



Neutral Citation No: [2015] EWHC 2763 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PRESTON DISTRICT REGISTRY

Claim No. A90PR769

Openshaw Place
Ring Way
Preston
Tuesday, 14th July 2015

Before:
MR JUSTICE KERR

Between:

CHIEF CONSTABLE OF LANCASHIRE

Applicant

-v-

- (1) LEVI WAYNE WILSON
- (2) DANIEL JOHN DINNING
- (3) JORDAN LEE MURRAY
- (4) JOSHUA JAMES MURRAY
- (5) JOHN PAUL KERSHAW
- (6) DAVID KERSHAW

Respondents

Counsel for the Claimant:
Counsel for the First Respondent:
Counsel for the Second Respondent:
The Third Respondent did not attend
Counsel for the Fourth Respondent:
The Fifth Respondent did not attend
Counsel for the Sixth Respondent:
The Seventh Respondent did not attend
Counsel for the Intervener Secretary of State:

MR COHEN
MS WOODHOUSE-DAVIE
MR MCCORMACK

MR STARK

MR WILLOCK

MS BROADFOOT

APPROVED JUDGMENT

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A 1. THE JUDGE: The Chief Constable of Lancashire has obtained interim injunctions
against six men said to have engaged in gang-related activity in Preston. There was
originally a seventh man, the fifth respondent Jonjo Highton, but he was brutally
murdered last August, soon after the application was made. The applicant and the first,
B second, fourth and sixth respondents were all represented by counsel, and so was the
Secretary of State who intervened in the proceedings. The third and seventh
respondents (Mr Jordan Murray and Mr David Kershaw) are in custody and did not
appear but have, I was told, been given notice of the hearing.

C 2. I have to decide whether the applicable statutory provisions in Part 4 of the Policing and
Crime Act 2009 (“the 2009 Act”) are compatible with the protection afforded to the
respondents by article 6 of the European Convention on Human Rights (“the
D Convention”) (the right to a fair trial). In addressing that broad question, I have to
determine whether the present proceedings under the 2009 Act amount to “the
determination of... any charge against [the respondents]” (see article 6(1)). The
respondents say they do. The applicant, the Chief Constable, supported by the Secretary
of State for the Home Department (“the Secretary of State”) does not agree.

E 3. The respondents further submit that even if these proceedings are not a determination of
any charge against them, they are a “determination of [their] civil rights and
obligations...” within article 6(1). The Chief Constable and the Secretary of State agree
with that proposition. However, the parties then differ as to whether the rules of
F evidence and procedure governing proceedings under the 2009 Act, which are being
applied in the present case, comply with the requirement of a fair trial embodied in
article 6. In particular, the respondents contend that the civil standard of proof on the
balance of probabilities is incompatible with article 6, whether the proceedings are
G treated as civil or criminal, and they invite the court to make a declaration to that effect.
The Chief Constable and the Secretary of State oppose that course.

H 4. The respondents also complained in their composite skeleton argument (at paragraph
39) that if these proceedings are in substance criminal, the admissibility under the Civil
Evidence Act 1995 of hearsay evidence which would not be admissible under the
equivalent legislation governing criminal proceedings (reference is made to the Criminal
Justice Act 2003 and the Coroners and Justice Act 2009 in particular) constitutes a
violation of the right under article 6(3)(d) of the Convention, being:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

5. In consequence of the above complaints, I am invited by the respondents to determine that it is inappropriate to exercise the discretion of the court to grant an injunction under section 34(1) of the 2009 Act. I am asked to dismiss the Chief Constable's application and to discharge the existing interim injunctions. The Chief Constable and the Secretary of State oppose that course. Alternatively, I am asked to give such further directions as are needed to achieve a final disposal of the application.

The Background

6. The background is set out in a previous judgment in these proceedings given by his Honour Judge Butler sitting as a deputy High Court judge on 26 February 2015. I quote from paragraphs 15 and 16:

Preston, like many other major towns and cities, has for some time suffered from the activities of gangs of young men who are alleged to act as groups and alleged to be involved in criminal activities. There have been many cases in the Crown Court at Preston over the past five or six years while I have been sitting here, both in the criminal and latterly the civil jurisdiction, in which gang activity has been alleged against various defendants. The principal activities of these gangs across the country are drug-dealing but of course some of them are simply wicked and violent... The applicant's case is that there is a gang in the northern part of Preston, in the Deepdale area, famous for the location of Preston North End's football ground, although it is slightly outside the exclusion zone, and it is alleged that the gang is called either The Deepdale Gang or The Deepdale Gangsters. There is reference in the papers to Plungington as the gang name prior to 2014.

7. The Chief Constable contends that the six remaining respondents, the seventh being now deceased, are members of The Deepdale gang, which he says is to be equated with the gang known prior to 2014 as The Plungington Gang. Those names refer to areas in the north and centre of Preston. The Deepdale Gang is said to be at odds with The Avenham Gang based in the area south of the city centre, bordered by the River Ribble.
8. The application was made on 19 August last year in the County Court, interim orders without notice were made and the matter transferred to the High Court. Mr Justice Turner gave directions on 15 December 2014 for determination of the issues that are before me today. He also directed the filing of pleadings and further evidence.

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9. His directions included the filing of a witness statement from a police officer dealing with hearsay evidence relied upon: stating whether it is anonymous in the sense that the Chief Constable is unaware of the identity of the informant or anonymised, i.e. where the informant's identity is known but withheld; stating whether the evidence is multiple hearsay and, if so, to what degree; and explaining the sources in each case by reference to Appendix 3 of the "National Intelligence Model" used for the grading of intelligence sources.

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10. In their defences or amended defences, the respondents took the human rights points that are now before the court. The interim orders against them remain in force. An application by the third and fourth respondents, who are brothers, came before his Honour Judge Butler in February this year. I have already quoted from the judgment he gave on 26 February, dismissing the application to discharge the injunctions but varying them to some extent. Permission to appeal against that decision was refused on the papers by Jackson LJ on 15 May 2015. I understand that an oral renewal of that application is scheduled for 21 July 2015, which is next week.

