Web Journal of Current Legal Issues

Turner, 'Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de Menezes', [2008] 4 Web JCLI
http://webjcli.ncl.ac.uk/2008/issue4/turner4.html

Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de Menezes

Ian Turner
BA, LLM, PGCE
The University of Central Lancashire
idturner@uclan.ac.uk

Summary

On 22nd July 2005 an unarmed, white Brazilian, Jean Charles de Menezes, was shot seven times in the head by an élite firearms unit of the Metropolitan Police. Later it was discovered that the fatal shooting was a mistake: the deceased was not the black, North African man, Hussein Osman, who had participated in one of the failed London suicide bombings the day before. By virtue of the Human Rights Act 1998, Article 2 of the European Convention on Human Rights has been incorporated into UK Law. This Article permits the intentional deprivation of life only where the use of lethal force is for a legitimate aim and "absolutely necessary" (as per Article 2(2)). Moreover, it imposes a positive obligation on the state to protect life (as per Article 2(1)). This article assesses the controversial de Menezes shooting in the light of these two issues and, on balance, finds that the killing was lawful. However, notwithstanding this finding, it goes on to question whether the standard of this positive duty should be more favourable to state authorities in cases of suicide bombings, reflecting a more general obligation on them to protect the public at large from acts of terrorism.

Contents

Introduction

Just after 10.00am on 22nd July 2005 an unarmed Brazilian, Jean Charles de Menezes, was shot seven times in the head by plainclothes police officers on a stationary train at Stockwell tube station. The officers were members of 'SO19' (now 'CO19'), a specialist firearms unit of the Metropolitan Police Service (MPS). Eye witnesses at the time claimed that de Menezes was shot at point blank range after having been pushed to the ground (Burleigh and Fenton 2005: 2-3). The killing was believed to have been part of Operation 'Kratos', a code word used by the Anti-Terrorist Branch of the MPS to refer to tactics employed in the pursuit of suspected terrorists, especially suicide bombers (IPCC 2007c: 42-43). In fact, the operation was not a 'Kratos' operation: it was Operation 'Theseus 2', an operation to arrest Hussein Osman, one of the failed London suicide bombers from the day before (IPCC 2007c: 23). However, a Designated Senior Officer (DSO), as per 'Kratos' policy, was appointed in the event that a 'Kratos' scenario was to develop (IPCC 2007c: 23-24).

Initial police statements, including a press conference hosted by Sir Ian Blair, the Commissioner for the Metropolitan Police (MPC), later that day, stated that the person fatally shot was believed to have been a suicide bomber. The dead man was linked to the four suicide bombings in London on 7th July 2005 (where an attack on the city's transport system had killed 52 people and injured more than 700) and the four failed suicide bombings in London on 21st July 2005. It was further reported at the time that the suspect, now known to be Jean Charles de Menezes, was followed by Special Branch surveillance officers from his home in Tulse Hill, south London, into the underground station at Stockwell. He was allegedly wearing an unseasonal bulky jacket and fled from police when challenged, jumping over a ticket barrier (Burleigh and Fenton 2005: 2-3).

However, some 15 minutes after the shooting, senior police officers in Room 1600, the Special Branch operations room at New Scotland Yard, began to suspect an innocent man may have been killed, when an explosives expert at the scene confirmed that de Menezes had not been carrying a bomb (Dodd 2007a: 2). It was not until a day later, 23rd July 2005, that the MPC announced that the killing had been a tragic mistake: the suspect was not Hussein Osman, the black, North African man, who had failed to detonate a bomb on his person the day before.

To human rights lawyers the shooting of Jean Charles de Menezes – a mistake by agents of the state about the need to use lethal force against a suspected terrorist bomber – is altogether too familiar: it mirrors the facts of *McCann* v. *United Kingdom* (1995) 21 EHRR 97 in the European Court of Human Rights (ECtHR) some 10 years earlier. In *McCann* intelligence suggested that the Irish Republican Army (IRA) had been planning a terrorist attack at the changing of the guard ceremony on Gibraltar. Soldiers from the Special Air Service (SAS) were sent to assist the Gibraltar

authorities to arrest the IRA active service unit. This unit was believed to include two volunteers with criminal convictions for explosives offences, Daniel McCann and Mairead Farrell, and another, Sean Savage, with expertise in the manufacture and detonation of explosives.

Close to the sight of the intended target, the Gibraltar police thought that the suspects were going to detonate a car bomb by radio transmission, so authorised the SAS to arrest them. A plain clothes, SAS officer approached Daniel McCann from behind. When McCann turned around, the officer trailing him thought that McCann was going to detonate the bomb, so he shot and killed him. The other SAS officers trailing Farrell and Savage thought the same about them, so shot and killed them, too. No weapons were found on any of the suspects. The suspicious car thought to contain the bomb was empty. (But another car found by Spanish police in Marbella did contain explosives.) The applicants in the case were relatives of the three IRA personnel who had been shot. They complained to the ECtHR that the killings violated Article 2 of the European Convention on Human Rights (ECHR), the right to life. By a slim majority (11-10) the ECtHR agreed.

Article 2(2)(a) of the ECHR says:

> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary a) in defence of any person from unlawful violence…

The ECtHR held that the SAS soldiers were justified in killing the three IRA volunteers because of an honest belief they were about to commit a terrorist atrocity. However, the failings of the operation – the incorrect intelligence leading up to the shooting, for example – were such that the use of lethal force had not been "absolutely necessary", thereby breaching the terrorists' rights to life.

In *Bubbins* v. *United Kingdom* (2005) 41 EHRR 24 agents of the state seemingly also killed someone unnecessarily (albeit not a suspected terrorist). This was during a siege, the police believing the victim was a burglar, brandishing a firearm. The deceased's girlfriend had thought there was an intruder at her flat. The 'burglar' was drunk and was holding what appeared to the police to be a gun. Attempts were made to verify that the person with the weapon was Bubbins but these proved unsuccessful. No trained negotiator was present. Bubbins pointed the gun at an armed police officer. He refused to stand down so was shot. Later the gun was proved to be a replica.

Unlike *McCann* the ECtHR in *Bubbins* found that there had not been a breach of Article 2 of the ECHR (despite the deceased not having fired any shots at the police because it was an imitation weapon). The firearms officers had had an honest belief that their lives were in immediate danger so the use of lethal force in all the circumstances had been "absolutely necessary".

Article 2(2) of the ECHR therefore prohibits intentional killings by the state unless the force used is strictly proportionate to a legitimate aim like preventing unlawful violence. The degree of force exercised must remain "absolutely necessary" even in times of war or public emergency as per Article 15(2) of the ECHR (though Article 15(2) does exclude deaths resulting from lawful acts of war).

Article 2 not only confers a negative right upon an individual (that is, a right not to be arbitrarily killed by the state): it also possesses a positive sense. Article 2(1) imposes a positive or substantive duty on the state to protect life through civil and criminal measures to prevent death. It can, therefore, oblige the state to take positive steps to deter individuals from being killed either by another person (see, for example, *Regina (Amin)* v. *Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653) or by suicide (see, for example, *Regina (Middleton)* v. *West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182). This positive duty imposes a corresponding secondary obligation on the state: a procedural or investigative duty to examine how and why a person died (see, for example, *Finucane* v. *United Kingdom* (2003) 37 EHRR 29).

The shooting of Jean Charles de Menezes has, of course, taken on particular significance since the Human Rights Act 1998 (HRA) came into force in October 2000. Section 3 of this statute obliges any court, whether it be civil or criminal, to interpret legislation in line with Article 2 of the ECHR, for example. However, this "interpretative obligation" is not unqualified: it is to the degree "so far as it is possible to do so". If a court cannot interpret a statute in line with Article 2 of the ECHR "so far as it is possible to do so", the HRA s.4(2) allows for a "declaration of incompatibility". This process has been described as "legislative review" (O'Brien 2007), albeit it does not permit a court to invalidate the offending legislation. A declaration of incompatibility permits a government Minister to amend the legislation under the HRA s.10. Alternatively, there is "applied review" (O'Brien 2007) under the HRA s.6(1), whereby it is unlawful for a public authority to act in contravention of a Convention right like Article 2.

The purpose of this article is primarily to consider the circumstances surrounding the de Menezes killing with a view to questioning their compatibility with Article 2 of the ECHR. For example, is the action of the UK state unlawful as contrary to the HRA s.6(1) since an innocent man was shot in possible contravention of Article 2? Alternatively, since the discharge of police firearms is so rare, compared to the large number of incidents requiring the attendance of weapons' officers, should we start from the premise that the killing was lawful and oblige others to prove that it was not so? On the other hand, is the defence of self defence available to the 'SO19' officers who fired the critical shots? If so, should the defence under the Criminal Law Act 1967 s.3 permitting the use of "reasonable" force, be interpreted by the courts under the HRA s.3 as complying with Article 2(2)'s use of the words "absolutely necessary"? If not, under the HRA s.4(2) should the courts declare that the legislation is incompatible with Article 2(2) and leave it to be amended under the HRA s.10?

It was not until some five days after the shooting that the Independent Police Complaints Commission (IPCC) began an investigation. This was later named 'Stockwell One' to distinguish it from another IPCC investigation – 'Stockwell Two'– into the conduct of senior police officers immediately following the killing. The de Menezes family had complained that the police had either released inaccurate information, concurred with inaccurate information or failed to correct such information. The report into 'Stockwell Two' was published on 2nd August 2007 (IPCC 2007a) and found no evidence of misconduct against the MPC. It did find, however, "serious weaknesses" in how the MPS had handled critical information,

particularly the actions of Assistant Commissioner Andrew Hayman. The Senior Management Team of the MPS, including Assistant Commissioner Hayman, had had strong suspicions soon afterwards shooting that de Menezes was not linked to the then recent suicide bombings and failed suicide bombings. Nevertheless, it failed to communicate these suspicions to the MPC before his press conference later on that day. In fact, the MPC had had no knowledge of these until about 24 hours after the shooting (IPCC 2007b).

Prior to his press conference, the MPC wrote to Sir John Gieve, the Permanent Secretary at the Home Office. He said that a chief officer of police should be able to suspend the Police Reform Act 2002 s.17 which requires a police force to supply all information to the IPCC. This was because of a concern about revealing either the tactics that the MPS had and/or the sources of information on which it was operating. The MPC had therefore decided that the shooting should not be referred to the IPCC and that the IPCC should not be given access to the scene at that time. The investigation would be carried out by the police's own Directorate of Professional Standards. The investigation would be rigorous but sub-ordinate to the needs of the counter-terrorism operation (Home Office 2007a).

In the interests, therefore, of continuing anti-terrorist operations, does the "interpretive obligation" under the HRA s.3 permit the courts to read into the Police Reform Act 2002 support for the MPC's decision, because of the fundamental rights of Londoners to be protected from further unlawful violence? If not, again, under the HRA s.4(2) should the courts declare that the legislation is incompatible with Article 2 of the ECHR because of its lack of regard for the positive obligation to protect the life of the public in general? Alternatively, the substantive duty imposed by Article 2 could be interpreted in another way: what about the threat to the well being of those members of the public who came into contact with de Menezes in allowing (at that time) a suspected suicide bomber board two buses and a train before 'stopping' him at Stockwell?

Of course, an IPCC investigation did begin some days later. Its recommendations for action were passed to the Crown Prosecution Service (CPS) on 14th March 2006. Four months later, it was announced that no police officer was to be prosecuted (CPS 2006). Instead, the Office of the MPC (as the employer of the individual officers rather than Sir Ian Blair in his personal capacity) was to be prosecuted for failures under the Health and Safety at Work Act 1974 s.3(1), contrary to s.33(1)(a) of the act. Is this, too, an unlawful act contrary to the HRA s.6 for not being a sufficiently serious criminal charge to bring as required by Article 2?

The criminal trial began on 1st October 2007. The police were found guilty a month later and fined £175 000, with £385 000 costs. Following the guilty verdict, the Home Secretary issued a public statement saying that the MPC and the MPS "have my full confidence, and our thanks and support in the difficult job that they do" (Home Office 2007b). Again, was the choice of criminal charge sufficient to hold the state to account for the shooting, as the police were only fined, and then only £175 000? What about the statement of the Secretary of State? Does this reflect the seriousness of the police's actions on that day in July 2005?

