Neutral Citation Number: [2018] EWCA Civ 1189

Case No: A2/2016/4487

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY
Mr Justice Burton
C00BM271

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE UNDERHILL
and
LORD JUSTICE IRWIN

- -

Between :

JEROME JONES	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Intervener**

- -
- -

James Stark (instructed by The Community Law Partnership Ltd., Birmingham) for the Appellant
Jonathan Manning and **Ayesha Omar** (instructed by City Solicitor, Birmingham City Council) for the Respondent
Samantha Broadfoot Q.C. and Yaaser Vanderman (instructed by Government Legal Department) for the Secretary of State

Hearing dates : 24-25 April 2018

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Judgment Approved

Sir Brian Leveson P :

1. Gang-related violence and the resulting public disorder have become a scourge which affects many cities. It may flow from drug dealing but is not unusually accompanied by the discharge of firearms or other acts of extreme violence directed at members of other gangs such that entirely innocent members of the public can become caught up in the cross fire. Investigation of such incidents is rendered more difficult (if not impossible) by the refusal of those who are injured to assist the police by naming their attackers (whom they will frequently have recognised), either because they fear the potentially violent consequences of doing so or because they prefer to take the law into their own hands and retaliate in like mode. Additionally, members of the public are fearful of being involved in prosecutions because of the risk of intimidation and violence. The result is not only that public safety is seriously affected but also that maintenance of the rule of law is endangered.

2. The challenge presented by this type of behaviour is not to be underestimated. It has been felt particularly acutely in various areas of Birmingham where a gang known as the 'Guns and Money Gang' ("GMG") is said to operate. The GMG aligns its loyalty with another gang, 'the Johnson Crew', which was previously contained within the INCH 1 gang. However, the INCH 1 fractured into the Johnson Crew and 'the Burger Bar gang' following an internal dispute, and these two breakaway groups have been intense rivals ever since. This rivalry increased during the 1990s with both groups (and smaller affiliates) claiming postcode areas as 'their' territory. An example of the violence that spilled out as a result is the infamous murder, at a New Year's Eve party in January 2003, of Leticia Shakespeare and Charlene Ellis, who were caught in the cross fire of automatic machine gun fire wielded by offenders linked to the Burger Bar Gang targeting members of the Johnson Crew.

3. In an attempt to address the inability of the criminal justice system to bring the perpetrators of gang-related crime to justice, and anxious to do all that it could to disrupt anti-social behaviour, discourage gang membership and divert youngsters into lawful and more socially worthwhile activity, some ten years ago, Birmingham City Council sought to use s.222 of the Local Government Act 1972 and commenced proceedings for injunctions against named individuals alleged to be involved. In *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, however, it was held that such an application for the purpose of preventing gang-related activity should be refused by the court in its discretion, save in exceptional cases, because Parliament had intended the authorities to use the regime of Anti-Social Behaviour Orders set out in the Crime and Disorder Act 1998 and that the applicable standard of proof in such cases as would warrant an injunction was the criminal standard so as to achieve parity with the ASBO regime.

4. Since then, clearly aimed at reversing the effect of *Shafi*, Part 4 of the Policing and Crime Act 2009 ("the 2009 Act") introduced a new remedy enabling the county court or the High Court to grant an injunction for the purpose of preventing gang-related violence (including the protection of those involved with it from such further violence). By s. 51 of the Serious Crime Act 2015 ("the 2015 Act"), from 26 May 2016, the statutory purpose now also applies to gang-related drug-dealing activity. Finally, Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") replaced the old scheme for anti-social behaviour orders (in force on 23 March 2015).

5. This appeal concerns the compatibility of these provisions with Article 6 of the European Convention on Human Rights ("ECHR"). It is contended on behalf of Jerome Jones that the proceedings under this legislation, while civil, are in respect of a criminal charge and therefore attract the provisions of Article 6(1), (2) and (3). Alternatively, the fair trial provisions of Article 6(1) require proof to be at the criminal standard, beyond reasonable doubt, rather than (as the legislation prescribes) on the balance of probabilities.

6. Both the Birmingham City Council and the Secretary of State for the Home Department (joined because of the issue of compatibility) argue that injunctions granted under this legislation do not entail the determination of a criminal charge and fall within the civil limb of Article 6(1). Further, even if the proceedings do involve the determination of a criminal charge, Article 6 does not mandate a specific standard of proof and the civil standard (with the identified protections) are sufficient. As for the alternative argument, 'fair trial' requirements do not require the criminal standard of proof and the legislation is fully compatible with the obligations of the UK pursuant to the ECHR.