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11. All six remaining respondents have been found in committal proceedings to have breached the interim injunctions against them and have been punished for contempt of court. I do not have the details of that exercise but it must follow that those breaches were found proved to the criminal standard.

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12. The Chief Constable has attempted to comply with the direction of Mr Justice Turner relating to hearsay evidence by filing the statement of Detective Sergeant Riley, dated 23rd January 2015. The respondents, however, complain that that statement is less than adequate for full compliance. The fourth respondent in particular complains that it fails to address the issue as to whether the allegations are founded on multiple hearsay and to what degree. However, a more recent statement from the same witness, dated 22 June 2015, has addressed those matters further.

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13. In view of the application for a declaration of incompatibility under section 4 of the Human Rights Act 1998, the papers were served on the Secretary of State in February 2015. She appears through Miss Samantha Broadfoot in support of the Chief Constable's position in relation to the human rights arguments, and relies upon a witness statement of Ms Esperanza Gomez dated 6 July 2015 which sets out the Secretary of

A State's understanding of the legislative purpose to which Part 4 of the 2009 Act is directed.

The Statutory Scheme

B 14. The Court of Appeal in *Birmingham City Council v James* [2013] EWCA Civ 552, [2014] 1 WLR 23, considered the interrelationship between gang-related violence injunctions and anti-social behaviour orders. It held that the local authority applicant is not precluded by the availability of the latter from founding an application on the former. Moore-Bick LJ at paragraphs 4 and 5 of his judgment explained the background to the legislation as follows:

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E 4. In the past the council has attempted to make use of its powers under section 222 of the Local Government Act 1972 in order to disrupt the activities of gangs by obtaining injunctions restraining individual gang members from entering part of the city and associating with other gang members. However, in *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, [2009] 1 WLR 1961, this court held that section 222 of the 1972 Act did not give local authorities substantive powers but was merely procedural in nature, allowing them to exercise powers formerly vested only in the Attorney General. The court held that although it is possible in some circumstances to obtain an injunction to prevent a breach of the criminal law, the appropriate way to obtain relief of the kind sought in that case was for the local authority to apply section 1 of the Crime and Disorder Act 1988 for an anti-social behaviour order ('ASBO').

F 5. The provisions in Part 4 of the Policing and Crime Act 2009 were enacted in response to the court's decision in *Birmingham City Council v Shafi*. Section 34 gives the court power, on the application of Chief Constables or local authorities, to grant injunctions prohibiting the persons to whom they are addressed from acting in ways that would promote gang-related violence or requiring them to act in certain ways, including taking prescribed activities.

G 15. Section 34(1) of the 2009 Act empowers the court to grant an injunction against a respondent aged 14 or over if two conditions are met. The first is that the court is satisfied on the balance of probabilities that the respondent has engaged in or encouraged or assisted gang-related violence or gang related drug-dealing activity (section 34(2)). The second condition (section 34(3)) is that the court thinks it is "necessary" to grant the injunction for either or both of the purposes of preventing the respondent from engaging in or encouraging or assisting gang-related violence or gang-related drug dealing activity or to protect the respondent from the same.

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16. The added reference to “gang-related drug dealing activity” as an alternative to gang related violence was the result of a very recent amendment post-dating the making of the present applications which replaced, without transitional provisions, the earlier wording of the section with effect from 1 June 2015.

17. Section 34(4) provides that an injunction can contain prohibitions or positive requirements. There is a definition of “gang-related” in section 34(5). It is now defined as follows:

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.

That has been the definition since 1 June 2015 when it changed. The wording until 31 May 2015 was as follows:

‘Gang-related violence’ means violence or a threat of violence which occurs in the course of or is otherwise related to the activities of a group that—

- (a) consists of at least three people;
- (b) uses a name, emblem or colour, or has any other characteristic that enables its members to be identified by others as a group; and
- (c) is associated with a particular area.

The reference to “name, emblem or colour” and association with a particular area have been removed, therefore, but were in place when these applications were made.

18. By section 34(6) “[v]iolence includes a threat of violence.” The definition of ‘violence’ in the interpretation section states that it includes violence against property. Section 35 delineates the permissible scope of the injunction under section 34 in such a way that it can prohibit presence in a particular place, being in the company of particular persons in a particular place, having charge of a particular species of animal in a particular place or wearing particular types of clothing. It could also prohibit use of the internet to facilitate or encourage violence or drug-dealing. The order can also include notification requirements relating to a change of address, curfew requirements and reporting

A requirements, as well as a requirement (in section 35(3)(d)) to “participate in particular activities between particular times on particular days”.

B 19. Section 35(4) states:

A requirement of the kind mentioned in subsection (3)(b) [i.e. to be at a particular place between particular times on particular days] cannot be such that the respondent must be at one location for more than 8 hours in any day.

C Section 35(5) provides that the injunction must be in terms that so far as practicable, will avoid any conflict with the respondent’s religious beliefs and any interference with times at which he or she normally works or attends any educational establishment.

D 20. By section 36(2), an injunction under section 34 may not include a prohibition or requirement lasting more than two years from the date on which the injunction is granted. It is common ground that “the date of the injunction” is a reference to a final injunction and not to an interim injunction granted before trial with or without notice. If it is to last for more than one year from that date there must be a review hearing within the last four weeks of the one-year period (section 36(4)) and the court may order other review hearings at other times (section 36(3)). Section 36(6) enables the court to attach a power of arrest in relation to any prohibition in the injunction or any requirement thereof, apart from one which has the effect of requiring the respondent to participate in particular activities.

E 21. Section 37 provides that the application to the court may be made by the chief officer of police for a police area or the Chief Constable of the British Transport Police Force, or by a local authority. There must be prior consultation by the applicant with any local authority, and any chief police officer considered appropriate to consult, and in the case of a respondent under the age of 18, the youth offending team established under section 39 of the Crime and Disorder Act 1998 for the area in question (section 38).