The substantive obligation imposed on the state to protect life under Article 2(1) has been interpreted by the ECtHR as requiring a corresponding procedural duty to investigate a deprivation of life. Such investigative measures must be inter alia independent and timely. The fact that the police retained control over the investigation for several days after the shooting, justifying a suspension of their statutory obligation to refer the matter to the IPCC, suggests another breach of Article 2. Moreover, is the IPCC sufficiently independent to satisfy the procedural obligation? Indeed, is this investigative duty satisfied by the criminal trial? Or will it be fulfilled only when the inquest has been completed sometime in January 2009?

It is the purpose of this study, therefore, to consider the Article 2 compatibility of these, and other, issues arising from the fatal killing of Jean Charles de Menezes (which the IPCC report says "should have been avoided" (IPCC 2007c: 138)). However, the intention of this article is for any such evaluation to be more than a lengthy case analysis of the shooting's right to life implications for the deceased. In assessing whether there has been an unlawful denial of this fundamental right (since from the explanation given above a deprivation of life under Article 2(2) can be legal if it is "absolutely necessary" and for a legitimate aim), wider considerations of the state's duty to protect not only the life of the person whose life has been denied but the lives of the wider community from acts of suicide terrorism will be undertaken. The circumstances of the shooting did not involve a stand off between police and a suspect brandishing a weapon, threatening either the life of a hostage or the lives of armed officers: an entirely innocent man was summarily executed in the full glare of a packed London underground tube train. Nevertheless, the events surrounding the shooting symbolise the new and unique forms of terrorism that that the UK authorities now face post '9/11', overshadowing the IRA atrocities of the 1980s and 1990s. They challenge the very nature of policing in the 21st Century, and the state's obligations to maintain safety and security.

Possible Infringements of Article 2 of the ECHR

As stated above there are three elements to Article 2 of the ECHR. First, there is a person's negative right not to have his/her life intentionally deprived unless, as per Article 2(2), the state can justify the infringement on the grounds that it is for a legitimate aim and "absolutely necessary". Secondly, there is a positive or substantive obligation imposed on the state to protect the lives of those people who come under its responsibility. Thirdly, there is a corresponding obligation derived from the positive duty to protect life: a procedural duty to investigate killings. In assessing the potential breaches of Article 2 in the Stockwell shooting, the following sections will do so by reference to, first, the negative right, and, secondly, the positive duty; for reasons of word length the investigative obligation is reserved for a later article in this study. The fact that the inquest into the shooting is not scheduled to commence until 22nd September 2008 (BBC News 2008) reinforces the need for a subsequent assessment of the procedural issues arising from the case.

A breach of the negative right not to be unlawfully killed?

The need for armed police to fatally shoot de Menezes

The most appropriate criminal offence committed by the two armed police officers from 'SO19' who shot Jean Charles de Menezes, codenames 'Charlie 2' and 'Charlie 12', would be murder: the "unlawful killing of a reasonable person in being during the Queen's peace with maliceaforethought" (Coke 3 Inst 47, quoted from Herring 2008: 234). There is no dispute that first the officers in discharging their weapons did kill de Menezes – there was not a break in the chain of causation such as self-detonation of the suicide vest that the officers believed him to be carrying – and secondly they did so with malice aforethought. That is, it was clearly their direct intention to kill him by jointly firing seven shots at his head from close range (rather than forseeing death or Grievous Bodily Harm as a "virtual certainty" – oblique intention – from another desired action (see, for example, *R* v. *Woolin* [1999] 1 AC 82, HL), possibly a volley of shots aimed at a person sitting next to him).

Arguably, 'Charlie 2' and 'Charlie 12' would have a defence to a charge of murder based on the protection of themselves and the commuters on the train from a suicide bombing, as per the common law and the Criminal Law Act 1967 s.3(1). The common law principles of self defence, which have been partially codified recently by the Criminal Justice and Immigration Act 2008 s.76, permit individuals to use necessary force to defend themselves. There are two limbs to this defence. The first, the need for force to defend oneself, is subjectively assessed, requiring a defendant to have an honest and genuine belief that force is necessary (as per *R* v. *Williams* [1987] 3 All ER 411, CA). This means that if a defendant makes a mistake about this genuine and honestly held belief, he is acquitted, even if the need for force is considered to be objectively unreasonable. (Note that the House of Lords has recently confirmed that, for the purposes of a civil claim for battery, the standard is lower, in that the belief in the need for self defence must also be reasonably held – see *Ashley* v. *Chief Constable of Sussex* [2008] UKHL 25.) This principle of the criminal law seems to accord with the jurisprudence of the ECHR. In *McCann* the ECtHR said (at para 200):

> The Court accepts that the soldiers honestly believed, in the light of the information that they had been given…that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives...The use of force by agents of the State in pursuit of one of the aims delineated in Article 2(2) of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

If de Menezes had been a suicide bomber, would he not have tried to detonate the bomb when he became aware (if he did) that Special Branch surveillance officers were following him? What about the 'SO19' team at the train station? They were not undercover; they were wearing caps to identify them as police officers (Dodd 2007a).

One had a long-barrelled weapon visible (Dodd 2007a). If de Menezes had been a suicide bomber, he would therefore have had ample time and warning to detonate his device. Does this represent an honest belief on the part of 'SO19' officers about the need for lethal force?

Furthermore, what about the armed officers' belief when they confronted de Menezes? De Menezes was white; Hussein Osman, the suspected suicide bomber the police were pursuing, was a black, North African. It has since been established that de Menezes was not wearing an unseasonal, bulky jacket masking a suicide bomber's vest but in fact a denim jacket, T-shirt and denim jeans; neither was he carrying a bag (IPCC 2007c: 36). Security forces in Israel, well used to confronting suicide bombers, have to be sure they can see a suicide vest or explosives before they open fire (Taylor 2006: 13).

It is perhaps logical to begin with an assessment of the principal firearms officers who killed de Menezes. The IPCC report states that the two officers who shot him were both very experienced. 'Charlie 2' had 20 years police service. He has been a firearms officer for 16 years and a Specialist Firearms officer for 14 years. 'Charlie 12' had 22 years police service. He had been a firearms officer for 14 years and a Specialist Firearms officer for seven years (IPCC 2007c: 28). The report goes onto say that every police officer is fully accountable and anyone involved in using firearms tactics will be subject to full and proper scrutiny and investigation. Every armed police officer knows that they face this level of accountability (IPCC 2007c: 28).

Furthermore, statistics on the police discharge of firearms are relevant to the issue of the officers' belief about the need to defend themselves and other people on the train. For example, between April 1999 and March 2000 there were 10,915 operations in which firearms were issued to officers, with the MPS accounting for 2,862 of such operations. Of these, there were only seven incidents where police actually discharged their firearms and three fatalities (Jones 2005). The fact that there were only three deaths at the hands of armed police in nearly 11,000 firearms operations is of particular significance. Because instances of actual police discharge of weapons are very rare, coupled with the intensity of the physical and psychological training of elite firearms officers, and the close scrutiny they are subjected to if they do fire their guns, the author believes that there is an arguable presumption that the armed officers who shot de Menezes were acting within the law of self defence.

In the context of suicide bombings Rogers notes that for the armed officers to believe that Jean Charles de Menezes was a suicide terrorist, they should have reached some level of certainty about this. But if they were aware of imperfections in the surveillance operation, then finding that they had honest grounds for believing him to be a suicide bomber would be difficult (Rogers 2005). What evidence, if any, is there to suggest otherwise? For example, having heard the order to stop the suspect getting on the tube, 'Charlie 2' believed this was relayed from the DSO and that de Menezes was a suicide bomber who had entered the station in order to blow up a train (IPCC 2007c: 63-64). In relation to other 'SO19' officers involved in the operation, albeit not those who discharged the critical shots, 'Charlie 6' interpreted the same order as an instruction to stop a suicide bomber. He believed he might have to shoot the suspect in order to stop him killing members of the public and himself (IPCC 2007c: 61). 'William' believed that this was a 'Kratos' incident and he needed to stop the

suspect immediately from detonating any device (IPCC 2007c: 61). 'Vic' believed the tone and urgency of the order, combined with all the intelligence, meant that de Menezes had to be stopped immediately and at any cost (IPCC 2007c: 61). In these circumstances, it seems to the author that the 'SO19' officers' belief in the need for self defence from an attack by a suicide bomber, prior to them entering the train and confronting de Menezes, was honestly held.

What about the officers' belief when they did encounter de Menezes for the first time? In the seconds prior to the shooting, 'Charlie 2', for example, saw a person he believed to be a police surveillance officer point at a male on the train. 'Charlie 2' described this man "as Asian, dressed in jeans wearing a bulky looking denim jacket". De Menezes then stood up and was grabbed by the same surveillance officer, 'Ivor', who pushed him back onto the seat. The IPCC report states that at this stage 'Charlie 2' was convinced de Menezes was a suicide bomber about to detonate a bomb. He honestly believed that unless he acted immediately everyone present was about to die. He formed the opinion that the only option was to shoot the man in the head and kill him instantly to prevent any detonation (IPCC 2007c: 64). Following this, the author believes that the belief of 'SO19' officers (principally 'Charlie 2') in the need for protection from a suicide bomber, when confronting the suspect for the first time, was also honestly held.

In summary, therefore, the armed police seem not to have been aware of any imperfections in the surveillance operation. On a related issue, the IPCC report into the shooting states that there was no evidence that the DSO, Commander Dick, had used any code word or given any order for de Menezes to receive a critical headshot without challenge (IPCC 2007c: 61). However, the 'SO19' personnel did believe that a positive identification had been made: the suspect was Hussein Osman, the suicide bomber that the police were pursuing from the previous day. This had triggered "State Amber", meaning 'SO19' intervention may be required (IPCC 2007c: 94). 'SO19' then went to "State Red", a clear signal for armed support to take control of the operation, their objective from hereon being to 'stop' de Menezes entering the tube system (IPCC 2007c: 60). What did the 'SO19' officers understand by the word 'stop'? They believed, from the tone of the DSO's order, that the suspect was a suicide bomber who needed to be 'neutralised', it was said above. Was it reasonable, therefore, for them to delay the 'stop' to establish, first, whether de Menezes was Hussein Osman, and, secondly, to establish whether he was a suicide bomber, considering everything they knew about him prior to entering the station, and the reaction of the surveillance officer, 'Ivor', in pushing the suspect down onto a seat?

It was stated above that the first principle of the defence of self defence in UK law seems to accord with ECHR jurisprudence. (Therefore, 'SO19's seemingly genuine and honest belief in the need to fatally shoot de Menezes would be justified by reference to Article 2(2).) However, Leverick would dispute this argument about domestic law's compatibility with the ECHR: a person's belief in the need to kill in self defence, which objectively may be unreasonable, arguably, does not satisfy Article 2(2)'s "absolute necessity" test (Leverick 2002). Indeed, Feldman goes further: he argues that the subjective test of necessity may be acceptable for an ordinary person but may be insufficient for firearms officers who have the training and background information needed to assess risk and to weigh up their responses to it. In this regard a more demanding standard should be expected of them (Feldman

2002: 191). Should, therefore, the honest belief of the armed officers, which may be objectively unreasonable, because of, for example, the manner in which they approached de Menezes, and the lack of similarities between him and Hussein Osman, be an infringement of Article 2? Feldman's argument is, of course, only an opinion but is certainly convincing. Nevertheless, whilst the need for lethal force in the de Menezes case might not have been reasonably held, the test in UK law – the requirement of only a genuine and honest belief on the part of the firearms officers – and its compatibility with Article 2 may now be resolved. Cross says that it seems to conform to ECHR law in the opinion of the Administrative Court in *R (Bennett)* v. *HM Coroner for Inner South London* [2006] EWHC 196 (Admin) (Cross 2006). (This case was subject to an appeal – [2007] EWCA Civ 617 – but the issue about the compatibility of the defence of self defence with Article 2(2) was not pursued.) Indeed, Ormerod notes that the ECtHR had the opportunity to reassess the legality of UK measures in the later case of *Bubbins* (referred to earlier) but in not doing so, implicitly accepted that it was lawful (Ormerod 2008: 363).

The other limb of the domestic defence of self defence is that the degree of force used must be reasonable (as per *R* v. *Owino* [1996] 2 Cr App R 128, CA). This is assessed objectively, so the defence is not available if the defendant makes an honest mistake about the degree of force required and uses it in a manner which, objectively, is disproportionate to the threat s/he is faced with. Is this element of the defence compatible with Article 2(2) of the ECHR? In explaining further the meaning of "absolutely necessary", the ECtHR in *McCann* said (at para 149):

> [The] use of the term "absolutely necessary" in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.

