



Householders and the law of self defence

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A householder may be liable in criminal or civil law, or both, if he uses force against an intruder resulting in the intruder's death or injury. Cases such as those of Tony Martin and Munir Hussain have drawn attention to this potential liability and led to calls for householders in this position to be given greater protection from the threat of prosecution.

At present, a householder who kills or injures a burglar will have a complete defence (and will therefore be acquitted) if the force he used was reasonable and was exercised either in defence of himself or another, or in the prevention of crime. In recent years the Conservatives have consistently argued that the test of "reasonable force" should be replaced with a test under which householders would not be prosecuted unless their actions were "grossly disproportionate". Labour and the Liberal Democrats have taken the view that the existing law works well and no change is needed.

A pledge to give householders greater protection appeared in the Conservative 2010 election manifesto. This commitment survived the coalition negotiations with the Liberal Democrats and appears in the Government's coalition agreement published in May 2010.

Critics of the proposal to replace "reasonable force" with "not grossly disproportionate force", including the chairman of the Criminal Bar Association and the QC who acted as defence counsel for both Tony Martin and Munir Hussain, have expressed concerns that such a move could encourage vigilantism and would effectively sanction extrajudicial punishment.

In June 2010 the Government indicated that it would "explore all the options before bringing forward proposals".

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1 Criminal liability and defences

A householder who confronts and kills an intruder may be liable to a charge of murder or manslaughter. If the intruder is only injured, the householder could face charges such as assault, wounding or even attempted murder. However, the householder has a complete defence (and will therefore be acquitted) if the force he used was reasonable and was exercised either in defence of himself or another, or in the prevention of crime.

The use of force in self defence is governed by the common law, while the use of force in the prevention of crime is governed by section 3 of the *Criminal Law Act 1967*.¹ In each case, the test to be applied is whether force was **necessary** and, if so, whether the degree of force actually used was **reasonable in the circumstances**. The question of whether the force used in any particular case was “reasonable” will be answered on the basis of the circumstances and the danger as the householder believed them to be. This is so even if the householder’s belief was a mistaken one honestly held, unless the mistake was due to the his or her self-induced intoxication.² The court may also take account of the householder’s physical characteristics in deciding whether the force used was reasonable³ but not – save in exceptional circumstances – any psychiatric conditions that may have made the householder perceive the circumstances as more dangerous than a reasonable person would have done.⁴

The householder is not expected to undertake a detailed risk analysis before deciding whether to use force:

If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was

¹ There will inevitably be a degree of overlap between the common law defence and the statutory one, as a householder who uses force against an intruder will often be doing so both in self defence and to prevent crime. However, to date the courts have interpreted the two defences in the same way: see *Archbold Criminal Pleading, Evidence and Practice*, 2010, para 19-39c

² *R v O’Grady* [1987] QB 995, *R v Hatton* [2005] EWCA Crim 2951

³ “Circumstances which would not be seen as threatening by a robust young man may appear so to a frail elderly woman”: Smith and Hogan, *Criminal Law*, 11th edition, 2005, p331

⁴ *R v Martin* [2001] EWCA Crim 2245

necessary that would be most potent evidence that only reasonable defensive action had been taken.⁵

[Section 76 of the Criminal Justice and Immigration Act 2008](#) established a statutory framework (based on existing case law) for assessing reasonableness. It was aimed at “clarifying” the operation of the common law and section 3 defences, rather than amending them. The explanatory notes to the Act provide further information:

Section 76: Reasonable force for the purposes of self-defence etc.

532. Section 76 provides a gloss on the common law of self-defence and the defences provided by section 3(1) of the Criminal Law Act 1967 and section 3(1) of the Criminal Law Act (Northern Ireland) 1967, which relate to the use of force in the prevention of crime or making an arrest. It is intended to improve understanding of the practical application of these areas of the law. It uses elements of case law to illustrate how the defence operates. It does not change the current test that allows the use of reasonable force.

533. In line with the case law, notably from the leading case of [Palmer v R \[1971\] A.C. 814](#), the defence will be available to a person if he honestly believed it was necessary to use force and if the degree of force used was not disproportionate in the circumstances as he viewed them. The section reaffirms that a person who uses force is to be judged on the basis of the circumstances as he perceived them, that in the heat of the moment he will not be expected to have judged exactly what action was called for, and that a degree of latitude may be given to a person who only did what he honestly and instinctively thought was necessary. A defendant is entitled to have his actions judged on the basis of his view of the facts as he honestly believed them to be, even if that belief was mistaken.