F 22. The 2009 Act includes provision under section 39 for applications to be made without notice and without prior consultation, and the application may be made to the High Court or to a county court. If it is made without notice and adjourned until the return date, the court may grant an interim injunction if it thinks that it is just and convenient to do so with or without a power or arrest (section 40(2) and (3)). The same is the case where the application is made without notice save that the interim injunction may not require the respondent to participate in particular activities.

A 23. Section 42 provides for applications to vary or discharge such injunctions. Sections 43
and 44 deal with powers of arrest and the issue of warrants for arrest. Section 45
empowers the court to remand an arrested person for medical examination, which can be
in custody for not more than three weeks or on bail for not more than four weeks, and
there are certain other provisions relating to respondents who are under the age of 18
B and which include certain additional safeguards. The present respondents are, I
understand, all adults and have been since the applications were made.

C 24. Section 47 requires the Secretary of State to issue and from time to time may revise
guidance relating to injunctions under Part 4 of the 2009 Act. Potential applicants are
required to have regard to that guidance and the court would obviously do so too. I have
been taken to part of the current guidance issued as recently as 1 June 2015, updated to
deal with the amendments I have mentioned.

D 25. Those provisions of the 2009 Act are part of a process which was described by Jackson
LJ in *Birmingham City Council v James* at paragraphs 20 and 21 as follows. He referred
at paragraph 20 to:

E ...three different procedures for pre-empting violent or other unacceptable
conduct, if there was good reason to anticipate such conduct.

F He then said that they were: an application for an anti-social behaviour injunction
("ASBI"); an application for an anti-social behaviour order ("ASBO"); and an
application for an injunction to restrain gang-related violence ("IRGV"). At paragraph
21 he said this:

G It may be noted that these three sets of statutory provisions are a manifestation
of the growing tendency to use the civil law as a means of preventing or
punishing criminal conduct. This lowering of the barrier between civil and
criminal litigation may give rise to difficult issues, for example, in relation to
article 6.2 and 6.3 of the Convention. But those issues do not require
consideration in the present case, which is a straightforward one.

H 26. There are indeed other types of such order placing restrictions on persons or regulating
their conduct by means of an application by a public body in a manner that does not
involve charging an individual with any criminal offence. I was shown cases and some
statutory provisions in which they have been considered. They are different from each

A other but have in common a relatively novel use of civil remedies to police an area more classically the province of criminal law.

B 27. Examples are not just those mentioned by Jackson LJ (ASBOs, ASBIs and IRGVs) but also there has been mention in the arguments before me of football banning orders, orders that arise from having been convicted of certain sex offences (formerly called sexual offences prevention orders and now called sexual harm prevention orders), and control orders.

C 28. I add in passing that recently, on 23 March 2015, new provisions in the Anti-social Behaviour, Crime and Policing Act 2014 entered into force, recasting what used to be ASBOs and ASBIs into a single new form of injunction which can be granted on the same basis as the legislation here, which uses and explicitly refers to use of the civil standard of proof on the balance of probabilities.

D The Issues, Reasoning and Conclusions

E 29. The following matters are common ground, or not seriously in dispute:

F (1) The guarantee of a fair trial under article 6(1) of the Convention applies to both criminal and civil proceedings. The additional protections in paragraphs (2) and (3) of the article apply only to criminal proceedings and “the contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases”. That is what Lord Steyn said in *R (McCann) v. Manchester Crown Court* [2003] 1 AC 787, at paragraph 7, citing from *Dombo Beheer BV v The Netherlands* [1994] 18 EHRR 213, 229, paragraph 32.

G (2) The question whether a particular legal proceeding involves the determination of a criminal charge attracting the protections in article 6(2) and (3), is answered by applying the criteria found in *Engel v The Netherlands* (1979-80) 1 EHRR 647, at paragraph 82. The three criteria are: (i) the domestic classification of proceedings; (ii) the very nature of the offence; and (iii) the nature and severity of the penalty.

H (3) The classification in domestic law of the present proceedings is that they are civil and not criminal as a matter of domestic law.

A (4) The first criterion (that of classification in domestic law) is only a starting point and is not definitive. The Chief Constable accepts that; to quote from the skeleton argument:

B Fulfilling either of the second two criteria can be sufficient to show that the criminal limb of [article 6] is engaged.

C (5) Parliament made a conscious decision in response to case law such as the *McCann* case and the decision of the majority in *Birmingham City Council v Shafi* (both cited above) to enact in the 2009 Act that the standard of proof should be a civil one on the balance of probabilities – and those are the words found in section 34(2) of the 2009 Act.

D (6) That was in line with the minority view of Moore-Bick LJ in *Shafi* that the standard of proof should be the civil one and not the criminal one, even though the application that was made was for relief in essentially the same terms as if the application had been for an ASBO.

E (7) If, which is one of the matters in dispute, the application of the civil standard of proof to proceedings under Part 4 of the 2009 Act is contrary to the right of the respondents to a fair trial guaranteed by article 6, whether or not those proceedings involve determination of a criminal charge, then it is not possible to read down the civil standard of proof provided for in section 34(2) so as to convert it into the criminal standard in the exercise of the court’s interpretative function under section 3 of the Human Rights Act. It is accepted by the respondents that to do so would, in the words of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (at paragraph 33) go against “the grain of the legislation”.

G Do these proceedings involve determination of a criminal charge?

H 30. The respondents in their composite skeleton argument submit that application of the second and third criteria in the *Engel* case lead to the conclusion that the respondents face a criminal charge in these proceedings. They submitted that it was very difficult to conceive of conduct supporting an application that did not involve a criminal offence and that the essence of gang-related violence is that it would almost inevitably involve criminal acts. They went on to submit that the House of Lords in *McCann* had accepted

A that the behaviour at issue in that case, which was an application for an ASBO, could be “sub-criminal” but nevertheless adopted the criminal standard as the appropriate standard by which to judge that conduct.