The Background to these Proceedings

7. In the years following the 1990s, this violence has not abated and the social problems in Birmingham therefore remain acute. By way of example, in a statement in support of these proceedings dated 11 February 2016, a police officer reported:

> "Over the last 6 months, there have been more than 11 firearm discharges alone and 4 more reported shootings in Birmingham City involving two separate gangs; innocent members of the public have been shot or put at risk. Incidents have occurred in busy areas during the day time. The number of incidents alone is alarming and the local press are reporting heavily on each and every shooting, which in itself is alarming for the public and is spreading fear among the communities."

8. In an effort to contain this very disturbing social picture, proceedings were commenced by Birmingham City Council against Mr Jones and 17 other defendants all of whom were said to be members of the GMG or a rival gang. It is alleged that Mr Jones (who is 21 years of age having been born on 1 June 1996) has been an active member of GMG. He is said to have committed acts capable of causing nuisance and annoyance to other people living and working in the area and to have engaged in, encouraged or assisted gang-related violence and drug dealing.

9. On 15 February 2016, in the Birmingham County Court, *ex parte* without notice, His Honour Judge McKenna granted an interim injunction against Mr Jones and 16 others pursuant to s. 34 of the 2009 Act and s. 1 of the 2014 Act. It was later continued by Judge Worster. The order was the subject of an appeal to the High Court on the grounds that it was incompatible with the ECHR; that application was combined with a similar application in a case being pursued in Liverpool (*Chief Constable of Merseyside v. Joyce and others*) in which identical issues were raised. On 11 October 2016, the matters came before Burton J who was referred to the decision of Kerr J in *Chief Constable of Lancashire v Wilson and others* [2015] EWHC 2763 (QB) in

which the same points had been fully argued and were exhaustively analysed, with Kerr J rejecting the challenge of incompatibility.

10. *Wilson and others* was to have been the subject of an appeal but the case was discontinued by the Chief Constable for reasons unconnected to the merits of the legal challenge. Thus, with the same arguments advanced as had been rejected by Kerr J (together with two additional arguments that Burton J said would have supplemented the reasoning of Kerr J), Burton J expressed the view, on the papers, that he would have declined to differ from Kerr J's judgment and, for the reasons he gave, agreed with him. He was prepared to grant leave to appeal. On that basis, the parties agreed that he would so rule. In the event, therefore, he held that the proceedings in this case were not in respect of a criminal charge and did not require the criminal standard of proof.

11. In the period which has elapsed before this appeal could be heard, the trial of the action came before the county court. It was heard over a period in excess of three weeks by Judge Carmel Wall who, on 12 July 2017, gave an extensive judgment which, transcribed, is some 429 paragraphs in length: she concluded that Mr Jones had been involved in gang related drug dealing. That judgment itself also is to be challenged on appeal but the court was told that time was extended until after resolution of an application for legal aid. There is, as yet, no clarity, as to when the appeal might be determined. In those circumstances, these specific issues of law (upon which basis Judge Wall proceeded) have been ventilated in this appeal.

12. During the course of the hearing, a copy of the orders made by Judge MacKenna and Judge Wall were made available. They are in slightly different terms but, rather than set out the orders made at the interlocutory hearing, to provide the context within which these legal challenges are being pursued, it is appropriate to set out the order made by on 13 July 2017 by Judge Wall in relation to Mr Jones. Under s. 34-36 of the 2009 Act as amended by the Crime and Security Act 2009 and 2015 Act, it was ordered:

> "Jerome Jones (whether by himself or by instructing, encouraging or allowing any other person) SHALL NOT
>
> 1. Use or threaten to use violence, harass or intimate any person.
>
> 2. Enter the area outlined in red on the map attached to this Order except that he may:
>
> i. Enter the Birmingham City Hospital site from Spring Hill/Dudley Road or Western Road when attending at that hospital for a pre-arranged appointment or emergency treatment and
>
> ii. Travel through the area without stopping, to attend Birmingham City Hospital for treatment in an emergency vehicle or at the direction of the emergency services.

> 3. Associate with, contact or attempt to contact, whether directly or through another person, by any means whatsoever, including social media, any of the following [10 named] people …
>
> 4. Be in possession of any controlled drug or psychoactive substance as defined by the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016 (unless he has a prescription for that drug).
>
> 5. Participate in any music video that he knows or ought to know includes any material that relates to the Johnson Crew, Burger Bar Gang or any other gang affiliated to either of those gangs including the GMG and AR gangs, and that may have the effect of promoting, supporting or assisting gang-related violence or drug-dealing by such gangs.

The area outlined in red covers a not insubstantial part of the centre of Birmingham. Further, the court ordered that a power of arrest under s. 36(6) of the 2009 Act (as amended) applied to paragraphs 1-4 of the order and that it should continue until 4.00 pm on 12 July 2019 with a review on 21 June 2018.

