of force in self-defence at place of residence'*) gives extra protection to householders faced with trespassers in their premises.
11. There is no change to the overarching test that a person may use such force as is reasonable in the circumstances as they genuinely believed them to be. In householder cases, however, 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. This means that the amendments to section 76 of the 2008 Act admit to the possibility of use of force which is disproportionate but nonetheless reasonable in the circumstances.
12. The widened householder defence will apply to lawful occupiers when they are defending themselves or others from a trespasser in a building or part of a building that is a dwelling. It does not apply to the protection of property or to the defences provided in section 3(1) of the Criminal Law Act 1967.
13. The current law will continue to apply to cases that do not fall within the widened householder defence.

Convention rights

14. The proposals clearly engage Article 2 and, arguably, Article 8 of the ECHR. This memorandum also considers Article 3.
15. The JCHR has previously expressed concern about the compatibility of the law on self-defence in respect of the failure to require reasonable grounds for an honest belief (see further - JCHR, Twenty-Third Report of Session 2007-08). The Government remains satisfied of the compatibility of the law in this respect.

Article 2

16. Article 2 includes a positive duty to have adequate criminal and civil sanctions in place to protect life. The European Court of Human Rights case law has however largely been concerned with the use of lethal force by the state against civilians, including where there has been a mistaken belief as to the threat posed: see *McCann v UK* (Application no. 18984/91); *Bubbins v UK* (Application no. 50196/99); *Bennett v UK* (Application no. 5527/08: admissibility).
17. The widened householder defence would be available to householders and other lawful occupiers who are defending themselves or others from someone they genuinely believe to be a trespasser. It does not extend for example to the common law defence of defence of property.
18. In the Government's view these amendments are compatible with Article 2. The test of lawfulness remains one of reasonableness in all the circumstances. Whether the force used in any case is reasonable in the circumstances is to be considered by reference to the circumstances as the defendant genuinely believed them to be at the relevant time. It is not to be decided with the benefit of hindsight.
19. The amendment to section 76 of the 2008 Act would not prevent disproportionate force from being found unlawful where this would be contrary to Article 2.
20. If the force used is grossly disproportionate in the circumstances, the defendant may never benefit from the defence.

Article 3

21. To the extent Article 3 is engaged, the Government considers that the proposals are compatible with the Convention right. Deliberate use of force that amounts to torture or inhuman or degrading treatment or punishment for the purposes of Article 3 would in the Government's view constitute grossly disproportionate force and would still be prohibited.

Article 8

22. Under Article 8, everyone has the right to respect for their private and family life, their home and their correspondence. A householder plainly falls within this right.
23. A state also has positive obligations which are inherent in the effective respect for private life. The notion of 'respect' is not clear-cut and varies from case to case. In determining whether positive obligations exist, "...regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the state has, in any event, a margin of appreciation" (see *Botta v Italy* (Application no. 21439/93)).

24. The notion of private life can extend to the bodily and mental integrity of a person, although whether it would always do so is unclear. Assuming, however, that Article 8 is (to some degree) engaged in respect of the rights of intruders, their Article 8 challenge would have to be that the law did not provide sufficient protection to their rights because the criminal law allowed for the use of disproportionate force in defence of oneself or others.

25. In the Government's view, if faced with such argument, the Courts will find that this degree of latitude in our criminal law is necessary and proportionate in a democratic society for the protection of the rights and freedoms of others and the prevention of disorder and crime. It reflects the fact that householders protecting themselves and their families in the heat of the moment may not be able to weigh the degree of force to be used to a nicety.

Ministry of Justice
27 November 2012