B 31. The respondents relied on the decision of the European Court of Human Rights in *Matyjek v Poland* (2011) 53 EHRR 10, App. No. 38184/03. I was taken through the facts of that case, which concerned what were called lustration proceedings. Briefly, a person found to have lied by making a false declaration denying having collaborated with the security services under the former regime, was banned from holding certain public offices for a period of ten years.

C 32. The court found that the proceedings were criminal in nature, even though they were classified in domestic law in Poland as civil proceedings, and the court noted that the making of a false declaration was similar to established criminal offences such as perjury even though not described as such in domestic law. As to the third criterion in *Engel*, the court noted the severity of the penalty which, though not involving a fine or imprisonment, did involve dismissal from public office and a ban on taking it up again for ten years.

D 33. The court concluded that, viewed overall, the proceedings did involve the determination of a criminal charge. Therefore, the respondents reasoned, the fact that an application for an injunction under section 34 of the 2009 Act is not formally framed as an accusation of a criminal charge is not to the point; such an application clearly requires a public authority to make an accusation against the respondent of what would virtually inevitably be serious criminal behaviour, and findings of fact would have to be made that those individuals had engaged in or assisted or encouraged that behaviour.

E 34. The respondents went on to submit that the types of injunction that could be granted under section 35 extend well beyond a simple prohibition against engaging in, assisting or encouraging gang-related violence. They can include measures such as curfews and exclusion orders which, the respondents pointed out, are closely analogous with punishments imposed by way of community penalty on persons convicted of crimes. The types of injunction available under the 2009 Act are very similar to and no doubt derived from the provisions in section 177 of the Criminal Justice Act 2003 (and surrounding provisions), providing for community penalties where a person is convicted under the criminal law.

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35. In oral argument Mr Stark, assisted by the other counsel for the respondents and speaking for all four respondents represented in court at the hearing, expanded on those arguments. He said the mandatory requirements in section 34(2) and (4)(b) are new and that there was absolutely no limit on what mandatory activities could be ordered against the respondent in such an application. He gave the example, not entirely frivolously, of a person being made to break stones on Dartmoor. He took me to Strasbourg authorities which, he said, would help the court reach the conclusion that in this case there was a determination of a criminal charge.

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36. He referred me to *Lauko v Slovakia* (App. No. 26138/95) (2001) 33 EHRR 40, in which Slovakia unsuccessfully denied that relatively minor sanctions for minor offences did not prevent the nature of the proceedings – that is the second criterion in *Engel* – leading to the conclusion that the charge was a criminal one. He also referred me to *Öztürk v Germany* (App. No. 8544/79) (1984) 6 EHRR 409, in which a minor traffic offence of which the applicant had been convicted, was held to be a criminal charge, with the consequence that it was a breach of article 6(3) to impose a financial cost on the applicant for the services of an interpreter at court.

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37. That a charge is not framed as a criminal one and does not lead to a criminal record is, submitted Mr Stark, shown by these cases to be far from decisive. He accepted that, as a matter of theory, it could not be excluded that conduct relied upon in a section 34 application might be conduct that is not criminal in nature; but he disputed the realism of that proposition.

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38. Thus, he challenged as unrealistic the suggestion made by Mr Cohen for the Chief Constable, supported by paragraph 4 of the Secretary of State's current guidance relating to the involvement of women and girls in gangs, that an injunction could be granted against a woman on the basis of assisting or encouraging gang-related activities if she were merely the partner of a gang leader who had engaged in such activities and not herself had any more active a role than that.

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39. Such a person would not, argued Mr Stark, be “assisting” or “encouraging” gang-related activity, in the language of section 34. Ms Davie, for the first respondent, helpfully added that the verbs “encourage” and “assist” mirror the same two verbs used in section 44 of the Serious Crime Act 2007, the statute which abolished the old common law

A offence of incitement and replaced it with statutory secondary criminal liability where a person assists or encourages a criminal act.

B 40. As to drug-dealing, although not relevant on the facts here (and the amendments relating to drug-dealing post-dated making the applications), Mr Stark said that in that field it was even less likely that a respondent would not be accused of criminal acts. He sought to counter the point made by the Chief Constable and the Secretary of State that the jurisdiction under section 34 is by its nature protective and preventive but not punitive. He commented, in that context, on a line of cases relied upon by the Secretary of State and Chief Constable, arising from the attempts of Italy to combat the Mafia by
C legislation.

D 41. The cases started with *Guzzardi v Italy* [1981] 3 ERHH 333, the first in a line in which restrictive orders had been made against suspected Mafiosi, who were not accused in the proceedings of any criminal acts as such. The suspects concerned were submitted to measures such as special supervision and compulsory residence in a restricted and small area. The Strasbourg challenges were brought under article 5 rather than article 6; it was the Commission that had raised the issue of article 6. The restrictive orders were
E founded on suspicion of past activities rather than on allegations of specific acts in the proceedings. There was no overt reference in the Italian legislation to anything corresponding to any standard of proof.

F 42. I was also taken to two subsequent cases emanating from the Netherlands – *Landvreugd v The Netherlands* (Application No. 37331/97) and *Olivieira v The Netherlands* (Application No. 33129/96), in which a form of administrative prohibitive order amounting to an exclusion zone had been made by the mayors of municipalities, against persons found to have taken hard drugs within the area of those municipalities.

G 43. Mr Stark submitted that all those cases were very different from the present because in none of them was there a specific accusation of criminal conduct. He said that that was an answer to the point that if a measure is preventive or protective in purpose, that necessarily deprives it of the character of a criminal charge.

H 44. There was also mention of well-known control order cases in this jurisdiction, which again are founded on suspicion; and in which, broadly speaking, a control order is made

A where a person is reasonably suspected of terrorist-related activity but there is no attempt to prove involvement in any specific such activity and hence no criminal charge.

