Status: Positive or Neutral Judicial Treatment

*1961 Birmingham City Council v Shafi and another

Court of Appeal

30 October 2008

[2008] EWCA Civ 1186

[2009] 1 W.L.R. 1961

Sir Anthony Clarke MR , Rix , Moore-Bick LJJ

2008 June 24, 25; Oct 30

Local government—Powers—Action by local authority—Local authority claiming civil injunction to control activities of alleged gang members—Injunction sought to prevent commission of criminal offence and public nuisance—Terms of injunction sought similar to anti-social behaviour order—Whether jurisdiction to grant injunction—Whether injunctive relief appropriate—Appropriate standard of proof— Local Government Act 1972 (c 70), s 222 — Crime and Disorder Act 1998 (c 37), s 1(1) (as amended by Police Reform Act 2002 (c 30), s 61(2))

In an attempt to mitigate the impact of the growing gang culture and accompanying serious crime in its area, the claimant city council, relying on section 222 of the Local Government Act 1972[1] , sought injunctions in the county court to restrain the defendants, who were alleged gang members, from entering the city centre, associating with named individuals and wearing green clothing, which was the gang's colour. The injunctions sought were in identical or almost identical terms to anti-social behaviour orders ("ASBOs") which the council had sought or obtained in the magistrates' court against juvenile gang members under section 1 of the Crime and Disorder Act 1998 , as amended [2] . The council claimed that the defendants had repeatedly behaved in a criminal and tortious manner as members of the gang, that their conduct would continue unless restrained by injunction, that the criminal law was not an effective remedy in the circumstances, and that the injunctions were required to prevent the future commission of criminal offences or to avoid future public nuisances. The council obtained interim injunctions against the defendants pending the trial of the action. At the trial the judge held that he had no jurisdiction to grant the injunctions, but that even if he had he could not be sure on the evidence that either defendant had participated in acts which were either criminal or amounted to a public nuisance, and that it was not necessary or appropriate in the circumstances to make the orders. He therefore discharged the interim injunctions and dismissed the claims.

On appeal by the council—

Held , dismissing the appeal, that section 222 of the Local Government 1972 vested in local authorities the procedural power, previously only available to the Attorney General at common law, to bring and defend proceedings in support of public rights; that the principles governing the common law jurisdiction to grant an injunction to restrain a breach of the criminal law or to suppress a public nuisance were subject to any legislation specifically designed to deal with the very situation for which an injunction was sought; that in the Crime and Disorder Act 1998 Parliament had enacted a detailed statutory scheme to restrain anti-social behaviour in a particular way and subject to particular safeguards, some of which did not apply to injunctions granted at common law; that, accordingly, although the court had jurisdiction to grant an injunction sought by a local authority under section 222 of the 1972 Act in circumstances in which an ASBO would be available, it would be wrong in principle for it to exercise its discretion to do so save in an exceptional case, and it should leave the authority to seek an ASBO in the magistrates' court; that, ***1962*** since the injunctions sought by the council against the defendants were typical of and in almost identical terms to an ASBO, and since the case was not an exceptional one, the appropriate course had been to decline to grant an injunction and leave the council to its remedy in the magistrates' court; and that, in any event, the judge had been entitled, whatever standard of proof was applied, to conclude, in the exercise of his discretion, that it was neither necessary nor appropriate to grant the injunctions (post, paras 23–24, 36, 44, 45, 52, 54, 59–60, 67, 69, 77).

Dicta of Hoffmann J in *Chief Constable of Leicestershire v M [1989] 1 WLR 20* , 23 applied.

City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA considered .

Per Sir Anthony Clarke MR and Rix LJ. If exceptionally the High Court or the county court find it necessary to consider whether to grant an injunction in circumstances in which the relief is identical or almost identical to an ASBO, it should apply the criminal standard of proof. However where the relief sought is not identical or almost identical to an ASBO and where the facts are much more complicated than in the instant case there is no reason why the ordinary civil standard of proof should not apply, subject to argument in a particular case (post, paras 51, 53, 65, 69).

R (McCann) v Crown Court at Manchester [2003] 1 AC 787, HL(E) considered .

In re D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499, HL(NI) and *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2009] 1 AC 11, HL(E) distinguished* .

The following cases are referred to in the judgments:

***1963**

Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, Plowman J and CA

Attorney General v PYA Quarries Ltd [1957] 2 QB 169; [1957] 2 WLR 770; [1957] 1 All ER 894, CA

B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening), In re [2008] UKHL 35; [2009] 1 AC 11; [2008] 3 WLR 1; [2008] 4 All ER 1, HL(E)

Barking and Dagenham London Borough Council v Jones (unreported) 30 July 1999; [1999] CA Transcript No 1369, CA

Chief Constable of Leicestershire v M [1989] 1 WLR 20; [1988] 3 All ER 1015

City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA

D (Secretary of State for Northern Ireland intervening), In re [2008] UKHL 33; [2008] 1 WLR 1499, HL(NI)

Gouriet v Union of Post Office Workers [1978] AC 435; [1977] 3 WLR 300; [1977] 3 All ER 70, HL(E)

Guildford Borough Council v Hein [2005] EWCA Civ 979; [2005] LGR 797, CA

H (Minors) (Sexual Abuse: Standard of Proof), In re [1996] AC 563; [1996] 2 WLR 8; [1996] 1 All ER 1, HL(E)

Kent County Council v Batchelor (No 2) [1979] 1 WLR 213; [1978] 3 All ER 980

Nottingham City Council v Zain (A Minor) [2001] EWCA Civ 1248; [2002] 1 WLR 607, CA

Portsmouth City Council v Richards (1988) 87 LGR 757, CA

R (McCann) v Crown Court at Manchester [2002] UKHL 39; [2003] 1 AC 787; [2002] 3 WLR 1313; [2002] 4 All ER 593, HL(E)

Runnymede Borough Council v Ball [1986] 1 WLR 353; [1986] 1 All ER 629, CA

Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)

Worcestershire County Council v Tongue [2004] EWCA Civ 140; [2004] 2 Ch 236; [2004] 2 WLR 1193, CA

Wychavon District Council v Midland Enterprises (Special Events) Ltd (1987) 86 LGR 83

***1963**

The following additional cases were cited in argument:

Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727

Chief Constable of Lancashire v Potter [2003] EWHC 2272 (Admin); The Times, 10 November 2003

Department of Social Security v Butler [1995] 1 WLR 1528; [1995] 4 All ER 193, CA

R v Rimmington [2005] UKHL 63; [2006] 1 AC 459; [2005] 3 WLR 982; [2006] 2 All ER 257, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

***1964**

Botta v Italy (1998) 26 EHRR 241

Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC

Gough v Chief Constable of the Derbyshire Constabulary [2002] EWCA Civ 351; [2002] QB 1213; [2002] 3 WLR 289; [2002] 2 All ER 985, CA

Guzzardi v Italy (1980) 3 EHRR 333

H (Minors) (Sexual Abuse: Standard of Proof), In re [1996] 1 AC 563; [1996] 2 WLR 8; [1996] 1 All ER 1, HL(E)

Karanakaran v Secretary of State for the Home Department [2000] EWCA Civ 11; [2000] Imm AR 271, CA

Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd [1993] AC 227; [1992] 3 WLR 170; [1992] 3 All ER 717, HL(E)

Mole Valley District Council v Smith (1992) 90 LGR 557, CA

R v Boness [2005] EWCA Crim 840; [2006] 1 Cr App R (S) 690, CA

R v Governor of Brockhill Prison, Ex p Evans (No 2) [2001] 2 AC 19; [2000] 3 WLR 843; [2000] 4 All ER 15, HL(E)

R v Secretary of State for the Home Department, Ex p Leech [1994] QB 198; [1993] 3 WLR 1125; [1993] 4 All ER 539, CA

R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)

R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)

R v W [2006] EWCA Crim 686; [2007] 1 WLR 339; [2006] 3 All ER 562, CA

R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139; [2008] ACD 20, CA

R (C (A Minor)) v Secretary of State for Justice [2008] EWHC 171 (Admin)

R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] AC 719; [2007] 3 WLR 922; [2008] 2 All ER 95, HL(E)

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293; [2006] 1 WLR 3213, CA

R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)

R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21; [2003] 1 AC 563; [2002] WLR 1299; [2002] 3 All ER 1, HL(E)

R (Parminder Singh) v Chief Constable of the West Midlands Police [2006] EWCA Civ 1118; [2006] 1 WLR 3374; [2007] All ER 297, CA

Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139; [2001] UKHRR 1150, CA

Secretary of State for the Home Department v JJ [2007] UKHL 45; [2008] AC 385; [2007] 3 WLR 642; [2008] 1 All ER 613, HL(E)

South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E) ****1964***

Westminster Bank Ltd v Beverley Borough Council [1971] AC 508; [1970] 2 WLR 645; [1970] 1 All ER 734, HL(E)

Wheeler v Leicester City Council [1985] AC 1054; [1985] 3 WLR 335; [1985] 2 All ER 1106, HL(E)

Z, In re [2004] EWHC 2817 (Fam); [2005] 3 All ER 280

APPEAL from Judge MacDuff QC sitting in the Birmingham County Court

On 16 August 2007 the claimant, Birmingham City Council, exercising its powers under section 222 of the Local Government Act 1972 , applied without notice for interim and final injunctions against the first to third defendants, Junior Cadogan, Marnie Shafi and Tyrone Ellis, respectively, (i) excluding them from Birmingham city centre and other defined areas of the Birmingham metropolitan area; (ii) prohibiting them from being in the company of 11 named persons, including in the case of the second defendant his brother; (iii) prohibiting them from being in the company of more than one person in a public place; and (iv) prohibiting them from wearing green clothing in a public place. On 17 August 2007 Judge McKenra granted interim injunctions against the defendants, which were subsequently continued until the trial of the action on 3 and 4 December 2007. The claim against the first defendant was subsequently adjourned, and he played no further part in the proceedings. By order dated 10 January 2008 Judge MacDuff QC, sitting in the Birmingham County Court, discharged the interim injunctions and dismissed the claims against the second and third defendants, but gave the council permission to appeal.

By an appellant's notice filed on 5 February 2008 the council appealed on, inter alia, the following grounds. (1) The judge had been wrong to hold that he had no jurisdiction to grant an injunction under section 222 of the 1972 Act in support of the criminal law; in particular (a) he had been wrong to hold that the council was entitled to sue in its own name for an injunction to prevent a breach of the criminal law only (i) there was “something more” than a mere threatened breach of the criminal law, and (ii) the case was exceptional and it was clear that nothing short of an injunction would prevent the unlawful acts complained of, and (iii) the council had a responsibility for the enforcement of that branch of the law; (b) he had been wrong to hold that an injunction “may only be granted where … there is a known likelihood of a specific crime”; and (c) he should have held that the principles enunciated by Bingham LJ in *City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697* were met and that he had jurisdiction to grant an injunction. (2) The judge had erred in holding that he had no jurisdiction to grant an injunction under section 222 of the 1972 Act to prevent a public nuisance on the basis that there was a comprehensive code for dealing with such matters contained in the Crime and Disorder Act 1998 , as amended, and the Housing Act 1996 , as amended. (3) The judge had erred in law in holding that the council would have to prove any facts to the criminal standard of proof. (4) In the circumstances the judge should have found that the defendants' behaviour justified the grant of injunctive relief.

The facts are stated in the combined judgment of Sir Anthony Clarke MR and Rix LJ.

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Jonathan Manning and *Justin Bates* (instructed by *Chief Legal Officer, Legal Services, Birmingham City Council, Birmingham*) for the council.

Maya Sikand (instructed by *McGrath & Co, Birmingham*) for the second defendant.

Ramby de Mello and *Tony Muman* (instructed by *McGrath & Co, Birmingham*) for the third defendant.

The court took time for consideration.

30 October 2008. The following judgments were handed down.

SIR ANTHONY CLARKE MR and RIX LJ

Introduction

1 This appeal relates to the circumstances in which it is appropriate for local authorities to use the civil law in order to control the activities of those who create disturbances and indulge in criminal activities on streets within their areas. There were originally three defendants in this action, Junior Cadogan, Marnie Shafi and Tyrone Ellis. On 17 August 2007 the appellant claimant, Birmingham City Council ("the council"), sought and obtained without notice injunctions against all three defendants in wide terms. They were subsequently continued, subject to slight amendments, until trial. The claim against Junior Cadogan was adjourned, with the result that he played no part in the trial and has played no part in this appeal. The trial of the action as between the council as claimant and Marnie Shafi and Tyrone Ellis as defendants came before Judge MacDuff QC (now MacDuff J), whom we will call "the judge", on 3 and 4 December 2007. In addition to written material the judge heard both oral evidence and oral submissions. By an order dated 10 January 2008 the judge dismissed the claims and discharged the injunctions. This appeal is brought against that order with the permission of the judge.

2 The judge held that the court had no jurisdiction to grant the injunctions sought and that, even if it did, he would have refused to grant them against Marnie Shafi ("MS") and Tyrone Ellis ("TE") on the facts of this case. The council submits that the judge was wrong on both counts. It is convenient to consider the issues that arise in this appeal under these headings: the orders, the council's case, the facts found, the legal principles, and jurisdiction and discretion.

The orders

3 The orders are in very similar terms. It is therefore convenient to focus on just one. We take that against TE. So far as relevant to this appeal, it was in these terms:

> "The court ordered that the defendant shall not (whether by himself or by instructing, encouraging or allowing any other person) (1) be in any public place in the City of Birmingham with any of the following people: Courtney Jones, Courtney Moore, Junior Hollingshead, John Shafi, Nelson Junior Nelson, Kristopher Boyd-Clarke, Tristan Miles, Sheldon Wint, Junior Cadogan, Hassan Ali; (2) enter that part of the City of Birmingham shown on the attached plan and delineated in red;
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> ***1966**
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> (3) assault, harass, intimidate or attempt to do any of the same to any person lawfully present in the City of Birmingham."

The plan attached showed a considerable part of the city. Because TE lives within what would otherwise have been part of the excluded area it was necessary to remove from the exclusion a small area which would enable him to go to and from his home. It meant however that he could not go into most of the area around his home. A power of arrest under section 27 of the Police and Justice Act 2006 was attached to the whole of the order quoted above.

The council's case

4 The judge set out the council's case and the background to it in his judgment, at paras 4 to 9. It may be summarised in this way. In recent years there has unhappily been an increase in violent crime in many of Britain's major cities including Birmingham. It is the council's case that there has been an insidious and worrying gang culture in some parts of the city which has been accompanied by an increase in serious crime. There are two main gangs, known as the Burger Bar Gang and its rival the Johnson Crew, and there are a number of subsidiary gangs which have allegiance to one or other of the main gangs. For example, a gang known as the Birmingham's Most Wanted ("BMW") is loyal to the Burger Bar Gang. The gangs consist of young men who commit crimes both individually and jointly and are, it is said, responsible for much of the crime committed in the city. The crimes include armed robbery, drug dealing, other serious drug-related offences and the possession, display and use of firearms. It is the council's case that the increase in crime has led to an increasing level of fear in the community.

5 The gangs are territorial, so that a gang member is safe (or feels safe) within his own territory but is (or feels) at risk in other territories. Within his own territory a gang member may feel safe to carry weapons, engage in violence and seek reprisals against rivals. Residents are often too frightened to co-operate with the police or give evidence. As a result the police are often faced with a wall of

silence and, as the judge put it in describing the council's case at para 9, where witnesses do come forward, they are intimidated into silence or worse. Members of gangs carry weapons for both offensive and defensive reasons. Again as the judge put it, within the community there is a perception that the criminal law is inadequate to control the situation. Gang members regard themselves as untouchable.

6 Historically the authorities have sought to rely upon the criminal law. The council has also sought and obtained anti-social behaviour orders (“ASBOs”) in the magistrates' courts. However more recently it has resorted to the civil law by seeking injunctions under section 222 of the Local Government Act 1972 , as it did in this case. It has done so as part of a multi-agency initiative in order to try to curb the activities of some of those said to be responsible for the wave of violent crime and thus to stop it or at least to mitigate the impact of the growing urban gang culture. In addition to the council, the agencies include the West Midlands Police, the Birmingham Anti-social Behaviour Unit and the West Midlands Probation Service. In a sentence, as the judge put it at para 15, it is thought that the ***1967** behaviour described above cannot be adequately controlled by normal policing and prosecutions in the Crown Courts and in the magistrates' courts, so that the injunction route is seen by the police and the council as a potentially valuable weapon in their armoury.