Is the requirement of reasonableness for the degree of force in UK law the same as strict proportionality in ECHR law? On this issue, the *Manual of Guidance on the Use of Police Firearms* published by the Association of Chief Police Officers (ACPO) suggests otherwise (ACPO 2005: para 3.9). In any event, if the armed officers had a genuine and honest belief they were faced with a suicide bomber, arguably, the need to kill rather than incapacitate would have been strictly proportionate as per Article 2(2), and therefore by definition also reasonable as per the common law and the Criminal Law Act 1967 s.3(1). Question marks may remain about the need to discharge nine shots (seven at the head of de Menezes) in such a confined space with commuters and other police officers in close proximity – a view expressed by the human rights organisation British Irish Rights Watch (BIRW) (BIRW 2006):

> British Irish rights watch is concerned by the level of force used during this operation…It would appear that an excessive number of rounds were fired. If one considers that De Menezes was restrained, the firing of eight or more shots in a contained public space, not only indicates a lack of control on the part of the armed officers, but considerable danger to the public."

However, on this issue Rogers argues (Rogers 2005):

> Once it is understood that there is a perceived need to kill the suspect from the moment of the very first shot, the officer should make sure that the suspect is dead. The advice to shoot repeatedly in the head was apparently from both Israeli and Pakistani security forces, and it seems quite proper that we should learn from their experience in dealing with suicide bombers.

Of course shots to the head are necessary if the suspect is to be killed but they are necessary for other reasons: shots to the bomber's chest could detonate his suicide vest (Taylor 2006: 14). In this respect, therefore, even the degree of lethal force used, and the manner in which it was exercised, albeit alarming maybe to the media and the general public, was arguably strictly proportionate and therefore "absolutely necessary" as per Article 2(2).

The shooting's operational and intelligence failings

In further ruling that there had not been a breach of Article 2, the ECtHR in *Bubbins* said that there had not been a failure to plan and organise the operation in such a way as to minimise to the greatest extent possible any risk to the right of life. This is in reference to the earlier findings of the ECtHR in *McCann*. There, notwithstanding the fact that the SAS soldiers had been justified in using lethal force because of an honest belief that the IRA volunteers were going to detonate a car bomb by radio transmission, the ECtHR still stressed the potential culpability of others involved in the operation (at para 150):

> In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

In subjecting the initial operational and intelligence failings to particular scrutiny, prior to the SAS end of the operation, the ECtHR in *McCann* held that there had been a breach of Article 2 (at para 201):

> [The] question arises whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

Taylor has argued that in running operations involving suspected suicide bombers the DSO has a range of codewords to convey instructions to the 'SO19' officers on the ground. They culminate in one particular codeword that authorises the use of lethal force. But, in the end, he says the success or failure of an operation depends on the quality of the intelligence. It is primarily this intelligence, received and analysed in the Special Branch operations room at New Scotland Yard, that determines how 'SO19' officers are instructed to act (Taylor 2006: 14).

At the police's criminal trial for breaches of the Health and Safety at Work Act 1974 (see more below), Clare Montgomery QC, lead counsel for the prosecution, said (Dodd 2007b):

> The shooting of Jean Charles was a shocking and catastrophic error...We say that the police planned and carried out an operation that day so badly that the public were needlessly put at risk, and Jean Charles de Menezes was actually killed as a result...We say that it was the police operation itself which invited the disaster. The disaster was not the result of a fast-moving operation going suddenly and unpredictably awry. It was the result of fundamental failures to carry out a planned operation in a safe and reasonable way.

In this regard, assuming the armed officers had an honest and genuine belief that de Menezes was a suicide bomber, what failings of the operation prior to the shooting, if any, caused the 'SO19' officers to believe they had to exercise "reasonable" force as per the common law and the Criminal Law Act 1967 s.3(1) and fatally shoot him?

Police uncertainty about a positive identification

A bag left by one of the failed suicide bombers from the day before contained a gym membership card. Inquiries at the gym revealed a possible identity of one of the suicide bombers, Hussein Osman (codename: 'Nettle Tip'), and an address, a block of flats at 21 Scotia Road, Tulse Hill, south London, the same address as Jean Charles de Menezes. At 4.20am on the day of the shooting surveillance teams were ordered to attend the premises. The first team arrived just after 6am and a second team just after 8.30am. The aim of the operation was to stop people coming out of the communal door to flats 14-22 of 21 Scotia Road (9 flats in all) and establish whether or not they were Hussein Osman. This was to be done at a distance away from the premises so as to not arouse suspicion of the occupants inside (IPCC 2007c: 55).

'Frank', an intelligence officer attached to Special Branch from special forces, was in an observation van parked outside the flats. He was relieving himself when de Menezes left the house at 9.33am. Consequently, he was unable to positively identify him as Hussein Osman, but did say that he was white, dark hair, beard/stubble, blue denim jacket, blue jeans and wearing trainers. He said it was worth someone else having a look (IPCC 2007c: 55). Other surveillance officers then followed de Menezes and at 9.36am he was described by the surveillance team leader, 'James', as a "good possible" identification of the suspect. At 9.42am he was described by 'Harry' as "may or may not" be the suspect and at 9.46am 'Ivor', riding the same bus as de Menezes from Tulse Hill to Brixton, was unable to positively identify the suspect. As a consequence, he was then recorded by 'Trojan 80', a tactical officer advising the DSO at New Scotland Yard, as "not identical". 'Laurence' reported at 9.49am that de Menezes was "not identical" to Hussein Osman. At 9.59am 'James' was asked to give a percentage of identification and replied, obviously not reflecting what 'Harry' and 'Laurence' had said, "[percentage] impossible but thought that it was suspect" (IPCC 2007c: 55-58).

Without a doubt, there was immense pressure on the police to apprehend the failed suicide bombers from the day before and prevent a repeat of the terrorist atrocities committed on 7th July 2005. Furthermore, we now have the benefit of hindsight in determining that this remark by 'James' was one of the critical reasons for the shooting. Nevertheless, one would have expected a more representative assessment from the police of the degree to which Jean Charles de Menezes was a likeness to Hussein Osman, especially from the officer who was tasked with leading the surveillance team. Indeed, the IPCC report concludes (IPCC 2007c: 128):

> The surveillance team leader 'James' expressed a level of doubt in communicating to Room 1600 words to the effect that "they believed the subject to be 'Nettle Tip', "it was a good possible", "it was believed to be him", "they could not give a percentage". Such phrases indicate that while not 100% certain it is thought that the subject and deployment of 'SO19' to carry out an armed interception was therefore justified. However 'James' did not communicate that some of his team thought that the subject was not 'Nettle Tip'. This information should have been fully communicated to [the DSO], Commander Dick as it may have influenced her decision-making. The Crown Prosecution Service may wish to consider whether this negligence by 'James' satisfies the test for gross negligence.

There was therefore an IPCC recommendation to the CPS to consider criminal charges against 'James' for gross negligence manslaughter. The CPS decided against pursuing any criminal charges against this officer. (In fact no individual officers were prosecuted. This decision by the CPS was subject to a judicial review challenge by the family of de Menezes, which is discussed in more detail below.) However, the police were prosecuted for breaches of the Health and Safety at Work Act. This omission by 'James' was a feature of the prosecution's case.

At the criminal trial Clare Montgomery QC, lead counsel for the prosecution, said that while the surveillance officers did not hear anything over the radio which could have led anyone to believe that Jean Charles had been positively identified as the suspect or that he had been safely discounted, in the operations room some officers apparently thought that there had been first a positive non-identification and then later a positive identification. Neither of these extreme views was justified on what the surveillance team were seeing and transmitting (Dodd 2007b). In this respect, why did the surveillance officers who had been following de Menezes for nearly half an hour on two buses and into Stockwell tube station facilitate the fatal shooting when not one of them had made a positive identification that he was in fact the suspect, let alone the suspect wearing only a denim jacket, not carrying a bag and intent on detonating a bomb on his person? Does this failure, therefore, by the surveillance officers, and 'James' in particular, which contributed significantly to the killing, signify a breach of Article 2?

The failure of 'SO19' to support Special Branch surveillance officers before Stockwell station

Once the police had located an address, 21 Scotia Road, Tulse Hill, from the gym membership card of Hussein Osman, the then officer in charge, Commander

McDowell, drew up a plan at about 5am. This stated that firearms officers from 'SO19' should be present to stop people emerging from the premises. Regrettably, the 'SO19' team took more than four hours to be assembled, briefed and then to arrive at the area. In fact the armed officers were not deployed on the ground until after de Menezes had left the flats (IPCC 2007c: 32). The IPCC report concludes (IPCC 2007c: 122):

> The management of the operation between 07:15hrs and 09:30hrs should have involved giving practical effect to the strategy devised so that appropriate resources were in place…from the earliest possible time…The policy…was, in essence, one of containment, stop and arrest. What occurred between 07:15hrs and 10:06hrs was a failure of that policy…During those hours there was a series of briefings. None of the eight people who left the flats before Mr de Menezes left were stopped in accordance with the strategy and when he left he was simply followed while ineffective attempts were made during the course of half an hour to determine whether he was 'Nettle Tip'. If appropriate resources had been in place there would have been the opportunity to stop Mr de Menezes during the course of his five minute walk from Scotia Road before catching the bus in Tulse Hill.

This failure in the deployment of 'SO19' on the ground until Stockwell compounded the seemingly chaotic nature of the shooting. One of the surveillance officers on the train, 'Ivor', had to point out the suspect to 'SO19' officers when they arrived. 'Ivor' himself, who had bravely hugged de Menezes to stop what he thought was the detonation of a bomb (IPCC 2007c: 65), was subsequently grappled to the ground by another 'SO19' officer, 'Charlie 5', who thought he, 'Ivor', was also a suicide bomber (IPCC 2007c: 65). The driver of the train was challenged by armed police when he was taking refuge in a tunnel (IPCC 2007c: 66).

Does the seemingly confused nature of the operation, especially at the time of the shooting, infringe Article 2? In *Makaratzis* v. *Greece* (2005) 41 EHRR 49, for example, the ECtHR found an unlawful denial of the right to life after a shooting at a garage, following a car chase. The police had fired shots at a car that had gone through a red light. They then chased the car, the driver having broken through five roadblocks before being stopped at the garage. The ECtHR was critical of the applicant's behaviour: he had been driving his car in the centre of Athens at excessive speed in an uncontrolled and dangerous manner, thereby putting the lives of bystanders and police officers at risk (at para 64). Furthermore, the court noted the prevailing climate at that time in Greece, which was marked by terrorist activities against foreign interests (at para 65). Nevertheless, the ECtHR still found a breach of Article 2 (at paras 67-68):

> [The] Court is struck by the chaotic way in which the firearms were actually used by the police in the circumstances. It may be recalled that an unspecified number of police officers fired a hail of shots at the applicant's car with revolvers, pistols and submachine guns. No less than sixteen gunshot impacts were found on the car, some of them attesting to a horizontal or even upward trajectory, and not a downward one as one would expect if the tyres, and only the tyres, of the vehicle were being shot at by the pursuing police. Three holes and a mark had damaged the car's windscreen and the rear window glass was

> broken and had fallen in. In sum, it appears from the evidence produced before the Court that large numbers of police officers took part in a largely uncontrolled chase. Serious questions therefore arise as to the conduct and the organisation of the operation.

The author believes, however, that the facts of the de Menezes case can be easily distinguished from those of *Makaratzis*. Yes, the nature of the operation which resulted in the shooting of Jean Charles de Menezes was clearly not measured at times. However, the armed officers were not shooting indiscriminately on the train, thus exposing the passengers to the risk of death or injury. In addition, since the shooting the MPC has gone some way to explaining the lack of 'SO19' support until Stockwell tube station (Sturcke and Dodd 2007):

> We have only a limited number of specialist firearms teams available...If we had put it in Scotia Road [straight away], it would not have been available anywhere else.

Therefore, whilst the late deployment of 'SO19' appeared to compound the chaotic nature of the 'stop', this seemed justified given the demands it was possibly facing only a day after four failed suicide bombings. An expectation that 'SO19' should have been on the scene immediately may be unreasonable. Illegitimate demands on state authorities to protect life are assessed in more detail later when the positive obligation imposed by Article 2(1) is analysed.