B 45. Mr Stark submitted that the control order cases in which the appellate courts in this jurisdiction had decided that there was no determination of a criminal charge, were cases in the same category as the *Guzzardi* line of authorities emanating from Strasbourg, where the basis of the application was suspicion rather than, as here, proof to the civil standard of conduct necessarily or virtually inevitably criminal in nature.

C 46. Miss Broadfoot, for the Secretary of State, supported the Chief Constable's position. She submitted that in the present proceedings the respondents do not face a criminal charge within article 6(1) attracting the protections of article 6(2) and (3). She reminded me that article 6(1) is given an autonomous Convention meaning, and took me through the Strasbourg cases again, beginning with *Guzzardi*, the more recent Mafia related cases which were *Ciulla v Italy* (1989) 13 EHRR 346, *M v Italy* (1991) 70 DR 50 and *Raimondo v Italy* (1994) 18 EHRR 237; and the two Dutch cases of *Landvreugd* and *Olivieira*.

D 47. Ms Broadfoot submitted that, while the *Guzzardi* decision is very brief in its consideration of the issue of article 6 and preventive measures, there was no basis for supposing that it had been wrongly decided or had been misunderstood in subsequent case law. It was, she submitted, part of a consistent line of cases and, importantly, had been effectively endorsed by Lord Bingham in the House of Lords in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440.

E 48. When dealing with the third issue before the House, namely "whether a non-derogating control order imposed under the 2005 Act constitutes a criminal charge for the purposes of article 6 of the European Convention", in holding that it did not, the court said this at paragraph 23, though I only quote part of it. After referring to domestic case law including *McCann*, Lord Bingham said this:

H The same distinction is drawn in the Strasbourg authorities. Treated as non-criminal are preventative measures such as those in the Italian cases already mentioned, *Lawless v Ireland (No. 3)* (1961) 1 EHRR 15, *Olivieira v The Netherlands...* and *Landvreugd v The Netherlands ...*; treated as criminal were the measures considered in *Öztürk v Germany ...*, *Demicoli v Malta* (1991) 14 EHRR 47 ...; *Benham v United Kingdom* (1996) 22 EHRR 293; *Lauko v Slovakia*; *Garyfallou AEBE v Greece* (1997) 28 EHRR 344. Even this

A distinction, however, is not watertight, since prevention is one of the recognised aims and consequences of punishment... and the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention.

The Italian cases that he had already mentioned were those that he referred to in paragraph 21, where he said this, though I only quote part of the paragraph:

B There is some analogy with the special supervision and protection measures imposed under Italian legislation, in so far as those cases fell within article 6(1) at all: see, for instance, *Guzzardi ...*; *Ciulla v Italy ...*; *M v Italy ...*; *Raimondo v Italy ...*; and *Arcuri v Italy*, Reports of Judgments and Decisions 2001-VII, p 517.

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D 49. In relation to the *Matyjek* case from Poland, the Secretary of State, supported by the Chief Constable, argued that it was distinguishable in that the Polish court had imposed a sanction because the defendant had previously lied in his lustration declaration and that the measure in question was clearly a sanction for past behaviour and could not be described as preventive since once the lie had been uncovered. The fact of past collaboration with the former security services was already known. Nor could the measure be described as protective of the individual who had lied.

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F 50. In short, Miss Broadfoot submitted that the *Matyjek* case was a completely different proposition from the jurisdiction being exercised here and fell on the other side of the criminal boundary because the nature of the proceedings were so different that the application of the second and third *Engel* criteria led to the opposite conclusion from that which I ought to reach here.

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H 51. Mr Cohen also submitted that in the present case the respondents did not face a criminal charge within article 6(1). He relied on the following main points. He submitted that the present regime is protective and preventive, not punitive. He reminded me that in *McCann* itself, the cases coming from Italy such as *Raimondo* had been found applicable, and the making of an order to protect relevant persons from further anti-social acts had been found in *McCann* not to amount to the determination of a criminal charge.

52. He referred me to the classical exposition of what criminal proceedings are, found in the judgment of Lord Bingham CJ, as he then was, in *Customs and Excise Commissioners v City of London Magistrates Court* [2000] 1 WLR 2020, 2025, which is as follows:

A It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant.

B 53. Miss Broadfoot submitted that, contrary to the position taken by the respondents, the
C conduct relied upon in a case such as the present need not in principle be criminal in
D itself and that there could be cases involving non-criminal conduct. She gave as
E examples persons who may be involved in accompanying other persons in a gang
F carrying drugs – not themselves carrying them but simply making up the numbers. She
G pointed out that the criminals themselves may not be those primarily targeted in gang-
H related violence injunction applications. It could be the associates rather than the
I criminals who are targeted, a point that ties in with the aim of protection of those
J persons themselves as well as the public.

54. Ms Broadfoot submitted that the wording of section 34(3) is highly prescriptive. The
second condition of which the court must be satisfied is that the court “thinks it
necessary to grant the injunction for either of both of the following purposes”, and the
two purposes that are then set out are prevention from engaging in the activity targeted
and protection of the respondent from gang-related violence or gang-related drug-
dealing activity. It therefore cannot on the plain wording of the statute, said Miss
Broadfoot, be correct to characterise the sanction as punitive, even though the Chief
Constable and the Secretary of State accept that the consequences of an order can be
serious for a respondent.

55. Mr Cohen added to the litany of examples canvassed before me of non-criminal
behaviour that might be relied on in an application such as this. He referred me to the
facts actually found by the judge in *Birmingham City Council v James*, where the trial
judge had found as follows, quoting from paragraph 8 of the judgment of Moore-Bick
LJ:

H That evidence satisfies me that Mr James was indeed in Handsworth Park on
the afternoon of the carnival on 7th August 2011. I do not accept the evidence
from Mr James and his father that he was not there. He had told PC Barton he
was going in no uncertain terms; he would not have missed the opportunity.
The carnival was in Burger Bar territory [Burger Bar being a gang]. Mr James
was part of a group of men who were affiliated to the Johnson crew [another

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gang] and a number of the officers speak of there being members of the Burger Bar in the park and of the tension there was. The group deliberately walked through the park. They were not there for the communal activities of a carnival. The size of the group, its obvious allegiance and the deliberate route through Burger Bar territory demonstrate that this was a premeditated visit...