Legislative Framework

13. It is beyond argument that local authorities are subject to statutory duties in respect of crime and disorder. Thus, by s. 6(1), (8) of the Crime and Disorder Act 1998, the authority must formulate and implement, among other things, a strategy for the reduction of crime and disorder (including anti-social and other behaviour adversely affecting the local environment) and must keep that strategy under review. By s. 17 of the same Act, authorities are also under a statutory duty to exercise their functions with due regard to the need to do all that they reasonably can to prevent crime and disorder in their area. In order to achieve these ends (and in the light of the decision of the Court of Appeal in *Shafi*), among other bodies, it is provided with legislative authority to take certain steps.

14. Thus, with effect from 31 January 2011, Part 4 of the 2009 Act introduced a new remedy by way of injunction for the purpose of preventing gang-related violence, purporting (subject to the ECHR arguments) to reverse the effect of *Shafi*. Further amendments (with effect from 1 June 2015) extend the purpose so that it also applies to gang-related drug-dealing activity. The purpose is to prevent those subject to an order from engaging in such behaviour or protect them from it. Thus, s. 34 of the 2009 Act deals with injunctions to prevent gang-related violence and drug dealing activity in these terms:

> "(1) A court may grant an injunction under this section against a respondent aged 14 or over if the first and second conditions are met.

> (2) The first condition is that the court is satisfied on the balance of probabilities that the respondent has engaged in or has encouraged or assisted—
>
> (a) gang-related violence, or
>
> (b) gang-related drug-dealing activity.
>
> (3) The second condition is that the court thinks it is necessary to grant the injunction for either or both of the following purposes—
>
> (a) to prevent the respondent from engaging in, or encouraging or assisting, gang-related violence or gang-related drug-dealing activity;
>
> (b) to protect the respondent from gang-related violence or gang-related drug-dealing activity.
>
> (4) An injunction under this section may (for either or both of those purposes)—
>
> (a) prohibit the respondent from doing anything described in the injunction;
>
> (b) require the respondent to do anything described in the injunction.
>
> (5) For the purposes of this section, something is "gang-related" if it occurs in the course of, or is otherwise related to, the activities of a group that—
>
> (a) consists of at least three people, and
>
> (b) has one or more characteristics that enable its members to be identified by others as a group.
>
> (6) In this section "violence" includes a threat of violence.
>
> (7) In this Part "drug-dealing activity" means the unlawful production, supply, importation or exportation of a controlled drug.
>
> "Production", "supply" and "controlled drug" here have the meanings given by section 37(1) of the Misuse of Drugs Act 1971."

15. Part 1 of the 2014 Act replaced *inter alia* the old scheme for anti-social behaviour orders ("ASBOs") under the Crime and Disorder Act 1998: breach of such an order was a criminal offence (s. 1(10) of the 1998 Act) and the definition has been widened to include behaviour which causes nuisance or annoyance (in housing related cases).

The material sections of the 2014 Act came into force on 23 March 2015 and, by s. 1, provides the power to grant injunctions in these terms:

> "(1) A court may grant an injunction under this section against a person aged 10 or over ("the respondent") if two conditions are met.
>
> (2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.
>
> (3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.
>
> (4) An injunction under this section may for the purpose of preventing the respondent from engaging in anti-social behaviour—
>
> > (a) prohibit the respondent from doing anything described in the injunction;
> >
> > (b) require the respondent to do anything described in the injunction.
>
> (5) Prohibitions and requirements in an injunction under this section must, so far as practicable, be such as to avoid—
>
> > (a) any interference with the times, if any, at which the respondent normally works or attends school or any other educational establishment;
> >
> > (b) any conflict with the requirements of any other court order or injunction to which the respondent may be subject.
>
> (6) An injunction under this section must—
>
> > (a) specify the period for which it has effect, or
> >
> > (b) state that it has effect until further order.
>
> In the case of an injunction granted before the respondent has reached the age of 18, a period must be specified and it must be no more than 12 months.
>
> (7) An injunction under this section may specify periods for which particular prohibitions or requirements have effect.
>
> (8) An application for an injunction under this section must be made to—

> (a) a youth court, in the case of a respondent aged under 18;
>
> (b) the High Court or the county court, in any other case.
>
> Paragraph (b) is subject to any rules of court made under s. 8(2)."

16. "Anti-social behaviour" is defined in s. 2 of the 2014 Act in these terms:

> "(1) In this Part "anti-social behaviour" means—
>
> (a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,
>
> (b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or
>
> (c) conduct capable of causing housing-related nuisance or annoyance to any person.
>
> (2) Subsection (1)(b) applies only where the injunction under section 1 is applied for by—
>
> (a) a housing provider,
>
> (b) a local authority, or
>
> (c) a chief officer of police.…"

17. The legislation has to be construed in the context of Article 6 of the ECHR which deals with the determination of civil rights and obligations on the one hand and criminal charges on the other: both are required to be the subject of a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In relation to criminal charges, Articles 6(2) and (3) provide further rights (the presumption of innocence along with procedural rights).