The central control of the operation at New Scotland Yard

Another issue in support of the prosecution's case was the arguably poor leadership of the operation by senior officers at New Scotland Yard. At the criminal trial Clare Montgomery QC said (Dodd 2007a):

> The operation that led to Jean Charles's death should have been planned, controlled and supervised by a group of senior officers at New Scotland Yard. That was the theory. The reality was different.

First, one may consider the nature of an operation briefing. At about 7.25am on the day of the shooting, Commander McDowell passed control of the operation to Commander Dick. She had also been specially selected for the role of DSO if a 'Kratos' operation was to develop. Commander McDowell had begun a briefing about the operation's strategy at 6.50am but it was not until 7.15am that Commander Dick arrived, having been told that the meeting was in another room (IPCC 2007c: 30). She therefore missed the first 25 minutes of the then leader's briefing. In this regard, the IPCC report notes (IPCC 2007c: 120):

> That was most unfortunate. While Commander McDowell at the end of the briefing would update her, the delay in her arrival prevented any opportunity to have a face-to-face meeting with her Silver Commanders. Commander Dick was therefore unable to influence the briefings of ['SO19'] personnel.

The IPCC has also expressed concern at the choice of room at New Scotland Yard, Room 1600, to manage the operation (IPCC 2007c: 137):

> Room 1600 was normally used to command intelligence gathering operations rather than dynamically developing crimes in action. The latter normally being commanded in Central 3000 which has the ability to record all communications. That room should have been used for the operation and the explanations given for not using it are not satisfactory.

It was stated above, when discussing the genuine and honest belief of the firearms officers for the need to use lethal force, that several factors accounted for their obligation to fire several critical shots. These included: their understanding that de Menezes had been positively identified as Hussein Osman; their order to move to "Code Red", requiring them to take control of the operation; and the tone of the 'stop' order given to them by senior officers. What do these all say about the culpability of those managing the operation, especially the leader, Commander Dick? The IPCC report states (IPCC 2007c: 127):

> The failure of the surveillance team to identify the person as 'Nettle Tip' meant that Commander Dick was forced into giving the stop order. In the context of what had occurred it is clear that this was more than a normal police stop order and that in those circumstances she should have said that 'Kratos' had not been engaged and that 'SO19' should not shoot unless there was an absolute justification.

Another possible example of poor leadership in the operation was the omission by senior officers to plan for potential errors. This was an issue that was given particular weight by the ECtHR in *McCann*. There the court said that the UK authorities had failed to make sufficient allowances for the possibility: first, that their intelligence assessments (namely that a bomb actually existed and would most likely be detonated via radio transmission) might, in some respects, be incorrect; secondly, that there was a high possibility that the suspects were on a reconnaissance mission. These factors were not conveyed to the members of the special forces who fatally shot the three suspects, thus rendering, stated the ECtHR, the use of lethal force against them inevitable (at para 213).

A mistake in the de Menezes operation was arguably not planning for a different tactical option, in the event that the suspect left the address in Tulse Hill before the arrival of 'SO19', the arresting officers. The significance of this cannot be overstated (IPCC 2007c: 133):

> The absence of any other options resulted in Mr de Menezes being allowed to enter an environment that was very difficult to command and control. The worst-case scenario for this operation was that a suspected suicide bomber should be allowed to enter the underground system and detonate a device. Had this been a terrorist followed to Stockwell, the failure to apprehend him sooner could have resulted in an even more catastrophic outcome resulting in many deaths.

Indeed, in view of the many operational faults attributable to senior officers – the manner in which the operation was commanded, the failures to have resources properly deployed and the absence of any other tactical option – the IPCC invited the CPS to consider general charges of gross negligence manslaughter (IPCC 2007c:

136). Nevertheless, was the management of the operation an infringement of Article 2 since there was some justification for the surveillance team believing that de Menezes was the suspect Hussein Osman? In fact, it reported this suspicion back to Room 1600 at New Scotland Yard. When de Menezes got off the bus at Brixton to catch the tube, he saw that the station was closed. He then made a phone call before getting back on a bus to Stockwell. The Special Branch team interpreted this as a counter-surveillance measure (Taylor 2006: 14). (In fact De Menezes was simply calling his Brazilian workmate, Gesio d'Avila, to say he would be late for the electrical job they were starting in Kilburn (Taylor 2006: 14).) At the criminal trial Commander Dick said that this conduct was one of the reasons behind her eventual order to stop de Menezes entering the station (Dodd 2007a): "

> From the behaviour described to me – nervousness, agitation, sending text messages, [using] the telephone, getting on and off the bus, all added to the picture of someone potentially intent on causing an explosion.

In conclusion, do all the issues analysed above – the need for armed police to fatally shoot de Menezes, the failure of 'SO19' to support Special Branch surveillance officers before Stockwell station and the possible poor leadership shown from the central control room at New Scotland Yard – signal a breach of the negative right not to be unlawfully killed in Article 2(2)? First, the use of lethal force by the armed police arguably was lawful because it mirrors the genuine and honest belief held by the SAS officers in *McCann* (though here the manner in which the police entered the station and then the train, and the state in which they found de Menezes – blue jeans, T-shirt, denim jacket, no bag – hardly inspires significant confidence in such a belief). The responsibility of the surveillance officers trailing de Menezes and the senior officers at police headquarters is less easy to ignore. Of course, the principal reason for the ECtHR finding a breach of Article 2 in *McCann* was failing to manage the operation in a way that respected sufficiently the rights to life of the three IRA suspects. Such a conclusion may be the case here with the unrepresentative assessment by 'James', the surveillance team leader, of the degree to which de Menezes was a likeness to 'Nettle Tip'. One could also identify the arguably poor leadership shown by senior officers in overlooking possible errors in the operation. One such eventuality, which in fact did arise, was 'SO19''s inability to stop de Menezes before he arrived at Stockwell (culminating in the public being exposed to potential danger from a suspected suicide bomber between the time he left his flat in south London and the time he boarded a train (which is discussed in more detail below)).

It will be recalled that one of the contributory factors in the ECtHR's finding that *McCann* was a breach of Article 2 was the failure in planning for operational mistakes. The author has, of course, identified a similar shortcoming in the de Menezes shooting. Does this mean, therefore, that the same conclusion as the ECtHR should be reached here? No, the difference in the management of the two scenarios is significant: in *McCann* the authorities had had weeks to plan the operation, even allowing the suspects to cross the border into Spain, 'rec' the target and leave a suspected car bomb there (at para 203); in de Menezes the authorities had had literally hours from the time they identified the address in Scotia Road from Hussein Osman's gym membership to the fatal episode on the train at Stockwell. Furthermore, in the case of the latter the authorities were arguably under far greater pressure (in, of

course, a shorter space of time): 52 people had been killed a fortnight before on London's transport network and four failed suicide bombings had taken place only a day earlier. These considerations are clearly relevant in assessing whether the de Menezes shooting was an unlawful denial of the negative right not to be killed. Together with the obvious climate of intense public fear generated by events in July 2005, these considerations are assessed further in the next section, a possible breach of the substantive duty to protect life imposed on a state by Article 2(1).

A breach of the positive duty to protect the life of de Menezes, and others?

Article 2(1) of the ECHR imposes a positive or substantive obligation on the state to protect life: "Everyone's right to life shall be protected by law." It was considered by the ECtHR in *Osman* v. *United Kingdom* (2000) 29 EHRR 245 where the police had allegedly failed to protect Ahmet Osman and his father from being shot by Paul Paget-Lewis, Ahmet's former school teacher. Paget-Lewis had formed an obsessive, non-sexual attachment to Ahmet, one of his pupils. 18 months or so later he went to Ahmet's home, shot him and shot and killed his father. The ECtHR said (at para 115):

> The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions…It is…accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

The *Osman* principles have recently been applied to UK law by the House in Lords in *Van Colle* v. *Chief Constable of the Hertfordshire Police* [2008] UKHL 50. There the deceased, Giles Van Colle, had been shot dead by a former employee, Daniel Brougham, just days before he was due to give evidence for the prosecution at Brougham's trial for theft. The House of Lords ruled that the Hertfordshire police were not in breach of Article 2(1) in failing to protect the life of Giles.

In assessing the positive duty to protect life, the ECtHR in *Osman* (and indeed the House of Lords in *Van Colle*) focused attention primarily on the alleged failings by police to protect the lives of identifiable persons. This is not to say, however, that Article 2(1) ignores the safety and security of members of the public in close proximity to a killing. That is, the substantive obligation seeks to deter not only the denial of the life of a specific individual who has been killed, but the lives of other individuals from possible infringement by the criminal acts of others, including the deceased. This issue was highlighted by the ECtHR in *McCann*. There the UK authorities had followed the IRA suspects from Malaga in Spain and allowed them not only to cross the border into Gibraltar, but to prepare for the attack at the proposed

site of the bombing. Although the authorities had knowingly done all of these things because of the belief that they had insufficient evidence to charge the suspects with a crime, the ECtHR said that they had still exposed the local population to possible danger (at para 203):

> It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. The danger to the population of Gibraltar – which is at the heart of the Government's submissions – in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. The decision not to stop the suspects from entering Gibraltar is thus a relevant factor to take into account.

Indeed, much of the criminal trial arising from the de Menezes shooting attached particular emphasis on the police's failure to intercept a suspected suicide bomber for the thirty minutes or so between the time he left his flat in Scotia Road and the time he boarded a train at Stockwell station. To this end, the following examination of the killing and its compatibility with Article 2(1) will seek to assess, not only a denial of the positive obligation to protect the life of Jean Charles de Menezes, but also the lives of ordinary Londoners with whom he came into contact.

Endangering the public by taking over 30 minutes to 'stop' de Menezes

In the half hour after leaving his flat, de Menezes walked to a bus stop and caught a number 2 bus to Brixton tube station. There, he found the station was closed so doubled back on himself and took a bus to Stockwell. Inside the station, he calmly took the escalator down onto one of the platforms and alighted a train when it arrived. This failure by the police to intercept him above ground threatened the safety of his fellow commuters, the prosecution claimed at the criminal trial (Dodd 2007b). In ECHR jurisprudence exposing the public to danger is not a *prima facie* breach of Article 2. In *Osman* the court said (at para 116):

> Where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Of course, if the police suspected that de Menezes was Hussein Osman, then clearly they knew of the existence of a real and immediate risk not only to his life, but also to the lives of others in the immediate vicinity. Judged reasonably, therefore, maybe they failed to avoid that risk by taking too long to establish 100 per cent whether or not de Menezes was in fact 'Nettle Tip' and not providing 'SO19' support until Stockwell?

Moreover, in the recent ruling of the House of Lords in *Van Colle*, Lord Bingham also emphasised the "ought to have known" issue from *Osman*. He said (at para 32):

> The test depends not only on what the authorities knew, but also on what they ought to have known. Thus stupidity, lack of imagination and inertia do not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further enquiries or investigations.

Perhaps in the thirty minutes or so that the surveillance team was following de Menezes from his house to the train, they should have been able to say categorically that he – a white, Brazilian – was not Hussein Osman – a black, North African?

In failing to provide armed support until Stockwell, this was arguably not an effective use of the police's 'fighting time'. Taylor states that after the terrorist atrocities committed in the USA on 11th September 2001 (where, for example, two hijacked airliners were flown into the twin towers of the World Trade Center in New York), the MPS recognised that London could be the target of a suicide attack. It decided that the necessary resources, training and policy had to be in place as soon as possible. One of the first things the police did was to visit Israel to learn from their experiences of dealing with suicide bombers. The most important lesson they brought back was the need to buy time – to identify the suspect through accurate intelligence and then to intercept the bomber as far away as possible from the intended target (Taylor 2006: 14). He says (Taylor 2006: 14): "That's what the Israelis call their 'fighting time'."