Then a little further on, the judge commented:

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What else could it be but a threat of violence? It is a show of force, extreme bravado, a demonstration that Mr James and his associates are not afraid of the Burger Bar. It is deliberately provocative. It is all those things but it is also a statement that the group are ready and looking for a fight.

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I need not read any more. Mr Cohen pointed out that those findings are not findings of criminal acts but, nevertheless, can found an injunction under section 34.

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56. Mr Cohen gave as another example a hypothetical situation in which gang members boast on social media of having entered the territory of a rival gang, taunting them without expressing any explicit intention to commit acts of violence on them; and he said that that would amount to encouraging or assisting gang-related violence by effectively bringing it on their own heads, inviting retribution in the form of violence from the rival gang.

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57. Mr Cohen submitted that if the words “encouraging” and “assisting” were construed narrowly so as to embrace only criminal liability as a secondary party to a crime, that would defeat the purpose or one of the main purposes, of the regime, which is precisely to avoid criminalising those against whom injunctions are sought, and to deal with the problem of gangs through a regime that does not necessarily target the primary gangsters but others such as their associates, who may be in need of protection.

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58. I turn to my reasoning and conclusions on this issue. I do not, after reflection, accept the submission that gang-related injunctions entail determination of a criminal charge. It seems to me that the following points tell against that conclusion and impel me to the contrary conclusion:

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(1) First, I accept that in very many if not most cases, the conduct alleged against the respondents in an injunction under section 34 is likely to be criminal, although it will not necessarily and inevitably be criminal. That is often the case where civil injunctions are obtained whether by private or state entities. An example would be an ASBO or ASBI in the housing field where the conduct relied upon, as well as being antisocial, is also

A criminal. That is commonplace. That the conduct relied upon may very well be, and probably will be, criminal is not of itself decisive.

B (2) Secondly, it seems to me that *Guzzardi* and the other authorities in the line of cases mentioned by Lord Bingham in *MB* were accepted by him as relevant and authoritative for the purpose of drawing the line between the cases that do and do not involve determination of a criminal charge. In view of that recognition in the highest court in this jurisdiction, I do not accept the submission of Mr Stark that the *Guzzardi* line of authority can be treated as an aberration or not to be followed, or that it is of no relevance to the issue where the legislation here crosses the criminal boundary.

C (3) Thirdly, and most importantly, the purpose of an injunction granted under section 34 cannot lawfully be punitive (see section 34(3)(a) and (b)). The second condition is that the judge must consider the injunction “necessary” for either or both of the purposes there set out, neither of which is punitive in character. This is not mere semantics. It means that if a judge granted an injunction which, on a fair reading of the judgment and the reasoning, was in substance a punishment, that injunction would be unlawfully granted and liable to be discharged or overturned on appeal.

E 59. I recognise that there may be a danger of the regime being operated in practice in a punitive manner if it is wrongly and not correctly applied. For example if, hypothetically, a judge were to impose an unpaid work requirement as retribution and punishment for taking part in gang-related drug-dealing, that would be wrong and unlawful. If that were to happen, the judge would proceed upon a misdirection as to the law. It is not what the statutory scheme provides for. In a case, for example, where activities are required under an injunction, they must be activities that are considered necessary for either or both of the statutory purposes of prevention and protection.

G 60. For those brief reasons, I accept the submission of the Chief Constable and the Secretary of State that these proceedings and gang-related injunctions generally do not entail determination of a criminal charge within article 6(1), attracting the specific protections in articles 6(2) and (3).

H 61. One of those is, of course, under article 6(2), the presumption of innocence, which is framed as follows, quoting the well-known words:

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Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

In the respondents' composite skeleton at paragraph 39, they submitted:

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It has to be remembered that articles 6(1) to (3) are all part of the overriding requirement of a fair trial. If an application for a gang-related violence injunction [is a proceeding] in respect of a criminal charge, the respondents are entitled to the protection of article 6(2) and (3), and fairness clearly requires the application of the criminal standard of proof.

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62. If I had come to the conclusion that these proceedings did entail the determination of a criminal charge, I would have had to have addressed the question whether that automatically meant that the criminal standard of proof must be applied, and whether the impossibility of doing so here would mean that the section 34 regime is necessarily incompatible with the fair trial guarantee in article 6(2), embodying the presumption of innocence.

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63. As I have not reached that conclusion, I do not have to decide that point. It is certainly the case that in our legal system use of the criminal standard of proof to determine criminal charges is very deeply ingrained; but the court was not informed of the position in other Convention states and no authority was cited to me from Strasbourg or elsewhere on the question whether the article 6(2) presumption of innocence included use of the criminal standard as the only permissible standard for rebutting that presumption and proving guilt.

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Does the use of the civil standard of proof infringe article 6(1) of the Convention?

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64. The respondents submit that the right to a fair hearing requires use of the criminal standard of proof beyond reasonable doubt so that the court is sure that the allegations are made out and not merely that, as section 34(2) provides, the court is so satisfied on the balance of probabilities. They submit, at paragraph 43 of the skeleton argument:

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The nature of the civil trial that is engaged upon, the allegations made and the potential consequences in the form of prohibitions and requirements as set out in sections 34 and 35 of the 2009 Act require the criminal standard of proof to be employed to ensure that there is a fair trial, especially in the light of the limited protection from hearsay evidence given by the Civil Evidence Act 1995.

