Imminent Attack

by Graham Gilbert, Pupil - Call 2015

The use of a pre-emptive strike in self-defence, of the type the Attorney General suggested on 11 January the UK may deploy against potential terrorist threats, is nothing new to the criminal courts. The Attorney General said that, for such force to be justified, an attack on the UK would have to be "imminent".

The requirement of an imminent threat has been explored by the criminal justice system in relation to offences involving the possession of bladed articles, contrary to section 139 of the Criminal Justice Act 1988, and offensive weapons, contrary to section 1 of the Prevention of Crime Act 1953. It can be a defence to both these offences for a defendant to demonstrate that they were carrying the knife or weapon because they feared an imminent attack (such a fear is held to provide a defendant with a defence of "good reason" or "reasonable excuse" depending on which offence they are charged with and provided they can demonstrate that such a fear existed on the balance of probabilities).

To date, that which can be held to constitute an "imminent threat" has been left to tribunals with little guidance from the higher courts. This is not surprising given that the likely imminence of an event is highly fact-specific and is, therefore, the preserve of the fact-finding element of a court. As Keene LJ noted (at [13]) in *R v McAuley* [2009] EWCA Crim 2130: "it remains for a jury to determine how imminent, how soon, how likely and how serious the anticipated attack has to be".

When announcing the policy Mr Wright set out some of the factors that would have to be considered for a defensive attack by the UK to be justifiable. These would include: the nature and immediacy of the threat, the probability of an attack, the likely loss or damage as a result, and whether there are options for acting in self-defence that would cause less serious collateral damage. There are clear parallels between this statement and that of the Court of Appeal in *McAuley.*

The courts view on what constitutes an "imminent threat" is not straightforward. Two cases illustrate the point well. In *Evans v Hughes* [1972] 3 All ER a man was found in possession of an iron bar seven days after he had been the victim of an attack. Lord Widgery CJ held that (at p.416): "When you get to seven days you get in my judgement very close to the borderline, but at the borderline it is the good sense of the justices which must ultimately determine where or not there was reasonable excuse. I am not sure I would have reached the same conclusion". This

clearly left courts without a line in the sand, and it is little surprise that the matter came before the Court of Appeal in *McAuley* as recently as 2009. Again, the court declined to provide too much guidance on the concept.

In light of these decisions it would be simplistic to assume that the Attorney General can introduce a series of considerations and they will immediately be accepted: challenges and a bedding in period during which limits are established are likely.

Should there be such a questioning of a decision to launch a pre-emptive attack there is a real possibility of the processes behind it being questioned and raked over to decide if, on the facts known to the executive, a pre-emptive strike could indeed be justified under the criteria set down by Mr Wright.

It is entirely possible that the government might seek to withhold the minutes of such decision making meetings but that is unlikely to increase public confidence in the process or those who are making the tough choices. Indeed, it could end up with the government being painted in a very negative fashion by those targeted as a result of decisions made in those meetings: it is easy to imagine the kind of propaganda that could arise from the seeming cover up of a meeting at which the decision to use force was made.

The question is, then, rather than rely on a concept which is so circumstance specific and has exercised the courts for so long, would the Attorney General have been better served tying his colours to a different mast and attempting to define a list of specific conditions that need to be met in order for a pre-emptive strike to be justified. The list need not be exhaustive, nor need every condition be met, but it would at least give a degree of certainty to the matter if certain requisite boxes could be shown to have been ticked. Decisions would then be harder to challenge and discussions leading to them would be less likely to be opened up to scrutiny in a public forum. Of course, it is certain that the drafting of such a set of conditions would be arduous and all parties would have a say with some ending up unhappy. However, it may have been a more far-sighted option than appearing to adopt an existing concept that is so ill-defined.

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