Furthermore, the manner in which de Menezes was eventually 'stopped' further risked the lives of everyone in attendance. 'SO19' officers shouted "armed police" as they ran down the escalators and onto the platform in an attempt to clear the area of passengers (IPCC 2007c: 63). (However, none of the 17 witnesses recall hearing these police warnings (IPCC 2007c: 63).) Once the 'SO19' officers reached the platform, one of the Special Branch surveillance officers at the scene, 'Ivor', got up from his seat and placed his foot by the train door to prevent it from closing. He shouted "he's here" and indicated towards de Menezes (IPCC 2007c: 63). For these reasons Clare Montgomery QC argued at the criminal trial (Dodd 2007b):

> You will hear how obvious the approach of the firearms officers was and that the surveillance officers pointed at Jean Charles and shouted "he is here"…If Jean Charles had been a bomber, any bomb would have been detonated well before the firearms officers entered his carriage. The fact is that London and, in particular, the occupants of that tube carriage were lucky Jean Charles was not a bomber, but that is no defence which can aid the Commissioner, because as I have said it is the exposure to danger that is important.

The nature of the police's operation was certainly similar to the actions of the UK in *McCann*, in exposing the local population of Gibraltar to possible danger from three known IRA terrorists. Is this, therefore, a breach of the substantive obligation to protect life under Article 2(1)? Maybe not: in assessing earlier a denial of the negative right of Jean Charles de Menezes not to be unlawfully killed, the author did distinguish the risks taken by the authorities in *McCann* with those they took in de Menezes. He did argue that the actions of the UK in *McCann* were potentially much

more serious: there they had allowed the three suspects a far longer time to cross the Spanish border and to park a car with suspected explosives at the intended target. On a related issue, Fenwick states that where actions of state agents are very closely linked to the preservation of a *known individual's life* the state will be under a substantive obligation not only to seek to preserve life, but also act reasonably in doing so (Fenwick 2007: 41). This statement is attributable, in part, to the *Osman* principles. But of course there is an additional duty to act reasonably in preserving the life of the identified person. Fenwick further argues (Fenwick 2007: 41):

> The need to preserve life in the immediate situation would appear to override the general duty to maintain state security and prevent crime. These notions seem to underlie the findings of the Commission in *Andronicou* v. *Cyprus* (1996) 22 EHRR 18.

In this respect, therefore, it appears that the protection of the life of de Menezes (and possibly the lives of those immediate members of the public potentially at risk of danger from a suspected bomber and an armed unit of the police intent on stopping him), outweighs the positive rights of the wider community to be protected from acts of suicide terrorism. However, first and foremost, one must note the ruling of the House of Lords in *Van Colle*. There, in reference to *Osman's* requirement that a real and immediate risk to life should exist, Lord Brown said (at para 115):

> The test set by the European Court of Human Rights in *Osman* and repeatedly since applied for establishing a violation of the positive obligation arising under Article 2 to protect someone...is clearly a stringent one which will not be easily satisfied…It is indeed some indication of the stringency of the test that even on the comparatively extreme facts of *Osman* itself…the Strasbourg court found it not to be satisfied.

So arguing that the state has breached its substantive duty to protect life will not be easy. Furthermore, in stating the above, Fenwick was probably thinking more along the lines of a hostage type situation, especially as she made reference to *Andronicou*. There a boyfriend had held his girlfriend hostage. Later armed police stormed the flat where the girlfriend was being detained. The boyfriend shot the first officer entering the flat and then shot his girlfriend in the shoulder. The police returned fire – the boyfriend was shot 25 times, the girlfriend two times – and both occupants of the flat died.

In finding that there had not been a breach of Article 2, the Commission acknowledged that the police had tried to resolve the matter amicably (at para 183) and knew that they were dealing with an armed man who had committed previous acts of violence (at para 184). The Cypriot authorities were therefore justified in using a special armed unit of the police to try and end the siege (at para 185). Of course, the facts of *Andronicou* are clearly distinguishable from the events surrounding the shooting of Jean Charles de Menezes. In the case of the latter, for example, there were no real attempts by the MPS to conclude the operation before he entered Stockwell station, thus increasing the risk of an armed response. However, although the facts in the de Menezes case are distinguishable from those in *Andronicou*, this does not necessarily imply a breach of the substantive obligation in the former. Ending a hostage situation in a flat with the use of lethal force risked only the lives of the two

occupants and those (to a lesser extent) of the armed police officers involved. The threat level at the time of de Menezes was at its highest and clearly unique police tactics to combat acts of terrorism, especially those committed by suicide bombers, were arguably appropriate in order to protect the wider community (see more on this point later).

Does a breach of the positive obligation in Article 2(1) similarly arise in not allowing the surveillance officers trailing de Menezes to arrest him before reaching Stockwell? The time between him leaving his flat and entering the train station was not, it has been argued already, an effective use of the police's "fighting time". The IPCC clearly thought that there should have been a 'stop' much earlier (IPCC 2007c: 135):

> The [Special Branch] officers who were following Mr de Menezes had been authorised to carry firearms for their personal protection and the protection of the public. In the context of the events of 7 July and 21 July when, respectively, there had been a successful detonation and an attempted detonation of bombs on buses it was a failure of the management of the operation to permit Mr de Menezes to get on the bus at Tulse Hill. If he had been a suicide bomber that event could have been catastrophic. Therefore the failure to use [Special Branch officers] to stop him getting back on the bus in Brixton is an even more inexplicable failure to apply the strategy.

So some of the surveillance officers were armed, and the IPCC report believes a significant factor contributing to the death of Jean Charles de Menezes was the failure by the surveillance officers to arrest him in lieu of 'SO19'. But the purpose of the operation was for specialist firearms officers to undertake this responsibility. Arguably, an unnecessary challenging of de Menezes before Stockwell station by the surveillance officers without armed support from the highly trained 'SO19' officers might have exposed them, and commuters on the two buses, to greater danger.

In addition, does suggesting that there was a failure on the part of the state to protect life in the de Menezes case fully appreciate the climate of intense fear the capital, and other major UK cities, must have been under at that time? On 7th July 2005, almost a fortnight earlier, 52 people had died and more than 700 people had been injured after the detonations of four suicide bombs on London's transport system. In fact, three of the 7th July suicide bombers had left from Stockwell tube station. To commemorate the 7th July detonations there were similar bombings two weeks later on 21st July 2005 but fortunately these bombs had failed to explode, the four intended bombers having escaped from the scenes. The police were therefore under immense, if not unprecedented, pressure in the hours after the suicide attempts to find the four failed bombers. The IPPC report states (IPCC 2007c: 16-18):

> Deputy Assistant Commissioner Peter Clarke is the Head of the Anti-Terrorist Branch. He states that following the attacks on 7 July, the threat level in respect to the threat posed to the UK from international terrorism was raised from Level 3 (substantial) to Level 1 (Critical). Deputy Assistant Commissioner Clarke further states that the threat level has never been at the Critical level before. The definition of Critical is that: "Available intelligence and recent events indicate that terrorists with an established capability are

> actively planning to attack within a matter of days (up to two weeks). An attack is expected imminently."

Deputy Assistant Commissioner Clarke…details the scale and intensity of policing activity following the 7/7 bombings; in the week prior to the attacks on the 7 July, the total number of officer days where police officers were used, over and above normal policing duties, across the Capital was 6,916. In the following week this number rose to 12,673. Across London, the high level of aid from the uniform police strength was maintained in the following weeks. 8,929 additional officer days were recorded in the week of the 14 to 21, July and 9,217 were deployed between 21 and 27 July…

> DAC Clarke also records the fact that in periods of heightened tension and an enhanced awareness of the threat from terrorism, the police will receive more calls from the public about people who have aroused their suspicions. The Computer Aided Despatch system used by the MPS indicates that calls categorised as suspect terrorist calls rose from 2 in the 2 weeks prior to 7 July to 104 in the period up to 21 July. Between 7 and 21 July 2005 more than 3,900 calls were received by the Anti-Terrorist Hotline.

Unquestionably, therefore, the police's investigations into the 7th July attacks, their attempts to arrest the failed 21st July bombers, and the public's heightened awareness of further terrorist atrocities, placed untold pressure on them at that time. In assessing breaches of Article 2(1), such demands on state authorities are recognised by the ECtHR. In *Osman* the court also said (at para 116):

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

Of course, a potential breach of the substantive duty to protect life in the de Menezes case – not only the life of Jean Charles de Menezes himself, but also the lives of his fellow commuters in being exposed to a suspected suicide bomber for more than 30 minutes – has been identified already. However, to fulfil its obligations post the 7th July bombings and 21st July failed bombings, the police obviously responded by dramatically increasing the deployment of its officer personnel. Indeed, James states (James 2007): "[The police]…would have been mad to have let it happen a day later." What more, therefore, could the police have reasonably done to address the unparalleled terrorist threat they were faced with? It is hardly unreasonable to have expected specialist armed officers to arrive on the scene much earlier. However, it was stated above that the MPC had attributed this delay to 'SO19's deployment on operational duties elsewhere. Ironically, because of this, other acts of terrorism may have been foiled at the same time, which, for reasons of security, cannot be published. If so, paradoxically, in a possible failure to protect life in one case, the authorities would have fulfilled their obligations in another.

The prosecution of the police for breaching only the HSA 1974

Does the prosecution and the subsequent conviction of the Office of the MPC for breaching only Health and Safety at Work legislation hold the police sufficiently to account for the shooting? The positive duty imposed on states by Article 2(1) is clear that in certain circumstances the availability of only civil, administrative or disciplinary remedies is not enough to deter the taking of human life: those responsible for some homicides should be prosecuted, and then for a criminal offence which reflects the seriousness of the conduct causing death. For example, in *Oneryildiz* v. *Turkey* (2004) 41 EHRR 20 the ECtHR found a violation of the substantive obligation where state officials had not been prosecuted for a criminal offence reflective of their degree of culpability.

Here the applicant had lived with his relatives in a slum quarter of Istanbul which was surrounded by a rubbish tip. In 1991 an expert report was published stating that the tip did not conform to technical requirements and outlined the dangers of the slums next to it. Later there was an explosion of methane caused by decomposing refuse, the subsequent landslide killing 39 people. Two local mayors were prosecuted for negligent omissions in the performance of their duties as they failed to order the destruction of the slums and/or the closure of the tip. On appeal their sentences to three months imprisonment were reduced to fines, the enforcements of which were suspended.

The ECtHR ruled that there was a breach of Article 2(1). The two local officials had not been prosecuted for the more serious criminal offence of negligently causing the deaths. It said (at para 93):

> Where it is established that the negligence attributable to State officials or bodies … goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity…the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative.

The question, therefore, for consideration here is whether the negligence of the police in the case of the de Menezes shooting exceeded, if at all, a mere liability for breaches of the civil law. If so, criminal charges reflecting the seriousness of the killing should be brought. When discussing the passage of the Corporate Manslaughter and Corporate Homicide Bill through Parliament (now the Corporate Manslaughter and Corporate Homicide Act 2007) the Parliamentary Joint Committee on Human Rights (JCHR) considered whether the new offence of corporate manslaughter would satisfy the requirements of *Oneryildiz*. In general reference to ECHR principles, it said (JCHR 2006: para 1.25):

> It is precisely in the context of the conduct of dangerous activities by the State, such as the use of lethal force in the context of law enforcement…that the Strasbourg case-law imposes the most stringent requirement that there may in

> certain circumstances need to be criminal prosecution in order to ensure the full accountability of the State for any deaths caused by its gross failures.

Of course, there was a criminal trial of the police for the shooting of de Menezes. However, the CPS decided to prosecute the Office of the MPC (the employer of the individual police officers) under the Health and Safety at Work Act 1974 s.33(1)(a) for breaching s.3(1) of the legislation. This was because the police failed

> to conduct its undertaking, namely the investigation, surveillance, pursuit and detention of a suspected suicide bomber, in such a way as to ensure that the person not in its employment (namely Jean Charles de Menezes) was not thereby exposed to risks of safety (CPS 2006).

Section 33(1)(a) of the Act creates a single offence of failing to discharge the duties imposed by ss.2 to 7. The relevant duty in this situation was provided by s.3(1), which states:

> It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

Does this prosecutorial decision to bring criminal charges only under the HSA therefore contravene the positive obligation imposed by Article 2(1)? Is it sufficient to deter the police from committing similar mistakes again? Is Article 2(1) further infringed in that being found guilty the police were only fined, and then only £175,000, with £385,000 costs? Before the criminal trial the human rights organisation Amnesty International questioned the charge because such a prosecution could result only in a financial penalty and not in someone being found individually criminally responsible for the death (Amnesty International 2006). In this respect, did Article 2(1) require the police officers who shot de Menezes to be charged with serious offences such as murder and/or the surveillance officers, together with the senior officers in charge of the operation, to be charged with gross negligence manslaughter? Of course, the IPCC invited the CPS to consider, for example, manslaughter charges against the surveillance officer 'James' and senior officers such as the DSO, Commander Dick. In fact the CPS declined to prosecute anyone, the MPS and individual officers, for any offence of homicide.