18. Construing the legislative scheme in the light of the Strasbourg jurisprudence, in *Wilson* (which Burton J adopted and followed), Kerr J considered whether proceedings under the 2009 Act amounted to the determination of a criminal charge. He applied *Engel v Netherlands* (1979-80) 1 EHRR 647 in which the European Court of Human Rights ("ECtHR") decided that, whether or not legal proceedings involved the determination of a criminal charge (thus attracting the protections in Article 6(2) and 6(3) of the ECHR) depended on three factors. These are their domestic classification, the nature of the offence and the nature and severity of the penalty. He accepted that, in the majority of cases, the conduct alleged on the part of those against whom an injunction under s. 34 of the 2009 Act was sought was likely to be criminal. He agreed that an injunction with punitive aims would not fall within the legislation but that the conduct, of itself, was not determinative; the legislative aim underpinning the creation of s. 34 injunctions in law was the prevention of gang-violence rather

than the punishment of perpetrators. In the circumstances, it did not constitute the determination of a criminal charge.

19. In relation to the application of the criminal (as opposed to the civil) standard of proof, Kerr J analysed *R. (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39 and *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440. In *McCann*, the House of Lords decided that, where Parliament was silent on the issue, the use of the criminal standard of proof was appropriate in relation to anti-social behaviour orders, although that regime did not entail a determination of a criminal charge. The case, however, could not be determinative in the context of the regime for gang-related injunctions set out in s. 34(2) by which Parliament had specifically provided for the standard of proof to be the balance of probabilities.

20. In *MB*, the House of Lords held that in cases where the civil standard of proof has been applied in respect of a civil order arising out of an allegation which could be described as criminal in nature, Article 6(1) required safeguards commensurate with the potential consequences. Analysing s. 34 of the 2009 Act, Kerr J accepted (at [79]) that:

> "it is true that the consequences for respondents against whom injunctions are granted may be grave and may include, for example, curfews, a ban from specific locations and other substantial interferences with their lives including a positive requirement to undertake particular activities."

21. However, he also highlighted the numerous safeguards including a two-year time limit on duration, an eight hour time limit on any requirement to be in a particular location, and the obligation on the trial judge to consider Article 8 ECHR implications in granting the application by way of example. Moreover, the broad legislative purpose of the 2009 Act was an avowed attack on the operation, ethos and culture of gangs and the need to break them up, and that purpose could not be achieved without measures which would have a major impact on the life of persons against whom such injunctions were granted. Accordingly, use of the civil standard did not violate art.6(1) by making the trial of a s.34 injunction application unfair.

A Criminal Charge

22. The first ground of appeal is to the effect that Kerr J should have concluded that the proceedings were in respect of a criminal charge. James Stark for Mr Jones accepted that the classic exposition of the test was to be found in *Engel*, namely (alternatively and not cumulatively) the domestic classification; the essential nature of the proceedings; and the nature and severity of the penalty. He also accepted that the domestic classification of the proceedings was civil (therefore satisfying the first limb) but, to provide the context for the remaining heads, identified the proceedings as involving emanations of the state seeking to restrict the activities, liberties and freedoms of individuals in order to protect the public. That, he argued, was the pursuit of a criminal charge.

23. Mr Stark's primary argument was that s. 34 of the Act required the individual to engage in, assist or encourage what must be criminal conduct whether gang-related

violence or drug dealing: the language used mirrors that which appears in criminal legislation dealing with the liability of secondary participants. Thus, mere presence at the scene of violence or drug dealing would not be sufficient.

24. He distinguished the line of authorities dealing with Mafiosi (*Guzzardi v Italy* (1981) 3 EHRR 333, *Ciulla v Italy* (1991) 13 EHRR 346, *M v Italy* (1991) 70 DR 59, *Raimondo v Italy* (1994) 18 EHRR 237) on the basis that it was not necessary to prove a criminal charge but sufficient to establish a suspicion to justify supervision and protective measures imposed under Italian legislation designed to undermine the Mafia. Thus, in relation to Mr Guzzardi, it was established that he was living off the proceeds of crime, so that the measure (requiring compulsory residence for three years within a comparatively small area of the island of Asinara), although restrictive, was justified. He relied on the observations in the judgment (at [100]):

> "On a true analysis, the order for Mr Guzzardi's compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime…. According to the Commission, it must follow from this that for the purposes of sub-paragraph (a) [of Article 5(1)] did not constitute detention after conviction by a competent court.
>
> In the court's opinion, comparison of Article 5(1)(a) with Articles 6(2) and 7(1) shows that for Convention purposes there cannot be a 'condemnation' (in the English text conviction) unless it has been established in accordance with the law that there has been an offence – either criminal or if appropriate disciplinary. Moreover, to use conviction for a preventive or security measure would be consonant neither with the principle of narrow interpretation to be observed in this area … nor with the fact that the word implies a finding of guilt."