7 One advantage of this approach is that it can be based on evidence which could not be adduced at a criminal trial. As the judge put it, at para 8, much of the evidence available to the council is derived from police intelligence. It cannot be proved by first-hand sworn evidence because the gangs are practised in intimidation of potential witnesses, with the result that, where police officers and community leaders have been informed of relevant events, those who could give evidence about them are unwilling to do so for fear of reprisals.

8 This action is one of many. The judge said, at para 10, that claims had already been issued against some 30 or 40 individuals and that the council intended to issue many more claims with a view to obtaining injunctions against all known gang members and to bring an end to their activities within the city. It is we think important to note that actions are only brought against adults. Where the council seeks an order against a gang member who is under 18 it does so by application for an ASBO in the magistrates' court. That is notwithstanding the fact that the order sought is in each case in identical terms. We return to this below because it strikes us as a curious distinction which has not been fully explained on behalf of the council.

9 As appears from the terms of the orders, they are not limited to anti-molestation orders of the kind set out in para (3) of the order quoted above, but operate by preventing the defendant from associating with certain named individuals in any public place within the city and from entering a large part of central Birmingham, sometimes very close to his home. Before the judge the council sought two further orders. The first was to prohibit MS and TE from wearing green clothing, green being the colour of the gang to which they were said to belong, and the second was to prohibit each from associating with any group larger than two including himself.

10 The particulars of claim in the cases of MS and TE are identical save for para 16, where the basic allegation is the same but the particulars are different. Para 16 alleged in each case: “The defendant has repeatedly behaved in a manner which is criminal and tortious, and which, in particular, constitutes a public nuisance and amounts to deliberate and flagrant breaches of the criminal law.”

11 The particulars of claim further asserted, in paras 17 and 18, that permanent injunctive relief pursuant to section 222 of the 1972 Act restraining each defendant's behaviour was likely to achieve the promotion or improvement of the economic, social or environmental well-being of the council's area or alternatively that it was expedient for the promotion or protection of their area that the defendant be restrained from committing tortious and criminal acts. It was further alleged in para 21 that each defendant's conduct would continue unless restrained by law and, in particular (albeit without prejudice to the generality of the foregoing), that the criminal law was not an effective remedy in the circumstances and that “his repeated arrests and convictions had failed to ameliorate his behaviour”.

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The facts found

12 The judge identified two classes of evidence before the court, first the general evidence and

secondly the evidence specific to MS and TE. However, as to the evidence as a whole, he noted, at para 13, that much of it came from police intelligence; sometimes from parties who could not be identified. Some of the intelligence was categorised as extremely reliable but some much less so. As to the general evidence relied upon by the council, some was in the form of statements read by consent and some was oral evidence. The statement evidence included a statement from Ian Coghill, who is director of the council's Community and Safety and Environmental Services. The critical oral evidence came from Detective Sergeant Borg of the West Midlands Police, whose statement was also put in evidence. Oral evidence also came from a street warden team leader, a police constable and an anti-social behaviour officer. In addition, both MS and TE gave oral evidence, as did Mrs Yasmin Shafi who is the mother of MS. We note in passing that no problem arose in this case by reason of the fact that the defendants were not told who was the source of the information given to or obtained by the police.

13 As we read his judgment, the judge accepted the council's description of the underlying situation and the problems presented by the gangs described above. In para 15 he stressed the following. Some gang members carry guns and many carry other weapons. There are outbreaks of fighting and public disorder. In June 2007 there were about 30 firearm discharges in the city, an average of one a day. At the highest level there are organised crime groups, orchestrating serious crime, with little street presence. Then there are the Johnson Crew and Burger Bar Gangs and other street gangs loyal to one or other of those. These street gangs engage in street crime and cause fear in the community as described above. At the lowest level are feeder groups where young people are recruited, often from schools, for what the judge described as the second tier groupings.

14 It is in our view unfortunate that, for whatever reason, the cases of MS and TE have become the first such cases in which there has been a test of the injunction approach. That is because they are on any view, as the judge held, at para 16, at the lower end of the scale. The specific evidence of course varies from case to case but the judge said that in some cases there is evidence that a defendant has himself committed robberies, discharged firearms or engaged in what he described as violent and wicked conduct. Some defendants have large and serious criminal records. On the other hand, as here, some defendants are implicated in crime and gang activities to a much lesser extent.

15 The judge summarised the evidence against MS, at paras 18–20. He was said to be a member of the BMW gang, a feeder gang for the Burger Bar Gang. Most members are between 15 and 21. They wear green clothing, particularly bandanas and hoods. They meet in Birmingham City Centre but are also active in Winson Green, Ladywood and elsewhere. They commit public order offences, robberies and shop thefts. MS was born on 5 June 1989 and was thus just 18 when this action was brought on 16 August 2007. MS admits that he is a member of the BMW gang but says that it is a small group which writes and performs music. He denies that he was a part of any general criminal activity. At para 19, the judge quoted the ***1969*** part of the statement from DS Borg's statement in which he said that MS “has been found to be regularly involved in criminal and anti-social behaviour including violent crimes with the use of weapons”.

16 However the judge, in our opinion correctly, added that that is a general statement of little value unless supported by other evidence. The supporting evidence comes from police intelligence and moreover from category A1 intelligence, which is the most reliable category, being described as “always reliable, witnessed by law enforcement agencies or reliable technical evidence”. The supporting evidence was 14 pieces of police intelligence between August 2005 and July 2007, during most of which period MS was of course 16 or 17. The judge summarised the evidence as follows, at para 19:

> “All these intelligence logs are categorised A1 or B1. On 14 occasions Shafi has been seen in the company of known members of BMW. Often he and his companions (some of whom had previous convictions) were reported to be wearing green bandanas. Usually the group consisted of only four or five persons, sometimes fewer. On one occasion, one of his companions was found in possession of an imitation firearm; on another, there was a report that a knife had been seen, although none was found when the group was searched. On another occasion, Shafi was removed from a West Midlands bus for disorderly behaviour; on another occasion he had suffered a stab wound to his leg, believed to have been inflicted by a member of a rival gang. At least three of these incidents occurred outside what is now the area from which he is excluded by interim order. On none of these 14 occasions was Shafi himself seen to be engaged in criminal conduct although there was an element of suspicion in two

> instances (where, for example, he was wearing a top garment with its hood up in hot weather). On no occasion was he in possession of any knife or offensive weapon, nor any other incriminating object."

MS had two previous convictions, one for having in his possession an article which had a blade or was sharply pointed. At the time DS Borg made his statement there were three outstanding prosecutions pending against him but the judge records, at para 20, that by the time of the trial they had all been discontinued.

17 The judge considered the evidence relating to TE, at para 21. He described it as similar to that in the case of MS. He too was a member of BMW and DS Borg described his involvement in precisely the same words as he used in the case of MS. We have quoted them above. TE was born on 3 April 1989 and was therefore about two months older than MS. According to police intelligence TE came to police notice on 12 occasions between November 2006 and August 2007. The judge said that the evidence of at least four of them was of no value in the present context. For example on 2 March 2007 he was stopped by police officers when he was wearing a green bandana and on other occasions he was stopped when with others. The judge described the overall evidence thus:

> "He associates with other people (usually in a small group) who, according to good police intelligence, are members of the BMW gang. On two occasions, the person he was with had possession of a weapon (not a firearm). On another two occasions, he was in the vicinity of a recent ***1970*** disturbance, giving rise to the possible inference that he had been involved. When stopped, he had been less than co-operative with the police. On another occasion he was in a group of youths who were misbehaving in a public place. He had four previous convictions, three of which were for possession of offensive weapons. With one exception these go back to 2003. The most recent conviction was for having in his possession a bladed knife in the Birmingham city centre on 9 November 2006."

18 At para 91, the judge rejected the defendants' evidence that BMW was simply a small group of music lovers and said that he was satisfied that they both owed allegiance to it. He also said that he was satisfied that members of the gang, acting together, had in the past committed acts which were both criminal and amounted to a public nuisance but he rejected the submission that there was evidence on which he could conclude beyond reasonable doubt that either MS or TE had so participated. It is submitted on behalf of the council that the judge applied the wrong standard of proof. The judge's approach can be seen from this sentence, in para 91:

> "Take 6 April 2007 as an example. On that date the defendant Tyrone Ellis was seen by police officers in Corporation Street following a disturbance in the nearby Bull Ring Shopping Centre. It may be that, on the balance of probabilities I might just conclude that he had participated in the disturbance. However, I certainly could not be sure, and thus the evidence in respect of that particular day is of no value at all."