If homicide charges were not to be brought against individual police officers, an alternative charge of the then common law offence of corporate manslaughter (see *Attorney General's Reference (No. 2 of 1999)* [2000] QB 796, CA) could have been made. (There is now a new statutory offence of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007. Its reach is of interest here since operational activities by police forces are generally excluded. The JCHR noted that had the de Menezes shooting occurred after the Act came into force, the police could not have been liable for corporate manslaughter. The JCHR suggested that there was a very strong likelihood, therefore, that the UK would be in breach of the positive obligation in Article 2 for the very same reason that Turkey was found to be in breach in *Oneryildiz*: that the criminal offences charged did not reflect the

seriousness of the conduct which led to the death (JCHR 2006: para 1.8; and see, more generally, Gobert 2008).)

Indeed, this decision by the CPS not to bring any homicide charges over the de Menezes killing has been the subject of a judicial review challenge already. The application to judicially review the decision in late 2006 was unsuccessful: *Regina (da Silva)* v. *the DPP and the IPCC* [2006] EWHC 3204 (Admin). In considering the applicability of *Oneryildiz* to the shooting Richards LJ said (at para 37):

> Of course, it is clear from the statement of principles [in *Oneryildiz*] that a prosecution to secure individual accountability for a death must be brought where it is justified, and on the particular facts of the case [in *Oneryildiz*] it is not surprising that a prosecution merely for negligence in the performance of official duties, without any reference to responsibility for the deaths resulting from that negligence, was found not to reflect the gravity of the conduct and to be in violation of article 2. But there is no suggestion in the judgment that a prosecution must be brought even where it is *not* justified. On the contrary, para 94 refers to the application of criminal penalties "if and to the extent this is justified by the findings of the investigation", and the tenor of para 96 is that there is no absolute obligation to bring a prosecution.

The implication, therefore, from the judgment of Richards LJ was that the evidence in the de Menezes shooting did not justify more serious criminal charges. In further finding that the decision to prosecute the police only under the HSA had not been a breach of Article 2, the judge stressed the importance of the persons making the decision (at paras 53-55). He said that the decision had been taken by a senior and highly experienced Crown prosecutor and had been reviewed by the DPP himself and by leading counsel, both of whom had very great practical experience of serious criminal trials. The informed judgment of such people on a matter of that kind was one that it would often be impossible to say was wrong even if one disagreed with it. Further, the decision-making process had been lengthy, careful and thorough. The Crown prosecutor had directed himself by reference to the [Code for Crown Prosecutors] and, in particular, the evidential test he had applied in relation to each of the individuals considered had been whether there was sufficient evidence to provide a realistic prospect of conviction. In all the circumstances, the DPP's decision had been a reasonable one, and there was no reason to disagree with it.

Human rights groups like Amnesty International publicly questioned the court's ruling, believing there were ample reasons for ordering the prosecuting authorities to re-consider their decision (Amnesty International 2006). This was in part because of the misleading and/or false statements made in the immediate aftermath of the shooting and of other allegations that had emerged since. Therefore, issues of knowledge and credibility should have been left to a court and jury to assess. Amnesty concluded by saying that the failure to charge individuals in connection with the killing undermined public confidence in the rule of law and the conduct of law enforcement officials.

Of course, *da Silva* was a judicial review challenge as opposed to an appeal: the test of review being whether the decision was lawful or not. Considerations of potential breaches of Article 2 do reflect a lower standard of legality than would otherwise

categorise a judicial review application, but the court's enquiry is still not one into the merits of the decision (see, for example, *Regina (Bloggs 61)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 686, [2003] 1 WLR 2724). Maybe a different prosecutor presented with the same evidence might have decided the case the other way. This would not necessarily mean, therefore, a decision not to prosecute the police here for more serious criminal offences would unlawfully engage Article 2.

Paragraph 5 of the CPS *Code for Crown Prosecutors*, 'the full code test', provides for two stages when considering a criminal prosecution (CPS 2004). The first stage is a consideration of the evidence. If the case does not pass the evidential stage, the code prevents the case from proceeding no matter how important or serious it may be. If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest (CPS 2004: para 5.1). In relation to the evidential stage Crown Prosecutors have to be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against a defendant by a jury properly directed in accordance with the law (CPS 2004: paras 5.2-5.3) For example, what is the prospect of individual police officers being found guilty of either murder or manslaughter? The issue whether the firearms officers who shot de Menezes were liable for murder has been dismissed already; and by implication 'unlawful act' manslaughter (see, for example, *R* v. *Church* [1966] 1 QB 59, CCA for an explanation of this offence) since the unlawful act committed by the officers, for the purposes of the manslaughter, was arguably not unlawful (as per *R* v. *Lamb* [1967] 2 QB 981, CA) by reference to the defence of self defence. As regards gross negligence manslaughter the leading authority for this homicide offence is *R* v. *Adomako* [1995] AC 171, HL. Here, during an eye operation, an anaesthetist failed to notice the disconnection of an oxygen tube, despite obvious warnings that the patient was not breathing and going progressively blue. The principles of the offence are (at p.187): first the defendant owed a duty of care to the victim, secondly the defendant breached that duty, thirdly the breach caused the death of the victim and fourthly the breach can properly be characterised as gross negligence and therefore a crime.

First, did the police owe a duty of care to de Menezes (or at the very least a duty of care imposed by the criminal law since arguably the principle of care duty here is different from that required for negligence in civil law – see Herring and Paiser 2007)? The purpose of the operation was to stop occupants of Scotia Road at a safe distance from the flats and ascertain whether or not they were the suspect Hussein Osman. Clearly, the police would have owed a duty of care to individuals they would have stopped, especially if it had involved the plan of doing so with specialist armed support from 'SO19'. Secondly (albeit the third element of the *Adomako* principles), was there a causal link between any negligence on the part of police officers and the death of Jean Charles de Menezes? The issue whether the police officers caused the homicide was discussed above when considering the culpability of 'Charlie 2' and 'Charlie 12' for murder. The second and fourth principles of *Adomako* were arguably issues that the CPS had to consider more fully in their decision whether or not to bring charges for gross negligence manslaughter. Were the police negligent? Evidently the CPS thought so since the standard of care exercised by them was sufficiently lacking to justify a criminal prosecution under the HSA. However, could the police's degree of negligence be categorised as "gross", the fourth principle identified in *Adomako*? In *Adomako* Lord Mackay said (at p. 187):

> [Whether the negligence is to be characterised as gross] will depend on the seriousness of the breach of duty…The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death…was such that it should be judged criminal.

In considering whether the degree of negligence was "gross" – that is, a risk of death – was this a risk of death to the police (ie. a subjective test) or a risk of death to the jury (ie an objective test)? In commenting on a later case of *R* v. *Singh* [1999] Crim LR 582, CA, where a lodger had died from carbon monoxide poisoning from a faulty gas fire, Sir John Smith stressed that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury or even of serious injury but of death (Smith 1999: 583).

As has been stated above, the intended purpose of the police operation on that day in July 2005 was to arrest Hussein Osman, a failed suicide bomber. However, because of the nature of the arrest – the potential for Osman to correct the error from the day before – 'SO19', an elite firearms unit, was tasked with the operation. There is little doubt that there would have been a risk of death in using any firearms officers, let alone 'SO19', and this would have been obvious to a reasonably prudent person. However, would this risk of death have been a serious one? In operations concerned with suspected suicide bombers arguably the answer would still be "yes". But, do these principles of the criminal law apply to operations such as these? The author believes that the existing cases on gross negligence manslaughter are easily distinguishable from the facts of the de Menezes shooting. On the one hand, the fact that the police were facing what they believed to be a suspected suicide bomber, who may have shared responsibility for the deaths of 50 people only a fortnight before, arguably heightened their anxiety and affected their objectivity to some degree. Nevertheless, a reasonably prudent person is likely to associate a serious risk of death as being more attributable to the actions of the suspect, in attempting to detonate a bomb on his person, rather than to the specialist firearms officers intent on averting any unnecessary loss of life.

Even if the evidential stage in bringing murder and/or manslaughter charges against the police had been satisfied, would the second stage of the test, the 'public interest' stage, have been satisfied? The fact that this was a unique and unprecedented set of circumstances serves to support the argument that such a course of action might not have been followed. In any event, would a jury have convicted the MPS and individual officers if they had been prosecuted for more serious offences? Furthermore, ironically, such a course of action might have put the public at a greater risk of terrorist violence because of "defensive policing". That is, specialist firearms officers tasked with responding to incidents involving suspected suicide bombers might have been less likely to proceed according to their training for an increased fear of criminal prosecution. Indeed, "defensive policing" was an issue which weighed heavily on the minds of the House of Lords in *Hill* v. *Chief Constable of West Yorkshire* [1989] AC 53, HL, *Brooks* v. *Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 and the recent case of *Smith* v. *Chief Constable of Sussex Police* [2008] UKHL 50. In each case the House was very slow to find that the state owed a duty of care (if at all) in civil law to individuals who had

become victims of crime because of alleged police failures. Justifying this, Lord Phillips in *Smith* said (at para 89):

> In *Hill* v. *Chief Constable of West Yorkshire* [1989] AC 53…the House held that there was insufficient proximity between the victim and the police to give rise to a duty of care. However, both Lord Keith of Kinkel…and Lord Templeman identified four objections of principle to the existence of a duty of care on the facts of that case…. Two are relevant in the context of the present case. The first is the danger that the existence of a duty of care would alter, detrimentally, the manner in which the police performed their duties in as much as they would act defensively out of apprehension of the risk of legal proceedings. The second is that time and resources would have to be devoted to meeting claims brought against the police which could better be directed to their primary duties.

Following the guilty verdict in the de Menezes trial the Home Secretary issued a public statement (Home Office 2007b):

> The death of Jean Charles de Menezes was a profoundly shocking tragedy, and the de Menezes family have my deepest sympathy. This was a complex case, which raised a number of important issues for policing. We will consider carefully the implications of the verdict with the police service. The trial reminds us all of the extremely demanding circumstances under which the police work to protect us from further terrorist attack. The commissioner and the Metropolitan Police remain in the forefront of the fight against crime and terrorism. They have my full confidence, and our thanks and support in the difficult job that they do.

Does this statement satisfy the positive obligation imposed on the state to protect life as per Article 2(1)? That is, does it reflect the seriousness of the killing? Is it sufficiently condemnatory of the MPS to hold them to account for the shooting? Arguably, it does not if you compare it with the statement published by Nick Hardwick, the IPCC Chair, who oversaw the IPCC investigation (IPCC 2007d):

> There are no winners in any of this. The outcome will not assuage the grief and anger of the Menezes family, the case has damaged the reputation of the Metropolitan Police and I know it has caused anguish for the officers involved and their families.
>
> I live and work in London and have never forgotten the enormous challenges faced by the MPS in July 2005 and that those challenges continue to the present day. I and my IPCC colleagues also recognise that some of the officers involved in the incident on 22 July displayed outstanding personal courage.
>
> However, the Met's mission is to make London safer. On this one occasion, they failed…It is vital now that the right lessons are learnt and the public can have confidence in the measures taken by the police to combat the threat of suicide terrorism."

No individual police officer was prosecuted for the shooting of Jean Charles de Menezes. The positive duty imposed on a state by Article 2(1) does require criminal charges in some circumstances (and then offences relative to the blame in causing death). Arguably, it did not here – but the fact that no individual police officer is to be disciplined over the incident is possibly less easy to defend.

The failure to discipline any police officer

On 11th May 2007 the IPCC announced that the 11 firearms and surveillance officers named in the investigation were not going to face disciplinary charges (Campbell 2007). Decisions about the disciplining of the four senior officers who 'authorised' the shooting were going to be postponed until after the criminal trial, and maybe the inquest (IPCC 2007e). It has now been revealed that these remaining four officers are not going to be disciplined, either (Attewill 2007). (It was announced even before the first IPCC disciplinary decision that the two firearms officers who shot de Menezes, 'Charlie 2' and 'Charlie 12', would return to full operational duties (Muir 2006).) What message does all this convey about the UK state's duty to protect life, especially now it has been reported that one of the firearms officers involved has since shot and killed someone else (Khan 2006)? What message does it convey to the family and friends of Jean Charles de Menezes? Khan says (Khan 2006):

> The fact that not a single police officer has been prosecuted, suspended, or even disciplined for the deliberate killing of their loved one, has added insult to injury for the family...For them it has been extremely painful to see that, rather than being reprimanded, [some] officers in the shooting have been [promoted]."