25. It was, so Mr Stark argued, a preventive measure involving no conviction of any offence which principle followed the other Mafiosi cases. On the other hand, he submitted that the ECtHR took a wrong turning in *Landvreugd v Netherlands* (2000) EHRR CD 266 and *Oliviera v Netherlands* (2000) 30 EHRR CD 258 dealing with orders of exclusion from areas in Amsterdam for 14 days for using hard drugs within the area, breach of which order could lead to prosecution. It was held that although specific allegations of illegal drug use were made, given that the sanctions imposed were less serious than in *Raimondo*, this fact did not render the proceedings criminal.

26. On the other hand, Mr Stark submitted that the subsequent decision of *Matyjek v Poland* 38184/03 supported the contention that these proceedings should be characterised as criminal. In that case, the ECtHR concluded that lustration proceedings (which established a dishonest lustration declaration to the effect that the declarant had not been a collaborator with the former Communist regime) was in the nature of a criminal offence, albeit characterised as civil, not least because the consequence was dismissal from public office and bar for ten years from exercising public functions including within the legal profession, public and political service. It was put (at [47]) in this way:

> "It is the Court's established jurisprudence that the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as 'criminal' from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the 'criminal' sphere."

27. Turning to the third limb of *Engel*, although Mr Stark accepted that an injunction cannot lawfully be imposed for punitive reasons (see s. 34(3) of the 2009 Act), the reality is that the order can (and he argued does) have a punitive effect, representing a severe restriction on freedom of movement. Its possible provisions were modelled on the then existing provisions of a community punishment order and contain many terms that would be found in a community rehabilitation order which can be imposed following conviction.

28. In response, Samantha Broadfoot Q.C., for the Secretary of State, argued that the provisions of the Acts have specifically been designed to ensure that they are civil, preventive measures and the pre-conditions do not necessarily involve the commission of crime. Caught within s. 34(2) of the 2009 Act is having "engaged in or … encouraged or assisted" the relevant activity, defined as "to entangle, involve, commit or mix oneself up" which can be committed in many non-criminal ways. She gave examples of intentionally provoking a rival gang by going to areas that the rival gang perceives as its territory or making fun of their members on social media.

29. Turning to the jurisprudence of the ECHR, far from being distinguishable, Ms Broadfoot argued that the *Guzzardi* line of authorities demonstrates that the fact that the measures may be highly restrictive and curtail liberty to a considerable degree does not mean that any of the *Engel* criteria justify the conclusion that the proceedings are criminal. She pointed to the different conclusions in the cases decided when the criteria were formulated. Furthermore, this approach has recently been confirmed in *Tommaso v Italy* [2017] ECHR 205 in which the Grand Chamber at [143] confirmed that special supervision in relation to Mafiosi was not comparable to a criminal sanction and did not determine a criminal charge so as to trigger the criminal aspect of Article 6(1) of the ECHR.

30. As for *Matyjek v Poland*, Ms Broadfoot submitted that the nature of the proceedings involved the imposition of a sanction because the person had lied in lustration proceedings and, for that reason, was disqualified for 10 years from exercising public functions. These proceedings were not protective or preventive but, clearly, "at least" a sanction for past behaviour and intended to constitute a deterrent to others required to undertake lustration. Further, the official vested with power to initiate lustration proceedings was vested with powers identical to those of the public prosecutor.

31. Jonathan Manning, for Birmingham City Council, adopted Ms Broadfoot's submissions. He echoed the circumstances in which the first condition required by s. 34(2) of the 2009 Act would be satisfied by, for example, using social media in a way that had the effect of perpetuating street gang rivalries and that under the 2014 Act, any act "capable of causing nuisance or annoyance" would be sufficient. He pointed to Part 2 of the 2014 Act as illustrating that where Parliament intended proof of an

offence to be a requirement, express provision for such a remedy is to be found in a Criminal Behaviour Order. Far from being punitive, the second condition in relation to both provisions is that an injunction is necessary to prevent the respondent from engaging in, or encouraging or assisting, gang-related violence or gang-related drug-dealing activity and or to protect the respondent from such violence or activity (in relation to the 2009 Act) or preventing him or her from engaging in anti-social activity (in relation to the 2014 Act).

32. As for the severity of the potential penalty, civil injunctions have never been considered criminal and are not to be regarded as imposing a penalty. The terms of any injunction are statutorily confined to those 'necessary' for protective purposes and any terms must both be necessary and proportionate. There is no element of punishment and no kind of tariff.