534. Section 76 retains a single test for self-defence and the prevention of crime (or the making of an arrest) which can be applied in each of these contexts.⁶

For more detailed information on the background to section 76, please see [House of Lords Library Note LLN 2008/001 Criminal Justice and Immigration Bill](#) (pp7-9).

The Crown Prosecution Service (CPS) has also published guidance summarising the position for householders confronted with an intruder:

Does the law protect me? What is 'reasonable force'?

Anyone can use reasonable force to protect themselves or others, or to carry out an arrest or to prevent crime. You are not expected to make fine judgements over the level of force you use in the heat of the moment. So long as you only do what you honestly and instinctively believe is necessary in the heat of the moment, that would be the strongest evidence of you acting lawfully and in self defence. This is still the case if you use something to hand as a weapon.

As a general rule, the more extreme the circumstances and the fear felt, the more force you can lawfully use in self-defence.

Do I have to wait to be attacked?

⁵ [Palmer v R](#), 1971 AC 814

⁶ [Criminal Justice and Immigration Act 2008: Explanatory Notes](#), p87, paras 532-534

No, not if you are in your own home and in fear for yourself or others. In those circumstances the law does not require you to wait to be attacked before using defensive force yourself.

What if the intruder dies?

If you have acted in reasonable self-defence, as described above, and the intruder dies you will still have acted lawfully. Indeed, there are several such cases where the householder has not been prosecuted. However, if, for example:

- having knocked someone unconscious, you then decided to further hurt or kill them to punish them; or
- you knew of an intended intruder and set a trap to hurt or to kill them rather than involve the police,

you would be acting with very excessive and gratuitous force and could be prosecuted.

What if I chase them as they run off?

This situation is different as you are no longer acting in self-defence and so the same degree of force may not be reasonable. However, you are still allowed to use reasonable force to recover your property and make a citizen's arrest. You should consider your own safety and, for example, whether the police have been called. A rugby tackle or a single blow would probably be reasonable. Acting out of malice and revenge with the intent of inflicting punishment through injury or death would not.⁷

When deciding whether to prosecute a householder who has used violence against an intruder, CPS legal guidance advises that:

prosecutors should be aware of the balance to be struck [between]:

- the public interest in promoting a responsible contribution on the part of citizens in preserving law and order; and
- in discouraging vigilantism and the use of violence generally.⁸

The CPS must also consider whether any prosecution would be in the public interest:

In many cases in which self-defence is raised, there will be no special public interest factors beyond those that fall to be considered in every case. However, in some cases, there will be public interest factors which arise only in cases involving self-defence or the prevention of crime. These may include:

- The degree of excessive force. If the degree of force used is not very far beyond the threshold of what is reasonable, a prosecution may not be needed in the public interest.
- The final consequences of the action taken. Where the degree of force used in self-defence or in the prevention of crime is assessed as being excessive, and results in death or serious injury, it will be only in very rare circumstances indeed that a prosecution will not be needed in the public interest. Minor or superficial injuries may be a factor weighing against prosecution.

⁷ CPS website, [Householders and the use of force against intruders](#) [accessed 30 June 2010]

⁸ CPS website, [Legal guidance: self-defence and the prevention of crime](#) [accessed 30 June 2010]

- The way in which the force was applied. This may be an important public interest factor, as well as being relevant to the reasonableness of the force used. If a dangerous weapon, such as firearm, was used by the accused this may tip the balance in favour of prosecution.
- Premeditated violence. The extent to which the accused found himself unexpectedly confronted by a violent situation, as opposed to having planned and armed himself in the expectation of a violent situation.

Use of Force against Those Committing Crime

The public interest factors set out immediately above will be especially relevant where, as a matter of undisputed fact, the victim was, at the material time, involved in the commission of a separate offence. Common examples are burglary or theft from motor vehicles. In such cases, prosecutors should ensure that all the surrounding circumstances are taken into consideration in determining whether a prosecution is in the public interest.