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65. In oral argument, Mr Stark submitted that if the criminal standard is not applied, there is a real risk that an unfair process will result, in particular through the use of anonymous hearsay, which, he asserted, the Chief Constable is attempting to employ in this very case. He pointed out that the findings could lead to consequences of great gravity for the respondents without commensurate protection afforded by the criminal standard of proof. He drew an analogy with the reasoning in *McCann* where the criminal standard had been found to be appropriate, and with cases in the disciplinary sphere where the criminal standard is sometimes applied in cases where the ability to earn a living is at stake and a person's livelihood is threatened.
66. He submitted, in short, that Parliament had overstepped the mark in enacting that the correct standard was that of the balance of probabilities, that that was unfair and would lead necessarily to an unfair process and that the court should so declare in a declaration of incompatibility under section 4 of the Human Rights Act. He pointed out that the problem could not be solved by a return to what used to be called the heightened civil standard of proof since that was no longer in operation as a means of dealing with the issue.
67. The Chief Constable, through Mr Cohen, submitted that there is nothing unfair about applying the civil standard as provided for in the legislation and made the following points in particular. He drew an analogy with care proceedings in which there is an element of protection in the exercise of the court's jurisdiction, which makes it appropriate for the civil standard of proof to apply. He referred to the well-known words of Baroness Hale in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 3, [2009] 1 AC 11, at paragraph 69:
- There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof... But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.
68. Mr Cohen pointed out that the protective element of this particular jurisdiction is novel and unique, and differentiated it from other types of regulatory order such as a football banning order or an ASBO, bringing this type of case closer to the analogy of care

A proceedings than to the types of cases where undesirable and reprehensible conduct is a subject of the application. He also pointed to procedural protections which he said were more than capable of assuring the fairness of the trial.

B 69. He listed these in his skeleton, referring to section 36(4) of the 2009 Act (the requirement for a review hearing where a prohibition or requirement is to last for more than a year); the section 38 duty of consultation with other agencies before making an application; the restrictions on the court's powers at without notice hearings; and the applicability of the procedural regime set out in Civil Procedure Rules, rule 65.43(3), which has been included specifically to regulate and ensure the fairness of the
C procedures when an application of this kind is made (whether it be in the High Court or a county court) and the accompanying practice direction.

D 70. The Secretary of State, through Miss Broadfoot, supported that position. She submitted that *McCann* case was not authority for the proposition that the criminal standard of proof was a necessary ingredient of a fair trial in the present case. Use of the criminal standard in *McCann* had been informed by considerations of pragmatism which required
E lower courts to decide cases in accordance with a clear and unambiguous standard, at a time when the heightened civil standard was still in use and might, it was thought, be a source of confusion to lower courts if they were required to apply it.

F 71. Ms Broadfoot pointed out that in *McCann*, the legislation then dealing with ASBOs – provisions in the Crime and Disorder Act 1998, as it then stood – was silent on the question of the standard of proof and that therefore their Lordships were free to determine what it should be, untrammelled by legislative compulsion such as exists in the present case.

G 72. I turn to my reasoning and conclusions on this issue. As I have been reminded and have noted, there was a time when the so-called heightened civil standard of proof was used in certain cases where regulatory injunctions were adjudicated upon; and that heightened civil standard was often, in practice, indistinguishable from the criminal standard. An
H example in the case of football banning orders is *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351, [2002] QB 1213. I accept that in *McCann* use of the criminal standard of proof was found appropriate in the context of the then ASBO regime, even though their Lordships did not find that the regime entailed a determination of a criminal charge.

A 73. However, the heightened civil standard of proof was discarded subsequently in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11. Lord Hoffman, after agreeing fully with the speech of Baroness Hale, said this at paragraph 5:

B Some confusion has, however, been caused by *dicta* which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

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E 74. After illustrating from case law examples in those categories, he said this at paragraph 13:

F My Lords, I would invite your Lordships fully to approve these observations. 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 the *McCann* case at page 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.

G 75. In the present case, that last option is not open to the court. The court is faced with a conscious legislative choice to adopt the civil standard in a statute enacted against the background that the House of Lords had decisively, the previous year, rejected the concept of a heightened civil standard. After careful reflection, I have reached the conclusion that use of the civil standard of itself does not necessarily make the hearing of a section 34 injunction application unfair within article 6 of the Convention.
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76. I bear in mind the observations in *McCann* of Lord Steyn at paragraph 37 and of Lord Hope at paragraphs 81 to 83, where they referred to the need for use of the criminal standard to determine applications for ASBOs and the discussion of what was then the heightened civil standard; but the reasoning in *McCann* proceeded from a position where, firstly, the statute was silent on the correct standard of proof; secondly, the

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heightened civil standard, as it was called, was then in favour; and thirdly, pragmatism dictated the need for a clear direction to lower courts to use the criminal standard and not the heightened civil standard.

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77. It seems to me, for those reasons, that the *McCann* case does not provide the answer here. It does not follow from the reasoning in that case that explicit use of the civil standard as a conscious legislative decision would entail a breach of article 6(1).

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78. In my judgment the answer is to be found by applying what Lord Bingham said in the *MB* case, which I have already mentioned, at paragraph 24. After accepting the Secretary of State's submission that non-derogating control order proceedings do not involve determination of a criminal charge, he said this in the latter part of paragraph 24:

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But I would accept the substance of AF's alternative submission: in any case in which a person is at risk of an order containing obligations of the stringency found in this case... the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences. This has been the approach of the domestic courts in cases such as *B* [2001] 1 WLR 340, *Gough* [2002] QB 1213 and *McCann* [2003] 1 AC 787, and it seems to me to reflect the spirit of the Convention.

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79. I think it is those words that I must consider and apply here. In the present case and in this particular jurisdiction, 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.

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80. There are safeguards. They have already been mentioned. There is the two-year time limit. There is the eight-hour time limit for a requirement to be in a particular location. There is the obligation of the trial judge to consider the impact of article 8 of the Convention – the right to respect for private and family life – and there are the express

A provisions in the 2009 Act for minimising interference with religious beliefs and minimising any disruption to attendance at a workplace or educational establishment.