33. In my judgment, Ms Broadfoot and Mr Manning are correct in their submissions for the reasons that they gave, coinciding as they do with the reasons given by Kerr J. Thus, the test in *Engel* (which it is common ground applies and has formed the basis of the submissions) was explained in domestic terms in *Gale v Serious Organised Crime Agency* [2011] 1 WLR 2760, [2011] UKSC 49 by Lord Phillips of Worth Matravers (giving the majority decision) when he said (at [16]):

> "None the less, the classification of proceedings under national law is one of three relevant considerations ("the three factors") to which the ECtHR always has regard when deciding whether or not article 6(2) is engaged. The second is the essential nature of the proceedings and the third is the type and severity of the consequence that may flow from the proceedings, usually described by the ECtHR as "the penalty that the applicant risked incurring". These three factors, and some of the jurisprudence in which they feature, were identified by Kerr LCJ in *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6, [2005] NI 383, at para 20, where he observed that they tend to blend into each other."

34. Analysing the decisions of the ECtHR, it is important to focus on the nature and consequences of the proceedings. In *Ozturk v Germany* (1984) 6 EHRR 409, it was established that a criminal charge was an autonomous concept consisting of "the official notification given to an individual by the competent authority that he had committed a criminal offence" ([55]), so that conduct which may involve underlying criminality does not necessarily amount to the bringing of a criminal charge, *a fortiori* where it is or may be conduct less than would justify an allegation of crime. Thus, the *Guzzardi* line of cases (confirmed very recently by the Grand Chamber in *Tommaso*) underlined that the need for what were preventative and not punitive measures arose because of a propensity to commit crime based on the premise of living off the proceeds of crime. Whether or not equivalent Italian offences of money laundering or handling stolen goods could be established was not to the point.

35. Neither do I consider that *Matyjek* provides evidence of a gloss on this principle or demonstrates that a different approach is now appropriate. Former collaborators were required to declare that collaboration (the lustration declaration) and, if they were found dishonestly to have denied that collaboration, they were subject to what can

only be described as a penalty, namely disqualification from a wide range of public functions (including acting as a lawyer) for ten years. The case is therefore an example of what was, in substance even if not in form, a criminal allegation of dishonesty in the particular circumstances then obtaining in Poland.

36. This approach has been mirrored in the domestic jurisprudence. In relation to non-derogating control orders, the principles set out in the cases emanating from the ECtHR were echoed in the House of Lords. In *Secretary of State for the Home Department v MB* (*supra*), Lord Bingham dealt with the effect of such an order in this way (at [24]):

> "Parliament has gone to some lengths to avoid a procedure which crosses the criminal boundary: there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order. I would reject AF's contrary submission. This reflects the approach of the English courts up to now: *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335 para. 57."

37. I appreciate that, even if not identified as such, an application might be based on what is more than a suspicion of criminal conduct (albeit, again, without identifying a specific criminal offence). If that is so, however, it is difficult to understand why an order preventative in object should require a lesser standard of proof and be treated differently merely because allegation is of suspicion of crime rather than involve the commission of crime. Many civil proceedings require the allegation of what could be used to mount a criminal prosecution without constituting a criminal charge or exacting a penalty: these could range from civil proceedings for damages following a road traffic accident based on what could also be the offence of careless driving to similar proceedings for assault based on an underlying complaint of murder or rape. The fact that such proceedings are brought by the victim cannot make a difference: a private prosecution could similarly be brought by a victim.

38. These are the clearest indications of the operation of the 'blending together' of the essential nature of the proceedings and the type and severity of the consequences which flow from the proceedings to which Lord Kerr referred in *Walsh v Director of the Assets Recovery Agency* cited by Lord Phillips above. In my judgment, these proceedings do not engage Articles 6(2) or 6(3) of the ECHR and are fair and square within the principles identified in the *Guzzardi* line of authorities.

39. In the circumstances, it is not necessary to deal with the alternative argument mounted by Ms Broadfoot that if the proceedings did involve the determination of a criminal charge, Article 6 did not necessarily mandate a specific standard of proof far less the standard of 'beyond reasonable doubt'. It is sufficient to observe that, even if that proposition can be made good, there would (or at least may) be consequential evidential and procedural requirements which could be necessary to meet the requirements of Articles 6(2) and (3). Having regard to my conclusion on the principal issue, however, these issues do not arise.

The Standard of Proof

40. Mr Stark argued that even if the proceedings were civil (applying *Engel*) it remained appropriate for the court to declare it incompatible with Article 6(1) of the ECHR on the grounds that the 'balance of probability' test set out in s. 34(2) of the 2009 Act and s. 1(2) of the 2014 Act did not meet the overriding criterion of fairness which the Article requires.

41. In support of this proposition, Mr Stark relied essentially on both domestic and ECtHR authorities which identified what fairness required in terms of enhanced procedural protection. In relation to the former, he cited *R v Securities and Futures Authority Ltd ex parte Fleurose* [2002] IRLR 297 which determined that disciplinary proceedings required notification in good time of the charges, facilities to prepare a defence and both to call and give evidence. Similarly, *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 per Simon Brown LJ (at [33]) and Jonathan Parker LJ (at [148]) dealt with the approach to penalties consequent on clandestine illegal immigrants being found concealed in vehicles and held that the more serious the allegation the more astute should the courts be to ensure that the trial process is a fair one. Finally, *R(G) v Governors of X School* [2009] PTSR 1291 concerned disciplinary proceedings against a teacher for alleged sexual impropriety with a 15 year old pupil. Article 6 was held not to apply but Lord Dyson (at [71]) observed that, if it had, the teacher would have been entitled to enhanced procedural protection, such as the right to have legal representation. None of these concerned the standard of proof.