Prosecutors should have particular regard to:

- the nature of the offence being committed by the victim;
- the degree of excessiveness of the force used by the accused;
- the extent of the injuries, and the loss or damage, sustained by either or both parties to the incident;
- whether the accused was making an honest albeit over zealous attempt to uphold the law rather than taking the law into his own hands for the purposes of revenge or retribution.⁹

2 Civil liability and defences

A householder who uses force against an intruder would potentially be liable under civil law as well as criminal. This is because most crimes of violence, for example assault, also amount to trespass against the person. Trespass against the person is an actionable civil wrong (or “tort”) for which proceedings can be brought in the civil courts.

As the civil standard of proof (the balance of probabilities) is lower than the criminal (beyond reasonable doubt), a civil claim may succeed where a criminal charge would fail or has failed. It may, therefore, be open to an intruder injured by a householder to sue the latter for damages, even where the householder had been acquitted of any criminal offence or the CPS had decided not to prosecute.

However, as in the criminal law, the householder will have a full defence if he can demonstrate that his actions represented reasonable force in defending himself or another. There are also statutory limits on an intruder’s ability to bring a civil action against a householder in the first place. These are set out in [section 329 of the Criminal Justice Act 2003](#), which was enacted in response to protest at the prospect of a burglar claiming compensation from a farmer who had shot him.¹⁰ The overall effect of section 329 is set out in the Explanatory Notes to the 2003 Act:

⁹ Ibid

¹⁰ The farmer in question was Tony Martin: see paragraph 3.1 of this note.

Section 329 makes new provision about cases where a person who has been convicted of an imprisonable criminal offence takes civil action for damages for trespass to the person against the victim of the offence or against a third party who has intervened, for example to protect the victim or to protect or recover property. It requires that, where a claimant convicted of an imprisonable offence wishes to sue someone for damages for a trespass to the person which is committed on the same occasion as the offence, he must first obtain the permission of the court. Permission may only be given if there is evidence that certain conditions relating to the defendant's perceptions and reasons for doing the act which amounted to trespass to the claimant's person are not met, or that in all the circumstances the defendant's act was grossly disproportionate. The defendant will not be liable at the trial if he can prove that the relevant conditions are met and that in all the circumstances the action was not grossly disproportionate.¹¹

The relevant conditions relating to the defendant's perceptions and reasons are that he only did the act amounting to trespass to the claimant's person because he believed that:

- (a) the claimant was about to commit an offence, was in the course of committing an offence, or had committed an offence immediately beforehand; and
- (b) the act was necessary to defend himself or another person; to protect or recover property; to prevent the commission or continuation of an offence; to apprehend or secure the conviction of the claimant after he had committed the offence; or to assist in achieving any of those things.

The then Home Secretary David Blunkett said that the measures were intended to "ensure that those intruding on the lives and property of decent citizens will not be able to turn the tables and sue them".¹²

3 Illustrative cases

An "informal trawl" by the CPS suggested that between 1990 and 2005 there were only 11 prosecutions of people who had used force against intruders into houses, commercial premises or private land. Only seven of those appeared to have resulted from domestic burglaries. Ken Macdonald, the then Director of Public Prosecutions, listed a number of cases where those who used force had and had not been prosecuted:

Householder/other victim not prosecuted

- Robbery at a newsagent's. One of the two robbers died after being stabbed by the newsagent. The CPS did not prosecute the newsagent but prosecuted the surviving robber who was jailed for six years (Greater Manchester);
- A householder returned home to find a burglar in his home. There was a struggle during which the burglar hit his head on the driveway and later died. No prosecution of householder who was clearly acting in self-defence (Derbyshire);
- Armed robbers threatened a pub landlord and barmaid with extreme violence. The barmaid escaped, fetched her employer's shotgun and shot at least one of the intruders. Barmaid not prosecuted (Hertfordshire);

¹¹ [Explanatory Notes to the Criminal Justice Act 2003](#), para 99

¹² Home Office press release 037/2003, *The cases of Brendon Fearon and Tony Martin*, 29 July 2003

- Two burglars entered a house armed with a knife and threatened a woman. Her husband overcame one of the burglars and stabbed him. The burglar died. There was no prosecution of the householder but the remaining burglar was convicted (Lincolnshire);
- A middle aged female took a baseball bat off a burglar and hit him over the head, fracturing his skull. The burglar made a complaint but the CPS refused to prosecute (Lancashire).