In concluding whether the shooting was a breach of the positive obligation to protect life under Article 2(1), the fact that there were errors and missed opportunities is a significant factor in assessing an infringement of this duty towards Jean Charles de Menezes. Of similar importance was the failure to stop a suspected suicide bomber for more than 30 minutes; and in that time to allow him to board two buses and enter an underground station. Of less relevance, though still applicable to Article 2(1), was the fact that the police were not prosecuted for homicide offences. At the very least, perhaps, individual officers should have been disciplined. Of particular note, however, was the obvious intense fear of more terrorist violence in the minds of ordinary Londoners and those whose responsibility it was to prevent it. Is there therefore not a corresponding substantive obligation imposed on the state by Article 2(1): the protection of the public in general from acts of suicide terrorism? Similar considerations were given particular credence by the court of the first instance, the Commission, in *McCann* (at para 207):

> The Commission recognises that the United Kingdom owed a responsibility not only to the three terrorist suspects in this case but was also under a positive obligation with respect to safeguarding the lives of the people in Gibraltar. The existence of any risk and the extent of such risk to other persons must therefore be given particular significance when assessing the necessity for the use of lethal force in this case, and whether the action taken was strictly proportionate to that risk.

Satisfaction of the procedural obligation

The positive or substantive obligation imposed on a state by Article 2(1) would be ineffective if there was no additional duty to investigate unlawful deprivations of life. In *McCann* the ECtHR said (at para 161):

> [A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

What are the minimum standards for an investigation to fulfil the requirements of Article 2(1)? In *Edwards* v. *United Kingdom* (2002) 35 EHRR 487 the applicants were the parents of Christopher Edwards. Christopher had been murdered by Richard Linford whilst being held on remand at HMP Chelmsford. The ECtHR said that because Christopher was a prisoner under the care and responsibility of the authorities when he died, the state was under an obligation to investigate his killing. In circumstances such as these certain features of the investigation would be required. The form similar investigations should take in the UK was confirmed in *Regina (Amin)* v. *Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653. Here Zahid Mubarek was murdered by his prison cellmate, Robert Stewart, who had had a history of violence and racist behaviour. The House of Lords said (at para 22) that, although the ECtHR in *Edwards* had not set down any one model of investigation to be applied in all cases, it had laid down minimum standards in a number of cases. For an investigation to be effective, a number of requirements had to be fulfilled. First it must be set up by the state of its own accord without the need for outside complaint or allegation. Secondly the persons responsible for the investigation must be independent – practically and hierarchically – of those implicated in the events. Thirdly the investigation must be effective in the sense that it is capable of leading to a determination of the identification and punishment of those responsible, including by criminal prosecution. Fourthly there is a requirement of promptness and reasonable expedition. Fifthly there must be a sufficient element of public scrutiny of the investigation and, sixthly, the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests.

On the day of the de Menezes shooting the MPC wrote to Sir John Gieve, the Permanent Secretary at the Home Office, to say that a chief officer of police should be able to suspend the Police Reform Act 2002 s.17, requiring the police force to supply all information to the IPCC. The MPC therefore prevented the IPCC from initially investigating the shooting. This was because of concern for the secrecy of continued police tactics in combating terrorism. The IPCC learnt of the MPC's letter three days later. His decision was subsequently reversed and an organised handover of the investigation was completed soon afterwards. Did this delay by the police in handing

over the investigation to the IPCC satisfy the elements of independence and promptness required by Article 2? Indeed, the IPCC states that the seriousness of the police's failure to allow it access from the outset has been highlighted by the fact that the surveillance log 165330 was altered (IPCC 2007c: 85). An independent forensics expert concluded that the original entry in the surveillance log read "a split second view of his face. I believe it was [Nettle Tip]. I told…" The entry was changed to read "a split second view of his face *and* I believe it was *not* [Nettle Tip]. I told…" (IPCC 2007c: 86). The IPCC report concludes (IPCC 2007c: 86):

> The significance of the word 'not' is that it changes the whole meaning of the sentence…An inference arises that because [Special Branch] had been involved in the surveillance of Mr de Menezes, the log was altered to distance the surveillance team from the identification…Had the IPCC been involved at the commencement of the investigation, the surveillance log would not have been released for amendments to be made.

Once the IPCC assumed responsibility for the investigation, was it conducted in accordance with Article 2? When the investigation was completed, the IPCC refused to publish its report until after the criminal trial of the police in October and November 2007, some 28 months after the shooting. Was this delay a breach of Article 2? Moreover, did the treatment of the de Menezes family during the IPCC investigation, and their access to support and advice, satisfy the requirements of Article 2 (which was the principal concern of the House of Lords for the family of Zahid Mubarek in *Amin*)? For example, it has been claimed that:

> [t]he CPS based their decision not to prosecute any officers on the first IPCC report into [the death of Jean Charles] which they refused to disclose to the de Menezes family or their legal team until very recently, several months after the decision was announced and after the threat of judicial review. The fact that such decisions can be made based on secret reports highlights just how little investigations into deaths of police custody have moved forward under the IPCC…(Kahn 2006)

Of course, one of the outcomes of the IPCC investigation was the criminal trial of the MPC for breaches of the Health and Safety at Work Act 1974. Did this trial satisfy Article 2's procedural obligations since the nature of the charges meant that it was too narrowly focused (Amnesty International 2006)?

Does an inquest satisfy the investigative requirements of Article 2? Indeed, how would an inquest into the shooting be affected by the Counter-Terrorism Bill 2007 currently being debated by Parliament? The Bill proposes *inter alia* the appointment of coroners by the Secretary of State in cases of national security. If de Menezes applied to this special coroner system, any subsequent inquest would arguably not be sufficiently independent from the executive to comply with Article 2 (JCHR 2008). If the existing coronial system is ECHR compatible, is an inquest into the shooting too long after the tragic events of July 2005?

On 25th July 2005 a de Menezes inquest did open at Southwark Coroners court but was adjourned on 7th September 2006. This was on the application of the CPS who wished to stay coronial proceedings until criminal matters involving the police had

been completed. The decision to adjourn the inquest was the basis of a judicial review application*: Regina (Pereira)* v. *Inner South London Coroner* [2007] EWHC 1723 (Admin), [2007] 1 WLR 3226. Now that the criminal proceedings against the police have finished, the inquest will resume on 22nd September 2008 and is expected to last three months (BBC News 2008). A proper assessment of the procedural issues raised by the de Menezes shooting will, therefore, be considered in a later article when the inquest has been completed.

Conclusion

Article 2 of the ECHR imposes three distinct obligations on the state: a duty not to kill someone (subject to the qualification in Article 2(2) that if it does, it must be for a legitimate purpose and "absolutely necessary"); a positive or substantive duty to protect life; and a procedural duty to investigate death. This article has largely considered only the first two obligations and their compatibility with the fatal shooting of Jean Charles de Menezes; assessing the case in the light of the third obligation is to be reserved for a later piece of work. This is principally because of word length but also because, at the time of writing, the inquest is still pending. There is little doubt that the death of Jean Charles de Menezes could have been avoided. What if 'Frank', the surveillance officer stationed in a van in Scotia Road, had not been relieving himself at the exact time de Menezes left his flat? What if 'James', 'Ivor' and the other Special Branch surveillance officers following him had been able to verify 100 per cent that he was not the suspect Hussein Osman? What if the specialist firearms officers had arrived much earlier? What if the 'stop' order issued by Commander Dick had been clearer? And so on… Nevertheless, do these errors and missed opportunities necessarily mean that Article 2 has been unlawfully engaged?

Mistakes as to the need for lethal force have been found by the ECtHR to be Article 2 compatible. In *McCann*, for example, the SAS were not acting unlawfully when they shot dead three IRA terrorists. They had an honest and genuine belief that the suspects were going to detonate a car bomb by radio transmission. The same could be said here about the armed officers, 'Charlie 2' and 'Charlie 12', who killed de Menezes, believing him intent on detonating a suicide vest (subject of course to the manner in which all the 'SO19' officers approached the train, shouting "armed police" with their guns visible, for example). 'Charlie 2' and 'Charlie 12' are highly trained and well experienced weapons officers. Not only that, they are elite firearms officers, tasked with special and highly dangerous operations such as the pursuit of suspected suicide bombers. Coupled with the fact that the actual discharge of police weaponry in the UK is very low, reflecting the tight control armed police exercise generally over their firearms, it is likely that this end of the operation was managed with respect for life.

However, the facts in *McCann* did breach Article 2 because the nature of the operation, prior to transferring responsibility for it over to special forces, had inadequately respected the right to life of the three IRA personnel. Could the same be said here of the management of the operation by Commander Dick and other senior officers in not planning for errors and mistakes in the arrest? What about the involvement of the Special Branch officers pursuing de Menezes, especially 'James' in failing to represent fully the opinions of the surveillance team to his superiors?

Although *McCann* was found to be Article 2 incompatible by the ECtHR, it was only by a majority of one (11-10). The minority judgment says (at para 24): "[This case] seems to us to fall well short of substantiating the finding that there has been a breach of the Article (art 2)." Indeed, in reaching its conclusion that Article 2 had not been infringed, the minority judges noted (at para 8):

> Before turning to the various aspects of the operation which are criticised in the judgment, we would underline three points of a general nature. First, in undertaking any evaluation of the way in which the operation was organised and controlled, the Court should studiously resist the temptations offered by the benefit of hindsight. The authorities had at the time to plan and make decisions on the basis of incomplete information…It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken. It should not be so regarded unless it is established that in the circumstances as they were known at the time another course should have been preferred.

So, according to the minority in *McCann*, hindsight should be ignored unless in the circumstances as they were known at the time another course of action should have been preferred. Of course, senior officers should have drawn up contingency plans in the event that 'SO19' was unavailable to make an arrest. As events unfolded, armed officers were not in place so passing responsibility for this over to the surveillance officers may have been preferable. However, the purpose of the operation was to involve a tactical unit overseeing the stop because of the nature of the suspect. The delay in assigning 'SO19' was because of their involvement in an operation elsewhere. What else, therefore, could the police have done to address this obstacle – short of, say, directing the elite firearms officers away from where they were originally deployed? With hindsight, this may have had catastrophic consequences also. Furthermore, in assessing whether another course of action should have been employed, it is significant that the minority in *McCann* did attach particular emphasis on the pressures of an ongoing anti-terrorist operation.

As regards the positive nature of Article 2, again with hindsight specialist armed support should have arrived much earlier. Because of 'SO19's late arrival it was able to 'stop' de Menezes only at Stockwell (and then it regrettably inferred the need for critical shots from the degree of anxiety expressed by senior officers at New Scotland Yard). However, 'SO19' was late because it was unavailable earlier. Was this unreasonable? Indeed, 'SO19' was assigned somewhere else (possibly averting a terrorist atrocity in another area of London). Alternatively, could this be a reflection of the disproportionate burden that should not be imposed on state authorities in the protection of life?

In reference to other elements of the substantive duty imposed by Article 2(1), criminal charges reflecting the level of state culpability in a homicide should be brought. Yes, there were errors and acts of carelessness exercised by individual police officers, so much so that the CPS believed that the standard of care owed to de Menezes and the Londoners with whom he came into contact on that day in July 2005

was sufficiently lacking to justify a criminal prosecution under the Health and Safety at Work Act 1974. However, was the degree of negligence so gross as to warrant manslaughter charges? The author in this article believes not. Nonetheless, the fact that no individual police officer was disciplined over the incident is perhaps less easy to defend.