42. In relation to the ECtHR, *Albert v Le Compte v Belgium* (1983) 5 EHRR 533 concerned procedural safeguards in disciplinary proceedings. The court did not, however, find it necessary to decide whether the process constituted criminal proceedings but (at [30] and [39]) rejected the procedural complaints (affecting presumption of innocence, notification in good time and the ability to call witnesses) as unfounded.

43. In order to obtain a declaration of incompatibility, Mr Stark recognised that he had to translate these authorities into requiring the criminal standard of proof on the basis of the principle that domestic decisions have spoken of fairness when imposing such a standard. The authorities which he cites, however, do no more than articulate what procedural fairness in those contexts requires. *B v Chief Constable of Avon & Somerset Authority* [2001] 1 WLR 340 (the making of a sex offender order under the Crime and Disorder Act 1998) and *Gough v Chief Constable of Derbyshire Constabulary* [2002] QB 1213 (banning orders under the Football Spectators Act 1989) both recognised that the proceedings attracted the civil standard of proof but considered that "the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them" was i.e. for all purposes "indistinguishable from the criminal standard" (per Lord Bingham CJ in *B* at [31] applied by Lord Phillips MR in *Gough* at [90]). Neither, however, suggest that failure to apply this standard would constitute a breach of Article 6.

44. That brings the analysis to the provisions of the Crime and Disorder Act 1998, Anti-Social Behaviour Orders (ASBOs) and the decision of the House of Lords in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 which Mr Stark relied upon as demonstrating the fairness requirement of the criminal standard of proof. The

case concerned applications to the magistrates (other than in the context of criminal proceedings) for ASBOs. This was in circumstances that breach constituted a criminal offence with a potential penalty, following conviction on indictment, of a term of up to 5 years' imprisonment: see s. 1(10) of the 1998 Act. Consistent with the analysis above, however, it was held that these applications did not determine a criminal charge within the meaning of Articles 6(1). The Act was silent on the standard of proof to be adopted in relation to an application in what were civil proceedings and the House went on to conclude that it did attract the higher standard of proof.

45. Lord Steyn did so for pragmatic reasons. He said (at [37]):

> "Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. If the House takes this view it will be sufficient for the magistrates, when applying section 1(1)(a) to be sure that the defendant has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law. In coming to this conclusion I bear in mind that the use of hearsay evidence will often be of crucial importance. For my part, hearsay evidence depending on its logical probativeness is quite capable of satisfying the requirements of section 1(1).

46. The high water mark for Mr Stark comes from the observation of Lord Hope (at [82]):

> "I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they were made."

47. The other members of the House agreed with both judgments (without suggesting that there is any difference between them). Both remarks, however, are *obiter* and, whether based on pragmatism or serious consequences, do not suggest that there is any underlying jurisprudential principle (such as would be based in the ECHR) for their justification. In any event, starting before this decision and developing thereafter, the law has since moved on.

48. The concept of a flexible standard of proof has been the subject of further judicial analysis, most particularly in care proceedings. The retreat started before *McCann* as far back as *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 repeated in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 [2003] 1 AC 153 in which Lord Hoffmann observed (at [55]:

> "I turn next to the commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

49. This approach was explained in *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 by Richards LJ in this way (at [62]):

> "Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

50. That approach was approved in *Re D* [2008] 1 WLR 1499, [2008] UKHL 33 although the issue was revisited in *re B (Children)(Care Proceedings: Standard of Proof)* [2009] 1 AC 11, in which Lord Hoffmann repeated his earlier observations and, commenting on *McCann*, said (at [13]):

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case (at 812) that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard."

51. Mr Stark sought to elevate these decisions into a principle that where the court is faced with applications for orders which significantly restrict the liberty of the subject, or in which the basis of the application relates to criminal or quasi criminal behaviour, the criminal standard is necessitated by a proper appreciation of the requirements of fairness under Article 6(1). In my judgment, that submission (even as a matter of domestic law) is too wide and unjustified.

52. First, if it was correct, the decisions of the Supreme Court in relation to the standard of proof in care proceedings would all have been wrongly decided. It is beyond argument that care proceedings can be (and frequently are) mounted on the basis of allegations that the parents or one of them have committed the most serious criminal offences in relation to their child or children, ranging from wilful neglect through sexual abuse to murder. The potential consequences (loss of parental rights) could not represent a greater infringement of the rights and liberties of the parent or parents concerned. Lord Hope's argument of fairness would thus apply equally to this situation but, in the light of the authorities, it is beyond argument that the appropriate standard of proof is the balance of probabilities.