We return below to the correct approach to the standard of proof.

19 We should also refer to para 92 of the judgment, where the judge said that, whatever matters would require proof, he would not make the orders. He correctly said that whether to do so involved the exercise of a discretion and added:

> "First and foremost, there is no evidence to show that the defendants or either of them have behaved in the past in a way which would justify making such an order. It may be that in some of the other cases, where the defendants are members of the senior echelons and the evidence can establish frequent participation in gang violence (for example) an order would be justified."

At paras 93 and 94, the judge made some observations about the detail of the orders which are not directly relevant to the issues in this appeal.

The legal principles

20 We were referred to a number of statutory provisions that impose duties upon the council with regard to the maintenance of law and order and the reduction of crime and disorder. They include sections 6(1) and 17 of the Crime and Disorder Act 1998 (as amended by Schedule 9 to the Police and Justice Act 2006) and section 4 of the Local Government Act 2000 . The obligations include a duty to formulate and implement a strategy for the reduction of crime and disorder, a duty to exercise the council's functions with due regard to the likely effect of the exercise of those functions on crime and disorder (and the misuse of drugs and alcohol) and a duty to prepare a sustainable community strategy for promoting the well-being of the relevant ***1971*** area. To that end the council has produced a series of strategies. It has for example created a group known as the Birmingham Reducing Gang Violence Group.

21 We entirely accept that the applications for these injunctions and other similar applications in other cases are born of the council's determination to deal effectively with the very difficult situation described by the judge. We also applaud the council's multi-agency approach to the problems. The question is, however, what is the correct approach in principle to the exercise by councils of their power under section 222 of the 1972 Act. Sections 111 and 222 provide, so far as relevant:

> "111
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> (1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act … a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."
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> "222
>
> (1) Where a local authority consider it expedient for the promotion of the interests of the inhabitants of their area—(a) they may prosecute or defend or appear in any legal proceedings and, in the case of any civil proceedings, may institute them in their own name …"

22 It is common ground that the council is a "local authority" and that it has power under section 222 to seek injunctive relief from the courts, at any rate in some circumstances. Section 37(1) of the Supreme Court Act 1981 provides: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." Taking the language of section 222 at its widest, therefore, it might be thought that the only remaining question for the judge was whether it was just and convenient to grant the injunction sought. However, the authorities show that it is not as simple as that because it has long been recognised that the court's power to grant relief by way of injunction is to be exercised only in support of some legal or equitable right. This gives rise to special considerations in cases where the interests of the public as a whole, or at any rate a section of the public, are affected or where rights enjoyed by the public are infringed. It is likely to be in cases of that kind that the local authority will wish to take action for the benefit of those who live within its area.

23 At common law a local council could not bring an action for interference with public rights unless it had itself suffered special damage peculiar to itself. Proceedings for the enforcement of public rights could only be brought by the Attorney General, either acting ex officio or through a private citizen known as a "relator" who was authorised to bring proceedings on behalf of the Attorney General and in his name: see *Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754* , 770–771, per Lord Templeman. The purpose of section 222 , as was recognised by the House of Lords in that case, was to enable local authorities in such cases to bring and defend proceedings in their own names without the involvement of the Attorney General. Accordingly, in their skeleton argument for this appeal Mr Manning and Mr Bates were right to recognise that the power vested in local authorities by section 222 of the 1972 Act reflects the power available to the Attorney General at common law to bring proceedings in ***1972*** support of public rights. It is necessary, therefore, to have regard to the nature and extent of that power in order to determine whether this is a case in which the court can properly grant an injunction at the suit of a local authority under that section.

24 It is thus common ground that section 222 does not give councils substantive powers. It is simply a procedural section which gives them powers formerly vested only in the Attorney General. This

appeal raises essentially two questions. They are, first, whether this is the type of case in which the court, acting in accordance with established principles, or any logical extension of them, can grant injunctions of the kind sought against the defendants and, secondly, if so, whether it should do so in the exercise of its discretion.

25 The courts have considered the correct approach to the exercise of this power in the public interest in two principal contexts: the restraint of breaches of the criminal law and the suppression of public nuisances. We will consider injunctions in aid of the criminal law first because it is plain from the way in which this case was both pleaded and presented that a principal plank of the council's case is that an injunction is required in aid of the criminal law, or at least in order to prevent the commission of criminal offences in the future. However, we recognise that the council also seeks to justify the injunctions on the basis that they are necessary to avoid the commission of public nuisances in the future. We will therefore briefly consider public nuisance separately before discussing the impact and interpretation of the legislation which introduced the ASBO and its effect upon the proper approach of the court to an injunction.

Injunctions in aid of the criminal law

26 The underlying approach is that described by Lord Templeman, with whom the other members of the Appellate Committee agreed, in the *B & Q case [1984] AC 754* , which was one of the Sunday trading cases, at p 776 a-f :

> "The right to invoke the assistance of the civil court in aid of the criminal law is a comparatively modern development. Where Parliament imposes a penalty for an offence, Parliament must consider the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence. In *Gouriet v Union of Post Office Workers [1978] AC 435* Lord Wilberforce said at p 481, that the right to invoke the assistance of the civil courts in aid of the criminal law is 'an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty … or to cases of emergency …' In my view there must certainly be something more than infringement before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area."

27 Lord Templeman accepted that it would not always be necessary for the use of the criminal law to be attempted before recourse was had to the remedy of injunction. He put it in this way, at p 776 f-g : ***1973**

> "It was said that the council should not have taken civil proceedings until criminal proceedings had failed to persuade the appellants to obey the law. As a general rule a local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts. But the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading. Delay while this was proved would have encouraged widespread breaches of the law by other traders, resentful of the continued activities of the appellants."

28 Subsequent cases show that injunctions may be granted even where it cannot be shown that criminal penalties would be inadequate. The leading case is *City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697* , in which an injunction was granted to restrain Bovis from causing a noise nuisance outside certain hours specified in a notice served by the council under section 60 of the Control of Pollution Act 1974 . It was a criminal offence "without reasonable excuse" to contravene the notice. A number of informations were laid against Bovis but they were adjourned and the injunction was sought in the meantime. Bovis appealed to this court contending that an injunction should not be granted unless it was first established that the defendant had committed an offence and that the defendant was deliberately and flagrantly flouting the law, neither of which could be established.

29 The appeal failed. The basis of the decision is most clearly stated by Bingham LJ. He first expressed the view that there may well have been bases on which the injunction could have been supported other than in support of the criminal law: see eg at p 713 d . However he said, at p 713 g , that the proceedings were in fact framed as being in support of the criminal law. On that basis he considered a number of classes of case: see p 714 b-g , where he identified such different types of case by reference to *Attorney General v Chaudry [1971] 1 WLR 1614* , *Kent County Council v Batchelor (No 2) [1979] 1 WLR 213* and *Runnymede Borough Council v Ball [1986] 1 WLR 353* . He noted that in the Runnymede case there had been no resort to the criminal law but an injunction was granted because of the risk of irreversible damage. He also referred to the speech of Lord Diplock in *Gouriet v Union of Post Office Workers [1978] AC 435* in which he expressed the view that injunctions of this kind should not be granted save where the criminal law had manifestly failed or where there was a risk of grave and irreparable harm. However Bingham LJ noted that, at p 491 in the same case, Viscount Dilhorne disavowed the suggestion that these were the only types of case in which the civil courts could and should come to the aid of the criminal law by granting injunctions at the instance of the Attorney General, and thus by inference at the instance of a local authority under section 222 of the 1972 Act. All depends upon the circumstances.

30 Bingham LJ identified the guiding principles as follows *[1992] 3 All ER 697* , 714 g-j :

> "The guiding principles must I think be: (1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution: see the authorities already cited; (2) that there must certainly be something more than mere infringement of the criminal law before the assistance of civil ***1974*** proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see Stoke-on-Trent Council v B & Q (Retail) Ltd … [at p 776] and Wychavon District Council v Midland Enterprises (Special Events) Ltd (1986) 86 LGR 83 , 87; (3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see Wychavon … [at p 89]."