Examples of Prosecutions

- A man laid in wait for a burglar on commercial premises, caught him, tied him up, beat him, threw him into a pit and set fire to him (Cheshire);
- A number of people trespassed on private land to go night-time fishing. They were approached by a man with a shotgun who threatened to shoot them. They ran away but one of the men was shot in the back with a mass of 40 shotgun pellets (South Wales);
- A householder lay in wait for a burglar who tried to burgle his shed. The householder shot him in the back (South Yorkshire).

Mr Macdonald said: "These examples show that prosecutors take great care over their decisions and have done for many years. So long as a householder is not acting in retribution or revenge, the force used in self defence would have to be wholly excessive and out of proportion before a prosecution would be contemplated."¹³

Below are further details of some high profile and recent cases that have involved the use of force by householders.

3.1 Tony Martin

Tony Martin had lived at a remote farmhouse for 20 years. There had been several previous break-ins and he had expressed dissatisfaction with the police response. On the night of 20 August 1999 two intruders, Brendan Fearon and Freddie Barras, broke into the farmhouse. Martin shot at both of them with an unlicensed shotgun, injuring Fearon and killing Barras. In April 2000, Martin was found guilty of murder and wounding with intent, having unsuccessfully pleaded self defence. He received a mandatory life sentence for the murder and a ten year prison sentence for the wounding.

Martin appealed his murder conviction to the Court of Appeal. Fresh psychiatric evidence was admitted that showed Martin was suffering from a long-term personality disorder. The Court ruled that Martin's state of mind was irrelevant for the purposes of self defence. However, it was relevant to the partial defence of diminished responsibility;¹⁴ the Court therefore substituted the murder conviction for a conviction of manslaughter on the ground of diminished responsibility.¹⁵ Martin's new sentences were five and three years' imprisonment.

¹³ CPS press release, [Homeowners and self defence - DPP issues further details of cases](#), 13 January 2005

¹⁴ Diminished responsibility is a partial defence in that if successfully pleaded it would only reduce a murder conviction to manslaughter (rather than an acquittal). Self defence is a complete defence as it would reduce a murder conviction to an acquittal.

¹⁵ [R v Martin \[2001\] EWCA Crim 2245](#)

3.2 Thomas O'Connor

An elderly registered blind man, Thomas O'Connor, stabbed and killed an intruder who attempted to break into his home in June 2003. He was arrested but not charged. At the inquest held in March 2004, the coroner said:

...Mr O'Connor was an elderly man in poor health, and Mr Kelso was big, fit and young.

"I have no doubt that Mr O'Connor acted in reasonable boundaries in protecting himself and his wife," Mr Pollard said.¹⁶

3.3 Edwin Pitkin

In February 2008, Edward Pitkin stabbed a man he believed to be an intruder attempting to enter his house. In actual fact the man was a near neighbour who (under the influence of drugs and alcohol) was attempting to enter Pitkin's house in the mistaken belief that it was his own.¹⁷

The CPS announced that no charges would be brought:

Following a full review of the circumstances surrounding Mr Woods' tragic death, CPS London has concluded that there is no realistic prospect of conviction for any offence arising out of his death.

Mr Rene Barclay, Director of Complex Casework said: "In order to prove the offence of Murder or Manslaughter we have to prove that Mr Pitkin killed Mark Woods unlawfully and not in self defence or in defence of another.

"A person is entitled to use such force as is reasonable in the circumstances for the purpose of self defence, the defence of another, the defence of property or the prevention of crime.

"In assessing the reasonableness of the force used we have to take account of the circumstances as Mr Pitkin believed them to be. We therefore concluded that there was no realistic prospect of conviction in this case because there was insufficient evidence to establish Mark Woods was unlawfully killed."¹⁸

3.4 Munir and Tokeer Hussain

In September 2008, Munir Hussain discovered three intruders in his house when he and his family returned home from the local mosque. Hussain's teenage son managed to escape and alert Munir's brother, Tokeer Hussain. When Tokeer arrived at the house the intruders fled, but the brothers chased and caught one of them: Walid Salem, a man with more than 50 previous convictions. The brothers then beat Salem, striking him with a cricket bat with such force that it broke in three places. Salem was left with a permanent brain injury and the brothers were charged with causing grievous bodily harm.