53. Secondly, the submission would also undermine the decision of the Supreme Court in *Gale v Serious Organised Crime Agency* [2011] 1 WLR 2760, [2011] UKSC 49. In that case, the compatibility of Part 5 of the Proceeds of Crime Act 2002 with Article 6 was specifically challenged in circumstances where s. 240(1)(a) of that Act allowed for the recovery of property that had been obtained through unlawful conduct (defined by s. 241(1) as unlawful under the criminal law). Furthermore, s. 241(3) identified the standard of proof required as the balance of probabilities.

54. The argument advanced by the appellants in *Gale* was identical to that of Mr Stark in this case namely that Article 6(2) applied because "an essential stepping stone towards proving that the property owned by the appellants was the product of crime was proof that the appellants had been guilty of criminal conduct in the form of drug trafficking and money laundering". It was also an argument advanced in *R v Briggs-Price* [2009] UKHL 19, [2009] AC 1026 which concerned confiscation proceedings under the Drug Trafficking Act 1994. Expressing the view of the majority, Lord Phillips said (at [54]):

> "The views on standard of proof expressed in *Briggs-Price* by members of the House were obiter but the application of the common ground in the views of Lord Phillips, Lord Brown and Lord Mance leads to the following conclusion. The commission by the appellants in the present case of criminal conduct from which the property that they held was derived had to be

> established according to the civil and not the criminal standard of proof. For the reasons that I have given that remains my conclusion. It is a conclusion which, prior to *Geerings*, appeared to be firmly founded on the decision of the Privy Council in *McIntosh v Lord Advocate* [2001] UKPC D1; [2003] 1 AC 1078. In my view that foundation is unshaken.

55. Thirdly, in any event, there are critical differences between the scheme and injunctions sought pursuant to the 2009 Act and the 2014 Act and the scheme analysed in *McCann* such that the observations in that case cannot necessarily be taken to apply in the same way. To illustrate, it is necessary to revert to the provisions of the legislation. As Ms Broadfoot submitted:

    i) although both can be made in order to prevent specific future conduct, injunctions under s. 34 can also be made to protect the individual himself from gang-related activity;

    ii) injunctions under the 2009 Act can only be imposed for a maximum of two years and require review;

    iii) under the 2009 and 2014 Acts an injunction can include mandatory rehabilitative requirements whereas an ASBO could only contain prohibitions;

    iv) breach of a gang or Part 1 injunction is not a criminal offence and the consequences are different.

56. It could also be added that the preconditions for an order include the rehabilitative or preventive requirement that the court thinks it is necessary to grant the injunction to prevent the respondent from engaging in, encouraging or assisting gang-related violence or drug-dealing activity or to protect him from gang-related violence (in relation to the 2009 Act) or to prevent him from engaging in anti-social behaviour (in relation to the 2014 Act).

57. Finally, it has been recognised that Parliament specifically devised the scheme following the decision in *Birmingham City Council v Shafi*. That much is clear from *Birmingham City Council v James* [2014] 1 WLR 23 in which Moore Bick LJ observed (at [13]):

> "Part 4 [of the 2009 Act] represents Parliament's considered response to the particular problem of gang-related violence. Although some kinds of gang activity may be classified under the generic description of anti-social behaviour, section 1(1) of the Crime and Disorder Act 1998 was not enacted with a view to dealing specifically with the consequences of gang culture. It is much broader in nature and is apt to apply to anti-social behaviour of all kinds. Section 34, as its terms indicate, is aimed at a particular kind of mischief and the choice of the civil standard of proof appears to have been a deliberate response to the view expressed by the majority in *Birmingham City Council*

> *v Shafi* about the appropriate standard of proof in proceedings for an injunction of the kind that the Council was seeking."

58. There is neither domestic authority, nor any conclusion from the ECtHR which supports the wide-ranging proposition for which Mr Stark contended. For my part, I see no reason for imputing into Article 6 a requirement that the criminal standard of proof should apply in these circumstances. There is thus no basis for a declaration of incompatibility.

Conclusion

59. Parliament was entitled to address the very real social harm which gangs and other anti-social behaviour have been inflicting on society in the way in which this legislation seeks to do. Built in to each legislative scheme are safeguards intended to address the impact on individuals. In my judgment, the legislation does not trigger the bringing of a criminal charge for the purposes of Article 6 of the ECHR and neither is the requirement that the court address the issues on the balance of probability a breach of Article 6.

60. For these reasons which are entirely in line with the careful reasoning and conclusions of Kerr J, adopted in this case by Burton J, I would dismiss this appeal.

Lord Justice Underhill :

61. I agree.

Lord Justice Irwin :

62. I also agree.