31 On the facts Bingham LJ said, at p 715 a-b , that the question was whether the local authority could show anything more—and he would interpolate substantially more—than an alleged and unproven contravention of the criminal law, and whether the inference could be drawn that noise prohibited by the notice would continue unless Bovis were effectively restrained by law and that nothing short of an injunction would effectively restrain them. The essence of the decision can be seen from the next passage in Bingham LJ's judgment, at p 715 b-d :

> "I am in no doubt that these questions must be answered in favour of the local authority. The conduct which the local authority seek to restrain is conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute. Even if the conduct were not criminal, it would probably be unlawful. The contrast with the planning and Sunday trading cases is obvious. I see no reason for the court pedantically to insist on proof of deliberate and fragrant breaches of the criminal law when, as here, there is clear evidence of persistent and serious conduct which may well amount to contravention of the criminal law and which may, at this interlocutory stage, be regarded as showing a public and private nuisance. It is quite plain that the service of the notice and the threat of prosecution have proved quite ineffective to protect the residents."

32 The essential basis of the conclusions of O'Connor and Taylor LJJ was to much the same effect. There is a passage in the judgment of O'Connor LJ, at pp 709 e -710 c , to the effect that the injunction was necessary to prevent the nuisance in circumstances in which, on the one hand, Bovis had refused to say what its "reasonable excuse" was for contravening the notice on the basis that it did not have to do so until the hearing of the informations and, on the other hand, it asserted that the council could not establish the commission of the offence. At p 716 j , after referring to the view of the members of the Appellate Committee in the B & Q case that great caution should be exercised before granting injunctions of the kind sought and that something more was required than a bare infringement of the criminal law, Taylor LJ said that there was there something more, namely a

nuisance gravely affecting the local inhabitants. He added, at pp 716 j -717 a , that every disturbed night or weekend involved irreversible damage and there would be delay before the criminal proceedings including any appeal were completed. He thus concluded that the criminal proceedings were likely to be ineffective to protect the inhabitants and that it was just to grant an interlocutory injunction.

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33 The principles summarised by Bingham LJ have been followed and to some extent broadened in later cases. For example, in Barking and Dagenham London Borough Council v Jones (unreported) 30 July 1999; [1999] CA Transcript No 1369 , Brooke LJ, with whom May and Laws LJJ agreed, said, with regard to Bingham LJ's principles:

> "The application of those principles means that if the court is satisfied that nothing short of an injunction will be effective to restrain a defendant's unlawful operations it may grant an injunction even though he has not yet been subjected to the maximum penalty available under the criminal law."

34 In Guildford Borough Council v Hein [2005] LGR 797 , this court adopted Bingham LJ's principles but Waller LJ expressed the view, at paras 75–77, that the court had slightly broadened the principles in Portsmouth City Council v Richards (1989) 87 LGR 757 . See also the judgment of Clarke LJ in Hein's case, at para 44. In Richards's case, at p 765, Kerr LJ had expressed the broad test as being that injunctions are only permissible to restrain a threatened breach of the criminal law if in the particular circumstances "criminal proceedings are likely to prove ineffective to achieve the public interest purposes for which the legislation in question had been enacted".

35 Further, as Waller LJ observed in Hein's case, at para 77, Kerr LJ also cited with approval a passage from the judgment of Millett J in Wychavon District Council v Midlands (Special Events) Ltd (1987) 86 LGR 83 , where Millett J commended a council for moving for a quia timet injunction in these words:

> "If they have good grounds for thinking that in any given case compliance with the law will not be secured by prosecution they are entitled to apply for an injunction. Counsel for the defendants criticised the council for threatening to seek a quia timet injunction even before any threatened breach of the law had actually occurred and when therefore no prosecution was possible. In a proper case I do not consider that that is a ground for criticism but for commendation. It must be an eminently sensible and convenient manner of proceeding."

36 Those cases suggest a somewhat broader approach than some of the earlier ones, although, in our judgment the essential principles remain those summarised by Bingham LJ, in so far as the injunction is sought in aid of the criminal law, if by that is meant or includes a case where the injunction is sought to prevent the defendant from committing criminal offences. As appears below, it is our view, first, that these principles are subject to any legislation which is designed to deal with the very situation which an injunction is sought to control and, secondly, that the ASBO legislation is designed to do just that.

Public nuisance

37 The council puts its case on the alternative basis that, quite apart from the fact that the injunction will restrain the commission of criminal offences, it is justified on the basis that it will also restrain the commission of a public nuisance. There is we think considerable force in the point that, ***1976*** where it is sought to restrain a public nuisance, the principles which the court should apply should be less restrictive than in the case where it is sought to restrain the commission of a crime. However, the cases have not to date clearly differentiated between the principles to be applied in the two classes of case where the same facts are relied upon in support of each. As noted above, the point was touched on by Bingham LJ in *City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697* , 713 d , although in the event the appeal was disposed of on the basis that the injunction was sought in aid of the criminal law. The relevant principles were treated as those applicable to that state of affairs, although all the members of the court plainly thought that the fact that the claimant had at least an

arguable case that Bovis was committing a public nuisance was a telling factor in favour of granting the injunction.

38 Some consideration was given to the point in *Nottingham City Council v Zain (A Minor) [2002] 1 WLR 607* , where this court allowed an appeal from an order striking out an action seeking an injunction restraining a defendant from entering a housing estate. The injunction was sought on the basis of evidence that drug dealing was taking place publicly on the estate, that the defendant was associating there with well known drug dealers and that he had been arrested on suspicion of drug dealing. The court held that that arguably amounted to a public nuisance and that since the council considered (in the terms of the condition precedent in section 222) that it was expedient for the promotion of the interests of the inhabitants of their area, it was entitled by reason of that section to seek an injunction its own name restraining the commission of the public nuisance whether or not it was also a criminal offence: see in particular per Schiemann LJ, at paras 14–17, and Keene LJ, at paras 26 and 27.

39 The decision is, however, of limited assistance here because, as Keene LJ made clear, at para 27, the court was considering only the power of the council to bring the claim under section 222 . It was not considering upon what principles the court should decide whether to grant an injunction to restrain a public nuisance. We also note in passing that the decision itself was academic because, by the time the appeal was heard, the defendant had been sentenced to three years' imprisonment and the council no longer sought the injunction.

40 Nevertheless *Zain's case [2002] 1 WLR 607* is instructive. In particular both Schiemann and Keene LJJ, who have considerable experience in this area, seem to us to provide some support for the council's case. Schiemann LJ said, at para 13:

> “However … it is within the proper sphere of a local authority's activities to try and put an end to all public nuisances in its area provided always that it considers that it is expedient for the promotion or protection of the interests of the inhabitants of its area to do so in a particular case. Certainly my experience over the last 40 years tells me that authorities regularly do this and so far as I know this had never attracted adverse judicial comment. I consider that an authority would not be acting beyond its powers if it spent time and money trying to persuade those who were creating a public nuisance to desist. Thus in my judgment, the county council in *Attorney General v PYA Quarries Ltd [1957] 2 QB 169* was not acting beyond its powers in seeking the ***1977*** Attorney General's fiat in trying to put a stop to the nuisance by dust in that case and thus exposing itself to potential liability in costs. It follows that, provided that an authority considers it expedient for the promotion and protection of the interests of the inhabitants of its area, it can institute proceedings in its own name with a view to putting a stop to a public nuisance.”

For this purpose he accepted, at para 8, Romer LJ's description of a public nuisance in *Attorney General v PYA Quarries Ltd [1957] 2 QB 169* , 184, as a “nuisance … which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects”.

41 Keene LJ said much the same, at paras 25–27. At para 25 and the first sentence of para 26 he recognised that in both the *B & Q case [1984] AC 754* and the *Bovis case [1992] 3 All ER 697* there was a relevant statutory duty on the local authority and added that that was an element identified by the court as important because the local authority was not seeking to rely on public nuisance. It is submitted with force on behalf of the council in this case that here, by contrast, the council is relying upon public nuisance. Keene LJ added, at para 26:

> “Where there is evidence of a public nuisance, it was historically always the case that the Attorney General could seek an injunction to restrain the nuisance and, before the passing of the Local Government Act 1972 , a local authority could … sue … so long as it obtained the Attorney General's fiat.”

He then said that the effect of section 222(1) was to allow the local authority to sue in its own name without needing the consent of the Attorney General. At the end of para 27 he said that, once it was established that a public nuisance was established, which was of course a question of fact, the court would have to exercise its discretion on the basis of the “well known principles applicable to such injunctions”. We suspect that he would have said the same if the local authority was alleging not the

fact of a public nuisance but the threat of one.