In conclusion, accounting for the many features of Article 2, negative and positive, the balance arguably falls in favour of not an unlawful denial of life. However, an assessment of the facts of the shooting is not a simple one: the negative right of Jean Charles de Menezes not to have his life deprived versus the positive right of the community to be free from acts of suicide violence results in what Feldman describes (albeit not in particular reference to this case) as a "[clash] of absolutes" (Feldman 2002: 204). If in the event that the killing was later held to contravene Article 2, the author would claim (assuming no new facts came to light since the writing of this article) that the de Menezes incident, with respect, should be put into perspective. This is one episode. Whilst it is highly regrettable that a police discharge of firearms resulted in a loss of life, and at the expense of an entirely innocent person, it must be assessed in the context of all the operations where armed officers are deployed. More importantly, there should be a serious consideration of the positive nature of the Article to protect the rights of the public at large from terrorist atrocities, which was an important factor in the ruling of the court of first instance, the Commission, in *McCann*. That is, perhaps the substantive obligation imposed by Article 2(1) should take less account of the private right of the individual whose life has been deprived. Debates about showing a greater respect for the public right of the wider community to be free from harm have happened in other contexts: for example, the Mental Health Act 2007 amends significantly the provisions of the Mental Health Act 1983 by broadening the scope of the state's existing compulsory powers to detain and treat those individuals suffering from a mental disorder. This "Hobbesian" argument – maybe we should surrender some of our individual freedoms in the war on terror so that the state can better protect our safety and security – may not find support from other human rights lawyers (see, for example, Harvey 2006; and more generally, Arden 2005, Feldman 2006, Gearty 2007 and Nabulsi 2007). However, the author is neither calling for the routine arming of the police nor a significant further deprivation of liberty in the fight against terrorism. For example, he is not supporting a relaxation of the powers to stop and search terror suspects in the Terrorism Act 2000 s.43 (especially since only 1 in 400 of them actually leads to arrest (Dodd 2007c)). He is not supporting an overruling of the ECHR obligations contained in Article 3 that prohibit states from deporting individuals to countries where there is a real risk that they may be tortured, even though the threat posed to a state from a deportee's continued stay may arguably outweigh their risk of torture in the receiving country (*Saadi* v. *Italy* (2008) 24 BHRC 123). The author is not supporting an increase in the state's powers of intrusion over suspects subject to "derogating" and "non-derogating" control orders under the Prevention of Terrorism Act 2005 ss.4 and 2, where there is insufficient evidence to prosecute them for a criminal offence. Indeed, he is not supporting the overruling of *A* v. *Secretary of State for the Home Department (No.2)* [2005] UKHL 71, [2006] 2 AC 221 prohibiting the use of evidence extracted through torture as a means of justifying criminal charges in the absence of more "conventional" evidence. He is not supporting an extension of the periods of pre-charge detention for terror suspects from 28 days in the Terrorism Act 2006 s.23 to 42 days in the Counter-Terrorism Bill 2007 cl.62. The author could go

on. If in the event, therefore, that the balance fell on the side of the de Menezes family, then perhaps a reconsideration of the nature of the positive obligation imposed on a state by Article 2(1) should be undertaken – but only in, say, operations dealing with suicide terrorism where the risks to life are that far greater. In calling for a standard more beneficial to the public interest, the author is neither calling for a unilateral relaxation of existing terror laws in the favour of state authorities nor or an extension to them.

Since the killing there has understandably been concern expressed about Operation 'Kratos' and its lack of accountability to Parliament. In some quarters these tactics employed by the police in the pursuit of terrorists, especially suicide bombers, are interpreted as a police "shoot to kill" policy. Human rights organisations such as Liberty (Liberty 2007) and BIRW (BIRW 2006) have called for the Parliamentary scrutiny of Operation 'Kratos' in the light of the de Menezes shooting. For example BIRW states: (BIRW 2006):

> British Irish Rights Watch was extremely concerned at the introduction and implementation of Operation 'Kratos' by the Metropolitan Police Force; and the subsequent death of Jean-Charles de Menezes in Stockwell underground station on 22 July 2005…While BIRW is mindful of the need to protect Londoners from suicide bombers, we are concerned about the implementation of a "shoot to kill" policy, and the clear operational and procedural problems which exist within Operation 'Kratos'. The implementation of Operation 'Kratos' raises serious questions especially in situations where there is room for error about the identity and intention of suspects. Significantly this policy does not appear to have undergone any consultative process nor been subject to Parliamentary debate, or Ministerial approval. British Irish Rights Watch believe that changes in police policy, which have a direct bearing on the right to life, as outlined under the UK's international commitments to human rights, should be subject to a full Parliamentary review. British Irish Rights Watch is concerned that the "shoot to kill" policy is proving problematic within the police force itself. The Metropolitan Police Commissioner, Sir Ian Blair, claims that it is the "least worst way of tackling a suicide bomber…I am not certain the tactic we have is the right tactic, but it is the best we have found so far." His attitude seems to indicate an unfocused policy—which is reactive and not proactive, with a potential for unlawful killings. BIRW disputes Sir Ian Blair's claim that there is "nothing cavalier or capricious" about Operation 'Kratos'; we feel that De Menezes' death proves that such a policy has unpredictable and dangerous results. There have been three previous incidents involving the use of lethal force, prior to the death of De Menezes, of which we are aware; all resulted in the deaths of unarmed men, none of whom represented a threat to national security at the times of their deaths.

The legality of Operation 'Kratos' has not been assessed here (despite some armed officers believing that the shooting was such an operation, and a DSO, Commander Dick, being appointed in the event that one did develop). This is because the events of July 2005 were in fact part of Operation 'Theseus 2', an operation to arrest one of the failed suicide bombers from the day before. However, if there is going to be a serious consideration of the Article 2(1) implications for the protection of the wider community from suicide bombers, as the author suggests, then for reasons of

transparency, accountability and so on this should be undertaken by Parliament, perhaps as part of a wider public debate about the state's responses to terrorism, including Operation 'Kratos', post '9/11'.

Bibliography

Amnesty International (2006) "UK: The Killing of Jean Charles De Menezes – High Court Misses an Opportunity" 14th December http://www.amnesty.org.uk/news_details.asp?NewsID=17201 Accessed 11th January 2008

Arden, Lady Justice (2005) "Human Rights in the Age of Terrorism" 121 *Law Quarterly Review* 604

The Association of Chief Police Officers (2005) *Manual of Guidance on the Use of Police Firearms* http://www.acpo.police.uk/asp/policies/Data/firearms.pdf Accessed 13th February 2008

Attewill, F (2007) "Police Officers Cleared in De Menezes Case" *The Guardian*, 21st December

BBC News (2008) "Inquest Date Set for Menezes Case" http://news.bbc.co.uk/1/hi/uk/7235200.stm Accessed 10th March 2008

British Irish Rights Watch (2006) "Submissions to the Parliamentary Joint Committee on Human Rights" as part of *The UN Convention Against Torture (UNCAT).* 19th Report of Session 2005-06, Volume II Oral and Written Evidence, 18th May http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-ii.pdf Accessed 17th December 2007

Burleigh, J and Fenton, B (2005) "Bomb Suspect Gunned Down on Tube After Frantic Chase by Armed Police" *The Daily Telegraph*, 23rd July

Campbell, D (2007) "Police in Tube Killing will not be Disciplined" *The Guardian*, 12th May

Cross, T (2006) "Article 2 of the ECHR and "Mistaken Belief" in the Prevention of Crime: A Re-Evaluation Post-*Bennett*" *Judicial Review* 180

Crown Prosecution Service (2004) *Code for Crown Prosecutors* http://www.cps.gov.uk/publications/docs/code2004english.pdf Accessed 4th March 2008

Crown Prosecution Service (2006) "CPS Statement: Charging Decision on the Fatal Shooting of Jean Charles de Menezes" 17th July http://www.cps.gov.uk/news/pressreleases/archive/2006/146_06.html Accessed 26th November 2007

Dodd, V (2007a) "De Menezes: the Key Questions" *The Guardian*, 2nd November 2007

Dodd, V (2007b) "De Menezes: the Case Against the Met" *The Guardian*, 2nd October 2007

Dodd, V (2007c) "Only 1 in 400 Anti-Terror Stop and Searches Leads to Arrest" *The Guardian*, 31st October 2007

Feldman, D (2002) *Civil Liberties and Human Rights in England and Wales* 2nd ed. (Oxford, Oxford University Press)

Feldman, D (2006) "Human Rights, Terrorism and Risk: The Role of Politicians and Judges" *Public Law* 364

Fenwick, H (2007) *Civil Liberties and Human Rights* 4th ed. (London, Routledge Cavendish)

Gearty, C (2007) "Rethinking Civil Liberties in a Counter-Terrorism World" *European Human Rights Law Review* 111

Gobert, J (2008) "The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making But Was it Worth the Wait?" 71 *Modern Law Review* 413

Harvey, R (2006) "Shoot to Kill" *Socialist Lawyer* July

Herring, J. (2008) *Criminal Law: Text, Cases and Materials*. 3rd ed. (Oxford, Oxford University Press)

Herring, J. and Paiser, E. (2007) "The Duty of Care in Gross Negligence Manslaughter" *Criminal Law Review* 24

Home Office (2007a) "Sir Ian Blair's Letter to Sir John Gieve" http://www.homeoffice.gov.uk/documents/foi-2405-stockwell-1.pdf?view=Binary Accessed 11th December 2007

Home Office (2007b) "Home Secretary: Met Police "have my full confidence"" 1st November http://www.homeoffice.gov.uk/about-us/news/blair-statement Accessed 11th December 2007

Independent Police Complaints Commission (2007a) '*Stockwell Two': An Investigation Into the Complaints about the Metropolitan Police Service's Handling of Public Statements Following the Shooting of Jean Charles de Menezes on 22nd July 2005* www.ipcc.gov.uk/ipcc_stockwell_2.pdf - 2007-08-02 Accessed 11th December 2007

Independent Police Complaints Commission (2007b) "IPCC Concludes Stockwell Two Investigation", 2nd August 2007 http://www.ipcc.gov.uk/news/pr020807_stockwell2.htm Accessed 11th December 2007

Independent Police Complaints Commission (2007c) '*Stockwell One': An Investigation Into the Shooting of Jean Charles de Menezes at Stockwell Underground Station on 22nd July 2005*, 8th November 2007 www.ipcc.gov.uk/stockwell_one.pdf - 2007-11-08 Accessed 11th December 2007

Independent Police Complaints Commission (2007d) "IPCC Statement Following Stockwell Verdict" 1st November 2007 http://www.ipcc.gov.uk/news/pr011107_stockwell.htm Accessed 11th December 2007

Independent Police Complaints Commission (2007e) "The Stockwell Investigation: Frequently Asked Questions" 16th November 2007 http://www.ipcc.gov.uk/faqs_for_stockwell_one.pdf. Accessed 11th December 2007

James, J (2007) "Flights of Fancy" 157 *New Law Journal* 1582

Joint Committee on Human Rights (2006) *Corporate Manslaughter and Corporate Homicide Bill*, 27th Report of Session 2005-06 http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/34/3402.htm Accessed 12th December 2007.

Joint Committee on Human Rights (2008) *Counter-Terrorism Policy and Human Rights (10th Report): The Counter-Terrorism Bill*. 20th Report of Session 2007-08 http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/108/10802.htm Accessed 13 June 2008

Jones, J (2005) "Comment" 78(2) *Police Journal* 95

Khan, Y (2006) "Justice for Jean?" *Socialist Lawyer*, December

Leverick, F. (2002) "The Use of Force in Public or Private Defence and Article 2" *Criminal Law Review* 347

Liberty (2007) "Liberty Accuses IPCC of "Delaying Justice" with Belated Stockwell Shooting Report" 8th November http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2007/ipcc-stockwell-shooting-report.shtml Accessed 12 December 2007

Muir, H (2006) "Officers Who Shot de Menezes to go Back on Duty" *The Guardian*, 29th July

Nabulsi, K (2007) "Don't Sign Up to this Upside Down Hobbesian Contract" *The Guardian*, 22nd March 2007

O'Brien, D (2007) "Judicial Review Under the Human Rights Act 1998: Legislative or Applied Review?" *European Human Rights Law Review* 550

Ormerod, D (2008) *Smith and Hogan: Criminal Law* 12th ed. (Oxford, Oxford University Press)

Rogers, J (2005) "Shoot, Identity and Repent?" 155 *New Law Journal* 1273

Smith, J (1999) *R* v. *Singh Criminal Law Review* 582.

Sturcke, J and Dodd, V (2007) "Met Chief Survives Vote of No Confidence" *The Guardian*, 22nd November 2007

Taylor, P (2006) "The Terrorist Who Wasn't" *The Guardian G2*, 8th March 2006