In December 2009, both Munir and Tokeer Hussain were convicted. Contrary to popular belief, the brothers did not actually raise self defence at their trial. Rather than admitting to the beating and arguing that it constituted reasonable force in self defence, they instead argued (unsuccessfully) that Salem's injuries were not inflicted by them at all but by a group of youths who had come to their aid. Munir Hussain was given a 30 month prison sentence

¹⁶ "Blind man in 'lawful' killing", *BBC News website*, 18 March 2004

¹⁷ "Cleared: family man who killed a 'burglar'", *Evening Standard*, 25 April 2008

¹⁸ CPS press release, *CPS advises no charges against Edwin Pitkin*, 25 April 2008

and Tokeer a 39 month sentence (the judge having decided that he had not been subject to as much provocation as his brother). Passing sentence, Judge Reddihough said:

"This case is a tragedy for you and your families," the judge told Munir Hussain. "Sadly, I have no doubt that my public duty requires me to impose immediate prison sentences of some length upon you. This is in order to reflect the serious consequences of your violent acts and intent and to make it absolutely clear that, whatever the circumstances, persons cannot take the law into their own hands, or carry out revenge attacks upon a person who has offended them."¹⁹

The brothers appealed against both conviction and sentence. The Court of Appeal dismissed the appeals against conviction, but allowed those against sentence. Again, the Court emphasised that this case had nothing to do with the law of self defence:

The combination of events which culminated in the serious injuries sustained by Walid Salem is highly unusual. By the time he was lying defenceless on the ground, none of his assailants was acting in self-defence or in Munir Hussain's case in defence of his wife, of his children, of himself, or of his home. This is not, and should not be seen as, a case about the level of violence which a householder may lawfully and justifiably use on a burglar. It is also clear that the violence to which Walid Salem was subjected was not designed to ensure that he would be detained, pending the arrival of the police, to be handed over to them. The burglary was over. No one was in any danger. The purpose of the appellants' violence was revenge: to teach at least one of the burglars a lesson. It was a sustained attack with weapons. The pleas of the eye-witness to desist were ignored. Such violence is not lawful. No one at trial suggested it was. That is why, after a careful summing-up by the judge, the jury convicted those they were sure had participated in the violence.²⁰

Munir's sentence was reduced to a twelve month suspended sentence, and Tokeer's to 24 months' imprisonment (not suspended). The Court of Appeal stressed that the reductions were on account of the brothers' good character and to "address and balance the ancient principles of justice and mercy", and not because their conduct had constituted reasonable force in self defence.²¹

3.5 Omari Roberts

In March 2009, Omari Roberts arrived at his mother's house to find two teenage intruders inside. In the ensuing confrontation, both intruders were stabbed: one fatally. The CPS decided that there was sufficient evidence to prosecute Roberts and that it was in the public interest to do so, and he was therefore charged with murder and wounding with intent.²²

The case proceeded to trial but shortly before the court hearing was due to begin the CPS dropped the charges on the basis of new evidence that had emerged:

The court heard that the decision to drop the charges came after the younger of the two burglars was re-interviewed by detectives two weeks before Easter.

The boy, who is now 15, suffered two stab wounds to his right knee during an initial confrontation with Mr Roberts in the kitchen of the semi-detached house.

¹⁹ "Self defence or malicious revenge? Jail for brothers who beat burglar with bat", *Guardian*, 14 December 2009

²⁰ *R v Hussain and another* [2010] EWCA Crim 94, at para 34

²¹ *Ibid.*, at paras 43 to 46. See also "Don't read too much into Munir Hussain judgment, say lawyers", *Guardian*, 20 January 2010

²² CPS press release, *CPS decides charges following death of Tyler Juett*, 27 October 2009

He claimed he then fled the house with Mr Roberts in pursuit. Prosecutors said this gave them a realistic chance of gaining a conviction as it meant Mr Roberts would have had time to call police.

But in the interview last month, the boy admitted he waited for his accomplice outside the house.

This supported the assertion by Mr Roberts that his struggle with Juett, from Aspley, Nottingham, immediately followed a fight with the boy, Gregory Dickinson QC, prosecuting, said.

The teenage accomplice also told a social worker following the burglary that he did have a knife and "would have killed" Mr Roberts, despite telling police he was unarmed.

(...)

The Crown Prosecution Service (CPS) said the decision to drop the charges was made after it received "significant new information" after the original decision to prosecute.