42 It is true that Keene LJ does not suggest that those principles are the same as those applied in cases like the *B & Q case [1984] AC 754* and the *Bovis case [1992] 3 All ER 697* . On the other hand, as we said earlier, the question what those principles were did not arise in *Zain's case [2002] 1 WLR 607* . So the relationship between the principles in the B & Q and Bovis cases (and later cases) on the one hand and the classic public nuisance case on the other remains to be worked out. It is not in our opinion necessary to take the matter further in this appeal, partly because of the judge's conclusions of fact to which we return below, but, more importantly, because of what appears to us to be the significance of the ASBO legislation to which we now turn.

The ASBO legislation

43 In Hein's case [2005] LGR 797 , which was a very unusual case on its facts, Waller LJ considered the decision of this court in *Worcestershire County Council v Tongue [2004] Ch 236* , where a local authority was seeking orders which would enable it to enter land in order to rescue animals which were at risk of being cruelly treated. It was ultimately decided that ***1978*** there was no power to fill gaps in the criminal law but in the course of his judgment Peter Gibson LJ quoted, at para 29, this statement by Hoffmann J in *Chief Constable of Leicestershire v M [1989] 1 WLR 20* , 23: “The recent and detailed interventions of Parliament in this field suggest that the court should not indulge in parallel creativity by the extension of general common law principles.” That principle was applied in the context of animal cruelty in Hein's case: see per Waller LJ, at paras 66–70. See also per Clarke LJ, at para 48.

44 The significance of the principle stated by Hoffmann J in this appeal is this. The terms of the injunction sought in this action are typical of an ASBO and, as already indicated, on the facts of this case they are identical or almost identical to the terms of an ASBO. We have already referred to what is in our view a striking feature of the council's approach in this case, namely that it seeks ASBOs against those under 18 and injunctions in identical terms against those over 18. Parliament has laid down a number of specific requirements which apply to ASBOs, some of which may not apply to injunctions granted at common law. In so far as it may be said that it is easier to obtain an injunction than an ASBO, the granting of an injunction in such circumstances would in our view be to infringe Hoffmann J's principle. In any event, it appears to us that where, as here, Parliament has legislated in detail to deal with a particular problem, the courts should in general leave the matter to be dealt with as Parliament intended and, save perhaps in exceptional circumstances, refuse to grant injunctive relief of the kind which can be obtained by an ASBO.

45 We recognise that there is a general principle that, where a claimant in a civil action has two available rights or remedies, he is in general entitled to choose which to rely upon. However, the principle to which we have referred is an exception to that general principle and applies in the kind of case contemplated by Hoffmann J, of which this seems to us to be an example. We recognise that it may be said that in Chief Constable of Leicestershire v M Hoffmann J was considering what he regarded as an unprincipled extension of the common law in a field in which Parliament had already legislated and that in this case the jurisdiction to grant an injunction in aid of the criminal law (and indeed to restrain a public nuisance) is already established. However, it seems to us that the thought which underlies Hoffmann J's principle applies here. Parliament has recently legislated to restrain anti-social behaviour in a particular way and subject to particular safeguards. In our view the court should have that fact well in mind in deciding how to exercise its discretion whether or not to grant an injunction in a particular case.

46 We turn therefore to the nature of an ASBO. The ASBO first appeared in the Crime and Disorder Act 1998 (“the CDA 1998”), which has been amended in some important respects since it was first enacted. Section 1 , as amended by section 61 of the Police Reform Act 2002 , provides, so far as relevant:

> “(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—(a) that the person has acted … in an anti-social manner, that is to say, in a manner that has caused or was likely to cause harassment, ***1979*** alarm or distress to one or more persons not of the same household as himself; and (b) that such an order is necessary to protect relevant persons from further

anti-social acts by him."

47 It is not in dispute that the council is a relevant authority. As we see it, the critical features of section 1 , as amended, are that the defendant must have acted in an anti-social manner in the past and that an order must be necessary to protect the public from further anti-social acts in the future. That is precisely the case made against MS and TE. By subsections (3) and (4) a magistrates' court may make an order (ie an ASBO) if it is proved that those conditions are satisfied. By subsection (5) the court must disregard any act of the defendant which he shows was reasonable in the circumstances. By subsection (6) the prohibitions that may be imposed are those which are necessary for protecting persons from further anti-social acts by the defendant. By subsection (7) an ASBO has effect for "a period (not less than two years) specified in the order or until further order".

48 Subsections (1), (4) and (6) , as amended, are of particular importance because of the decision of the House of Lords on two critical points relating to ASBOs in *R (McCann) v Crown Court at Manchester [2003] 1 AC 787* . The first was that the proceedings are civil proceedings and that hearsay evidence is admissible. The second was that, notwithstanding that the proceedings are civil proceedings, magistrates' courts should apply the criminal standard of proof to the requirements in section 1(1)(a) but not (b). Lord Steyn put it thus, at para 37, after a reference to the speech of Lord Nicholls of Birkenhead in *In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563* , 586 d-h :

> "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 way, 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)." (Original emphasis.)

Lord Hope of Craighead reached the same conclusions, at paras 77–83. So too did Lord Hutton, at paras 113 and 114, and Lord Hobhouse of Woodborough and Lord Scott of Foscote, at paras 116 and 117, respectively.

49 The whole topic of the standard of proof in civil cases has recently been revisited by the House of Lords in *In re D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499* and *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2009] 1 AC 11* . It was not however suggested by counsel in this appeal that the ***1980*** reasoning in those cases affects the decision of the House in *McCann's case [2003] 1 AC 787* . We agree that it does not, with the result that the decision in McCann's case governs the position in ASBO proceedings. It follows that, if these orders had been sought from a magistrates' court as ASBOs, the court would have to have been sure in each case that MS or TE (as the case might be) had acted in the way alleged and, if it was sure, would then have had to decide whether an order was necessary.

50 The judge approached the standard of proof in that way and concluded that he could not be sure on the evidence in either case. He further said that, whatever the standard of proof, he would not have granted the injunction, no doubt because he did not think that it was necessary to do so. It is submitted on behalf of the council that he was wrong to approach the standard of proof in that way in the context of an application for an injunction (as opposed to an ASBO). It would in our opinion be startling if that were so. In the passage quoted above, Lord Steyn said that the approach to the standard of proof which he identified should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law. By "this corner of the law" he was, as we see it, referring to orders restraining anti-social behaviour of the kind that can be restrained by an ASBO. He was not intending to apply the criminal standard of proof to other types of injunction, whether in aid of the criminal law or to restrain a public nuisance or otherwise.

51 The questions whether an injunction should be granted in this action on the one hand or whether an ASBO should be granted in identical or near identical terms on the other are surely questions which arise in what Lord Steyn would regard as the same corner of the law. It would be bizarre, not to say irrational, if the standard of proof in answering the two questions were different.

52 Suppose two identical cases in which A is under 18 and B is over 18. In one case an ASBO is sought against defendant A in the magistrates' court and in the other defendant B is over 18 and an injunction is sought against him in the High Court or a county court. The orders sought are in identical or near identical terms. It would again surely be bizarre, not to say irrational, if the standard of proof in the two cases were different. What then is the solution? In our view the natural solution is for the High Court or county court to decline to grant an injunction but to leave the council to seek an ASBO in both cases. That approach seems to us to be consistent with Hoffmann J's principle.

53 If, exceptionally, the High Court or the county court does find it necessary to consider whether to grant an injunction in circumstances in which the relief sought is identical or almost identical to an ASBO, it should follow the approach set out by Lord Steyn and the House of Lords in *McCann's case [2003] 1 AC 787* : see further paras 63 and 64 below. In expressing those views we do not wish in any way to undermine the general principle adverted to on behalf of the council and approved in the recent House of Lords cases of *In re D [2008] 1 WLR 1499* and *In re B [2009] 1 AC 11* that the standard of proof in civil cases is proof on the balance of probabilities. This will be true of the ordinary case of the kind which Schiemann and Keene LJJ had in mind in *Zain's case [2002] 1 WLR 607* in which a council seeks an injunction to restrain a public nuisance.