A CPS spokeswoman said: "After receiving significant new information last month, the case was reviewed and it was decided there was no longer a realistic prospect of conviction."²³

4 Proposals for reform

Cases such as those referred to in the previous section of this note inevitably give rise to a great deal of public and press attention: and in particular to calls for the law on self defence to be amended to give householders greater protection from criminal prosecution. Much of the criticism has been directed at the concept of "reasonable force", with opponents arguing that it is too vague and unclear and therefore leaves householders unable to judge whether their actions might result in a criminal prosecution.

While in opposition, a number of Conservative members attempted to amend the law on self defence (as it applies to householders) by way of Private Members' Bills:

- [*Criminal Justice \(Justifiable Conduct\) Bill 2003/04*](#)

Introduced by Roger Gale, this Bill would have given householders special protection from criminal and/or civil liability in respect of actions taken against intruders where the householder believed he was acting in self defence, to preserve or protect property or to prevent crime. The exemption would have applied whether the householder's belief "was reasonable or not". The Bill's Second Reading debate began on 30 April 2004 but was later adjourned;²⁴ the Bill did not proceed any further.

- [*Criminal Law \(Amendment\) \(Householder Protection\) Bill 2004/05*](#)

Introduced by Patrick Mercer, this Bill would have replaced the "reasonable force" test with one under which people acting in self defence (including but not limited to householders) would not be prosecuted unless the force used was "grossly disproportionate". Detailed background is set out in [Library Research Paper 05/10 Criminal Law \(Amendment\) \(Householder Protection\) Bill](#). The Bill had its Second

²³ "Burglar murder charge against Nottingham man dropped", *BBC News website*, 19 April 2010

²⁴ HC Deb 30 April 2004 cc1146-1180

Reading on 4 February 2005²⁵ and was committed to a [Standing Committee](#) for further consideration. However, it did not proceed any further.

- [Criminal Law \(Amendment\) \(Protection of Property\) Bill 2005/06](#)

Introduced by Anne McIntosh, this Bill was largely identical to the *Criminal Law (Amendment) (Householder Protection) Bill 2004/05* save that it extended to Northern Ireland as well as to England and Wales. Full background is set out in [Library Research Paper 05/83 The Criminal Law \(Amendment\) \(Protection of Property\) Bill](#). The Bill had its Second Reading on 2 December 2005 but did not proceed any further.²⁶

- [Criminal Law \(Amendment\) \(Protection of Property\) Bill 2006/07](#)

This Bill, introduced by Shailesh Vara, was identical to that introduced by Anne McIntosh in the previous session. It did not proceed beyond First Reading.

In December 2009, shortly after the Hussain brothers' trial, the then shadow Home Secretary Chris Grayling indicated that any future Conservative government would "look again at the current legal situation":

At the moment the law allows a defendant to use "reasonable force" to protect him or herself, their family or their property. Conservatives argue that the defence that the law offers a householder should be much clearer, and that prosecutions and convictions should only happen in cases where courts judge the actions involved to be "grossly disproportionate".²⁷

However, in a Lords debate in February 2010 both Labour and the Liberal Democrats expressed support for the current law of reasonable force, arguing that it works well and that adequate protection is provided by the "exercise of prosecutorial discretion and the good sense of the jury".²⁸

The Conservatives' 2010 election manifesto included a pledge to "give householders greater legal protection if they have to defend themselves against intruders in their homes".²⁹ This pledge survived the coalition negotiations with the Liberal Democrats and the coalition agreement includes a commitment to "ensure that people have the protection that they need when they defend themselves against intruders".³⁰ Justice Minister Nick Hanson has said that the Government is "reviewing the law and its interpretation carefully, and ... will explore all the options before bringing forward proposals".³¹

An ICM poll for the *Telegraph*, which is running a "[Right to Defend Yourself](#)" campaign to give householders greater rights to defend themselves, suggested that 79 per cent of all

²⁵ [HC Deb 4 February 2005 cc1075-1149](#)

²⁶ [HC Deb 2 December 2005 cc499-574](#)

²⁷ "Chris Grayling: A Tory government would seek to protect the rights of the victim", *Sunday Telegraph*, 20 December 2009

²⁸ [HL Deb 25 February 2010 cc1085-1087](#)

²⁹ Conservative Party, *Invitation to Join the Government of Britain: the Conservative Manifesto 2010*, April 2010, p56

³⁰ Cabinet Office, *The Coalition: our programme for government*, May 2010, p13

³¹ [HC Deb 15 June 2010 c735](#). See also "Minister plays down quick change to self-defence law", *BBC News website*, 6 June 2010

voters would support changing the legal test from “reasonable force” to “grossly disproportionate” force.³²

However, critics argue that any such change could encourage vigilantism and would effectively sanction extrajudicial punishment. Paul Mendelle QC, chairman of the Criminal Bar Association, has said:

“The law should always encourage people to be reasonable, not unreasonable; to be proportionate, not disproportionate,” he said, adding that the present law worked perfectly well and was well understood by juries.

(...)

“You would have, in effect, sanctioned extrajudicial execution or capital punishment for an offence, burglary, that carries a maximum of 14 years — which is the sentence that Parliament decided was appropriate.” He warned that the change could also make householders less safe. “Burglars, knowing that they could be killed, might be more likely to carry weapons and/or use extreme violence. So it would be wholly counterproductive,” he said.³³

Michael Wolkind QC, who acted as defence counsel for both Tony Martin and Munir Hussain said:

“If I manage to tackle a criminal and get him to the ground, I kick him once and that’s reasonable, I kick him twice and that’s understandable, three times, forgivable; four times, debatable; five times, disproportionate; six times, it’s very disproportionate; seven times, extremely disproportionate — in comes the Tory test — eight times, and it’s grossly disproportionate. It is a horrible test. It sounds like state-sponsored revenge. I don’t understand why sentencing should take place in the home. Why can’t it go through the courts? Why can’t the jury, as they always do, decide what is reasonable?”³⁴

Keir Starmer, Director of Public Prosecutions, also supports the concept of reasonable force, and has emphasised that there are “many cases, some involving death, where no prosecutions are brought”.³⁵

A possible alternative to amending the law of self defence itself might instead be to look at giving the courts greater flexibility when sentencing cases such as those of Tony Martin and the Hussain brothers:

So what should be done? One option would be to allow judges a greater discretion to fit the punishment to the crime. In [the Hussain case] the trial judge [did not] get the sentence wrong; [he was] acting within statutory guidelines.

(...)

David Thomas, the sentencing expert, told *The Times* that in the case of the Hussain brothers a prison sentence of 30 months was “as far from the guideline as [the judge] could properly go”.

(...)

³² [“Overwhelming support for campaign to protect householders who confront intruders”](#), *Telegraph*, 16 December 2009

³³ [“Fears of ‘licence to kill’ as Tories bid to change self-defence law”](#), *Times*, 25 January 2010

³⁴ Ibid

³⁵ [“DPP rejects call for change in self-defence law”](#), *BBC News website*, 28 December 2009

Judges are increasingly restricted over the sentences that they can impose, and the trend is towards greater straitjacketing: the Coroners and Justice Act 2009 will require them to follow guidelines, not just take them into account, unless contrary to the interest of justice.

Lord Judge, the Lord Chief Justice, was able to reduce the sentences of the Hussain brothers, freeing one of them, because the Court of Appeal can take a broader view. He said that the case had nothing to do with the right of householders, yet it highlighted the tension courts face in cases where justice seems at odds with the law.³⁶

In January 2010, Edward Garnier (then shadow Attorney General, now the incumbent Solicitor General) made a similar point:

Mr. Edward Garnier (Harborough) (Con): One aspect of the Hussain case that has escaped public attention is the way in which the Coroners and Justice Act 2009, and before that the Criminal Justice Act 2003, badly restricted the discretion of the sentencer. Judge Reddihough would have been more able to produce the sentence that the Court of Appeal produced yesterday had he not been hogtied by the Sentencing Guidelines Council, or the Sentencing Council. Will the Solicitor-General please discuss with her Government colleagues getting rid of the Sentencing Council, so that judges can sentence on the facts before them, rather than having to follow a template issued by other people elsewhere?

The Solicitor-General [Vera Baird]: There is no template, as the hon. and learned Gentleman well knows. The judiciary have a discretion and they rightly exercise it, because they, at first instance, are the people who see the dramatis personae before them, and who can make a proper assessment of the absolute detail and the nature of the person. Judges have plenty of discretion, and in the judgment that I have read, the trial judge made no suggestion that he found himself hogtied-and the Lord Chief Justice certainly did not, either.³⁷

Whether the Government will look at this issue alongside any substantive review of the law of self defence itself remains to be seen.

³⁶ “Judges need more discretion, not more laws”, *Times*, 25 January 2010

³⁷ [HC Deb 21 January 2010 c425](#)