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54 We return to the ASBO. The CDA 1998 provides a number of safeguards for defendants. For example, section 1E , as inserted by section 66 of the Police Reform Act 2002 , imposes consultation requirements. The combined effect of section 1(1) and 1(3) of the CDA 1998 , as amended, and section 127(1) of the Magistrates' Courts Act 1980 is that the behaviour relied upon to prove the first limb of the statutory test must have occurred no more than six months prior to the date of the complaint. Moreover, under section 4 of the CDA 1998 , as amended by the 2002 Act, the defendant has a right of appeal to the Crown Court, which is by way of rehearing. All these factors seem to us to point to the conclusion stated above, namely that, save perhaps in exceptional circumstances, the court should not in principle grant an injunction but leave the matter to be dealt with by way of application for an ASBO. While the High Court or a county court is no doubt capable of ensuring that the application is fairly heard and determined, given the detailed statutory scheme laid down by Parliament, the appropriate course is for the court to decline to grant an injunction but to leave the council to its remedy in the magistrates' court if it can establish it.

55 It is submitted on behalf of the council that the above approach is not consistent with the statutory scheme because there is no statute which describes the ASBO as an exclusive statutory code and because section 222 itself is aimed at public nuisances. Moreover, by section 91 of the Anti-social Behaviour Act 2003 Parliament provided an ancillary power of arrest specifically where an injunction was granted under section 222 to prohibit conduct which was capable of causing a nuisance or annoyance to a person: see section 91(2) . By section 91(3) the power existed where the court thought that either (a) such conduct consisted of or included the use or threatened use of violence or (b) there was a significant risk of harm to such person.

56 Section 91 of the 2003 Act was repealed by section 52 and re-enacted by section 27 of the Police and Justice Act 2006 , which also includes powers of remand and bail which had not been included in section 91 . It is observed on behalf of the council that the language of section 27 borrows heavily from that of sections 153A and 153C of the Housing Act 1996 , which created an anti-social behaviour injunction (“ASBI”) and was inserted into the Housing Act by the 2003 and 2006 Acts. It is submitted that, given the explicit references to nuisance, annoyance, violence and harm in section 27 of the 2006 Act, it is difficult to conceive of a case where a section 222 injunction could be granted with a power of arrest but an ASBO would not be available, yet the clear parliamentary recognition and intention that section 222 injunctions would be available in such circumstances renders it impossible to argue that the use of section 222 is an improper means of circumventing the will of Parliament. It is submitted that the judge was wrong to conclude otherwise.

57 There is undoubted force in those submissions. However, as is pointed out on behalf of the defendants, section 91 was only introduced in 2003 at the same time as sections 153A, 153B and 153C were inserted into the Housing Act 1996 by section 13 of the 2003 Act. An ASBI is defined by

section 153A(1) , as substituted by section 26 of the 2006 Act, as an injunction that prohibits the defendant from engaging in “housing-related anti-social conduct of a kind specified in the injunction”. It is submitted that ***1982*** both section 91 of the 2003 Act and section 27 of the 2006 Act were designed to complement proceedings instituted under section 222 of the 1972 Act for an ASBI and were not intended to complement any injunction granted under section 222 or enlarge the scope of the injunction which could be granted under section 222 .

58 We see the force of that submission because, if it was throughout intended that anti-social behaviour injunctions were within the powers in section 222 , it is difficult to see why it was necessary to make specific provision for ASBIs in the housing context. We do not, however, construe section 91 of the 2003 Act or section 27 of the 2006 Act as so limited as a matter of construction. We construe them as wide enough to give the court power to add a power of arrest if the statutory criteria are satisfied.

59 However, that conclusion does not seem to us to affect the conclusions which we reached earlier. Those sections do not themselves extend the jurisdiction contained in section 222 . Moreover, as shown in the decided cases to which we have referred, section 222 was essentially intended to confer on local authorities the procedural power, in the public interest, to seek injunctions which had previously been vested only in the Attorney General at common law. The discretion of the court whether or not to grant an injunction derives from section 37 of the Supreme Court Act 1981 . In this case, as already stated, the council seeks injunctions in aid of the criminal law (in the sense discussed above) or to prevent a public nuisance. However, the principles upon which such an injunction is to be granted remain to be determined. As stated above, as we see it they have been worked out to a considerable extent in the first class of case and in the classic case of public nuisance, but they remain to be worked out in a case which has elements of both and they also remain to be worked out where what is sought is in effect an ASBO. The critical factor in the present case is in our opinion that, whether the council seeks an injunction in aid of the criminal law or on the basis of an alleged public nuisance, the essential remedy sought is an ASBO.

60 It is in this context that Hoffmann J's principle—or something closely analogous to it—falls to be respected. Thus we conclude, for the reasons we have given, that the court should not indulge in parallel creativity by the extension of general common law principles. Hoffmann J did not of course have the ASBO in mind but it seems to us that, where—as here—a council seeks an injunction in circumstances in which an ASBO would be available, the court should not, save perhaps in an exceptional case, grant an injunction but leave the council to seek an ASBO so that the detailed checks and balances developed by Parliament and in the decided cases will apply.

61 The Judicial Studies Board has issued a detailed guide for the judiciary on ASBOs which is now in its third edition: see *Anti-social Behaviour Orders: A Guide for the Judiciary* . It sets out the position in some detail and makes reference to a number of the decided cases, of which there are now quite a number. It is those cases which at present set out the position in what Lord Steyn described as this corner of the law in the sense explained above. Good sense seems to us to lead to the conclusion that we should not now develop a separate but parallel jurisprudence in respect of identical orders. Put another way, we conclude that in such circumstances, save in an exceptional case, it would not be just and convenient for the court ***1983*** to exercise its discretion to grant an injunction under section 37 of the Supreme Court Act 1981 .

Jurisdiction and discretion

62 As we said earlier, the judge held that the court had no jurisdiction to grant the orders sought. For the reasons we have given, we do not agree that the court had no jurisdiction to grant the injunctions but we do think that it would be wrong in principle for the court to exercise its discretion by doing so. This is not an exceptional case in which the High Court or county court should grant an injunction against MS and TE in aid of the criminal law. It should in principle leave the council to seek an ASBO. The same or similar considerations lead to the conclusion that the court should not, in the exercise of its discretion grant an injunction to restrain future anti-social behaviour in the form of a public nuisance. We would therefore dismiss the appeal on that basis.

63 The judge found himself in a position in which (as we think wrongly) a trial had taken place. It appears that no one suggested at the outset that the appropriate course was not to embark upon a trial but to leave it to the council to proceed by way of an ASBO if it wished. For the future, we think that in a case of this kind, where the injunctive relief sought is to all intents and purposes identical or

almost identical to an ASBO, the appropriate course is for the court to refuse to grant an injunction and to leave the council to apply for an ASBO if it wishes. Indeed, we would not expect the council to seek an injunction in such a case, save perhaps in exceptional circumstances.

64 In the present case a trial in fact took place and we can understand why the judge considered and expressed a conclusion on each of the issues debated before him. It was therefore necessary for him to consider the correct approach to the standard of proof. Given that the order sought was essentially the same as an ASBO, the judge was in our view correct to apply the same standard of proof as would be applied in proceedings for an ASBO. For the reasons we have given, the only principled approach, in the light of the ASBO legislation and the pragmatic reasoning of Lord Steyn in *McCann's case [2003] 1 AC 787* (as set out in the passage quoted at para 48 above), was to adopt the same approach as was adopted by the House of Lords in McCann's case. The judge was accordingly correct to hold that he had to be sure that MS and TE had acted in the anti-social way alleged.

65 Since writing the above we have read Moore-Bick LJ's judgment expressing a different view on the standard of proof. We entirely understand his approach but adhere to our view that Lord Steyn's reasoning should be applied in this case, essentially for narrow pragmatic reasons and for reasons of fairness. The difference between our view and that of Moore-Bick LJ is a very narrow one. We again stress that in reaching this conclusion we do not in any way seek to depart from the principles in *In re D [2008] 1 WLR 1499* and *In re B (Children) [2009] 1 AC 11* . In particular we recognise that there may be cases in which the relief sought is not identical or almost identical to an ASBO and where the facts are much more complicated than they are here. In such cases, subject of course to argument in a particular case, we see no reason why the ordinary civil standard of proof should not apply.

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66 In this case, even if the approach set out above were for some reason held to be wrong, we would nevertheless dismiss the appeal. This was not an exceptional case of the kind the court had in mind in, say, *City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697* . In any event, on the facts, the judge not only held that he could not be sure that MS or TE had participated in acts which were either criminal or amounted to a public nuisance, he also said, at para 92, in a passage quoted at para 19 above, that, “whatever matters would require proof”, he would not make the orders. In that passage he said that there was no evidence to show that either MS or TE had behaved in the past in a way that would justify making such an order. It was not suggested that, if that was so, there was any proper basis for making the order. The judge had read the evidence and saw the witnesses. Whatever the correct approach to standard of proof, we see no basis upon which this court could properly interfere with that exercise of discretion on the part of the judge.

Conclusion

67 For the reasons we have given, these appeals must be dismissed. It would have been wrong in principle for the court to exercise its discretion to grant these injunctions because the appropriate course was for the council to apply for ASBOs. In any event the judge was correct to conclude that the relevant question was whether he was sure that MS or TE had acted in an anti-social way, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress. He was entitled to conclude that he could not be sure. Further, he was entitled to conclude, in the exercise of his discretion, that it was not necessary or appropriate to make the orders against these defendants.

68 In reaching these conclusions we do not wish to minimise in any way the problems identified by the council. However, we are confident that the courts have ample powers to deal with them. The difficulty for the council here was that, as was submitted on behalf of the defendants, the case against these individuals was very thin on the facts. There is no reason why an ASBO should not be made against those against whom the evidence is sufficient, which must be true in many cases. Moreover, there may be exceptional cases where it would be appropriate to grant an injunction. This is not such a case.

MOORE-BICK LJ

69 I agree that this appeal should be dismissed for the reasons given by Sir Anthony Clarke MR and Rix LJ with which I agree, save in one respect, namely, the standard of proof to be applied in proceedings for an injunction of the kind that were before the judge.

70 The council's application for an injunction was based on allegations that the defendants were

members of a gang of youths who on various occasions had harassed, intimidated and sometimes assaulted members of the public going about their lawful business in the centre of Birmingham and that they were likely to continue behaving in that way unless restrained by an order of the court. Although it was an important part of the council's case that the defendants had behaved in that way in the past, it was not necessary for it to prove that as a condition of obtaining the relief it sought. ***1985*** What was essential, however, if the council was to have any prospect of persuading the court to grant an injunction against the defendants, was that it should establish facts from which the court could be satisfied that there was a sufficient likelihood that, unless restrained, the defendants would behave in that way in the future.

71 The recent decisions of the House of Lords in *In re D (Secretary of State for Northern Ireland intervening) [2008] 1 WLR 1499* and *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2009] 1 AC 11* make it clear that, save in a few exceptional cases, the standard of proof in civil proceedings is proof on the balance of probabilities. It follows that, in so far as it is necessary for a claimant seeking an injunction to establish the existence of certain facts in order to obtain relief, he must in principle do so on the balance of probabilities.

72 Anti-social behaviour orders (“ASBOs”) are the creature of statute and the statutory provisions relating to them require certain facts to be proved before an order can be made: see sections 1(1)(a) and 1(4) of the Crime and Disorder Act 1998 . In many respects ASBOs are very similar to injunctions, but there are some important differences between them, principally the fact that the breach of an ASBO is a criminal offence punishable by up to five years' imprisonment. It was the fact that ASBOs have a flavour of the criminal law about them that the question arose whether proceedings for such orders are to be classified in domestic law as criminal or civil proceedings. However, it has now been finally established by the decision of the *House of Lords in R (McCann) v Crown Court at Manchester [2003] 1 AC 787* that they are civil in character. Ordinarily that would have led to the conclusion that it is sufficient to establish on the balance of probabilities the existence of the facts necessary to enable the court to make an order, but their Lordships held, essentially for pragmatic reasons, that the criminal standard of proof should apply, a course which Lord Steyn, in the passage of his speech cited by Sir Anthony Clarke MR and Rix LJ, at para 48 above, considered would “ensure consistency and predictability in this corner of the law”.

73 In McCann's case the House was concerned only with the legislation relating to ASBOs and not with the court's general jurisdiction to grant relief by way of injunction. Accordingly, when Lord Steyn referred to “this corner of the law” I think he meant proceedings under section 1 of the Crime and Disorder Act 1998 . He did not, in my view, intend to include in that expression all applications to restrain by injunction in the exercise of the court's general jurisdiction conduct of an anti-social kind that could, if the requirements of section 1(1) of the Act were satisfied, be controlled by an ASBO.

74 Sir Anthony Clarke MR and Rix LJ have come to a different conclusion on this point, largely because they consider that it would be irrational if the standard of proof were to differ depending on whether the application before the court was for an ASBO or an injunction. However, in my view the apparent anomaly is not as surprising as it may seem at first sight, because the formal requirements of the proceedings, the persons by whom proceedings may be commenced and the procedure by which the applications are made differ significantly. In particular, the nature of the legislation and the requirement that applications for ASBOs be made to the magistrates' courts were held to provide good reason for the adoption, ***1986*** exceptionally, of the criminal standard to the proof of the facts which must be established before an order can be made, despite the fact that the proceedings are civil in nature. There is no comparable reason, however, why proceedings for an injunction to restrain conduct that involves intimidation, harassment or assault should require proof to the criminal standard of the facts relied on in support of the claim. The anomaly to which Sir Anthony Clarke MR and Rix LJ draw attention arises only because in this case the conduct which the council seeks to prevent may in principle be amenable to being restrained by an ASBO (if the necessary conditions can be satisfied) or by the grant of an injunction. However, that will often not be the case, as, for example, where the person adversely affected lives in the same household: see section 1(1)(a) of the 1998 Act.

75 It is not uncommon for a claimant to seek an injunction on the basis of allegations that the defendant has acted in a way that involves a breach of the criminal law as well as an infringement of his private rights. Fraud and other examples of dishonesty provide some of the commoner examples, though the relief sought in such cases is not usually directed to restraining further acts of a similar kind. However, in *In re B (Children) [2009] 1 AC 11 the House of Lords* made it clear that, apart from a few exceptions, the same standard of proof applies in all civil proceedings. It is not affected by the seriousness of the allegation or the gravity of the consequences, if it is proved, although regard must

always be had to the inherent probabilities when reaching a decision. Since the present proceedings involved nothing more than a claim for an injunction, the civil standard of proof applied, unless the case can be brought within some other, hitherto unidentified, exception to the ordinary rule.

76 In my view it is desirable in the interests of consistency of principle that exceptions to the general rule concerning the standard of proof in civil proceedings should be confined to those cases in which there are strong grounds for departing from it. For the reasons I have given I do not think that there are sufficient reasons for recognising a new exception in cases of this kind, the precise scope of which is not easy to define. Civil proceedings for an injunction cannot as a class form an exception to the general rule and I do not think that proceedings by local authorities for injunctions in aid of the criminal law or to restrain a public nuisance can do so either. Sir Anthony Clarke MR and Rix LJ consider that, because of the anomaly to which he refers, the criminal standard of proof should apply in any proceedings for an injunction in which the claim is based on allegations that correspond to the requirements of section 1(1)(a) of the Crime and Disorder Act 1998 . In my view, however, that is to introduce an unnecessary element of uncertainty into an area of the law which has recently been clarified by the decisions in In re D and In re B (Children) . The anomaly to which Sir Anthony Clarke MR and Rix LJ refer is a product of the particular circumstances of this case; in my view it is not one which justifies the recognition of any new exception to the general rule relating to the standard of proof in civil proceedings. However, I agree that the fact that the principles which apply in proceedings for an ASBO differ in the respects mentioned earlier from those that apply in proceedings for an injunction is an additional reason for declining to grant relief by way of injunction where the ASBO procedure is available.

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77 For these reasons I think the judge was wrong to direct himself that he needed to be sure that the defendants had committed the acts on which the council based its claim for an injunction. In my view it was sufficient for him to be satisfied on the balance of probabilities of facts that demonstrated a sufficient likelihood that they would commit breaches of the criminal law in the future, unless restrained from doing so, to justify granting an injunction. Equally, in so far as it may have been necessary or desirable for the council to prove that the defendants were persistent offenders (see the comments of Bingham LJ in *City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697* , to which Sir Anthony Clarke MR and Rix LJ have referred), it was sufficient for it to establish that on the balance of probabilities. Having said that, I agree with Sir Anthony Clarke MR and Rix LJ that, even if all those matters had been established in this case, it would have been wrong for the court to exercise its discretion in favour of granting an injunction when it was open to the council to proceed by way of an application for an ASBO.

Appeal dismissed .

Permission to appeal refused .

12 February 2009. The Appeal Committee of the House of Lords (Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood) dismissed a petition by the council for leave to appeal.

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1. Local Government Act 1972, s 222(1) : see post, para 21.

2. Crime and Disorder Act 1998, s 1(1) , as amended: see post, para 46.