B 81. Even with those safeguards, there will be cases in which the interference with the life of a respondent against whom such an injunction is granted will be substantial. Yet, the respondents themselves accept (or at any rate the fourth respondent through Mr Stark accepts in his individual skeleton argument at paragraph 31), and in my view rightly, as follows:

C It is not contended by the fourth respondent that there are no issues with gang-related violence in Preston. The seriousness of gang-related violence and the effects it can have on the public and indeed those in and associated with gangs is not underestimated, and the murder of Jonjo Highton at the hands of members of a gang, described as The Avenham Gang, is very clear and tragic evidence of that.

D 82. It cannot seriously be disputed that gangs are a scourge in our cities and that the 2009 Act is a response to that. The broader legislative purpose is an avowed attack on the operation, ethos and culture of gangs and the need to break them up. That is clear from the Secretary of State's guidance which includes, at paragraph 2.1, the following:

E By imposing a range of prohibitions and requirements on a respondent, a gang injunction aims

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- to prevent the respondents from engaging in or encouraging or assisting gang-related violence or gang-related drug-dealing activity; and/or
 - to protect the respondent from gang-related violence or gang-related drug-dealing activity.

G Over the medium and longer term, gang injunctions aim to break down violent gang culture, prevent the violent behaviour of gang members from escalating and engage gang members in positive activities to help them leave the gang. Gang injunctions can also be used to protect people, in particular children, from being drawn further into more serious activity.

The witness statement of Ms Gomez is to similar effect.

H 83. That broader legislative purpose cannot be achieved without measures which will have a major impact on the life of persons against whom such injunctions are granted. Again, there is some analogy with the anti-mafia legislation deployed by Italy and discussed in *Guzzardi* and the subsequent cases, as there is with the control order cases, which Lord

A Bingham accepted in *MB* can have a “devastating effect” on the subject and his or her family.

B 84. I accept the point that these injunctions reach a new level of interference with the lives of respondents against whom they are granted, which includes mandatory orders, and that that is provided for in the legislation with only the civil standard of proof and not the criminal standard of proof as the yardstick for the court’s determination in the fact-finding exercise.

C 85. As against that, respondents have the protection of 34(3) which, as I have said, prevents the court from imposing sanctions that are punitive in character and requires the court only to grant injunctions which in its judgment are necessary to promote one or both of the non-punitive purposes of prevention and protection. On balance, and taking all the above into account, it seems to me that I should accept, and I do accept, the submissions of the Chief Constable and the Secretary of State that use of the civil standard does not violate article 6(1) by making the trial of a section 34 injunction application unfair.

Does the admissibility of hearsay evidence in these civil proceedings mean that the respondents’ right to a fair trial under article 6(1) is infringed?

E 86. I will go on briefly to consider the position in relation to hearsay evidence. It is common ground that in civil proceedings hearsay evidence is admissible under the Civil Evidence Act 1995, while in criminal cases it is admissible in more restricted circumstances; for example, those set out in sections 114 to 116 in the Criminal Justice Act 2003. It was common ground that the weight attached to hearsay evidence will be affected by the factors set out in section 4 of the Civil Evidence Act 1995. Those statutory provisions are supplemented by rules of court which enable a party wishing to cross-examine the maker of a hearsay statement to seek an order directing his or her attendance at court to answer questions.

F 87. The respondents complain of reliance, in this case, by the Chief Constable on unattributed anonymised hearsay. They refer to the dangers alluded to by Brooke LJ in the judgment of the court in *Moat Housing Group Ltd v Harris* [2006] QB 606, 131, in particular at paragraph 140 where he said this:

While nobody would wish to return to the days before the Civil Evidence Act 1995 came into force, when efforts to admit hearsay evidence were beset by

A complicated procedural rules, the experience of this case should provide a salutary warning for the future that more attention should be paid by claimants in this type of case to the need to state by convincing direct evidence why it was not reasonable and practicable to produce the original maker of the statement as a witness. If the statement involves multiple hearsay, the route by which the original statement came to the attention of the person attesting to it should be identified as far as practicable. It would also be desirable for judges to remind themselves in their judgment that they are taking into account the section 4(2) criteria so far as they are relevant...

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C 88. Mr Stark in his individual skeleton argument for the fourth respondent referred me to what was said by Mummery LJ in *Manchester City Council v Lee* [2004] 1 WLR 349 CA 30, which is well worth repeating here:

D Careful consideration needs to be given by the court in each case to the scope of the injunction which is justified by the evidence. In the exercise of its discretion, the court must ensure that the injunction granted is framed in terms appropriate and proportionate to the facts of the case. Thus, if the judge finds that there is a risk of significant harm to a particular person or persons, it would usually be appropriate for the injunction to identify that person or those persons so that the respondent knows the circumstances in which he might be in breach of the injunction and liable for contempt of court if he caused a nuisance or annoyance to them in the future.

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F 89. I would add that in nearly every case it is likely to be necessary for the trial judge to consider the impact of article 8 considerations when determining the scope of a gang-related injunction and to make a conscious assessment of the extent to which any interference is justified under the second limb of article 8, given the likelihood that the relief sought in the application may be such as to cause a substantial interference with the private and family life of the respondent.

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H 90. Mr Cohen informed me that, unlike other types of regulatory injunctions such as ASBOs, football banning orders and formerly sexual offences prevention orders, which were dealt with in the magistrates' court in civil proceedings, section 34 gang-related injunctions cannot be dealt with in the magistrates' court but must be dealt with in the High Court or a county court. He pointed out that in a magistrates' court the admission of hearsay evidence is governed by the Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999, which provide for a procedure broadly similar to the procedure under the Civil Procedure Rules. A useful account of that is given in

A paragraph 32 of May LJ's judgment in *R (Cleary) v Highbury Corner Magistrates' Court* [2007] 1 WLR 1272. It is not the case in the magistrates' court, still less in this court or the county court, that hearsay evidence is necessarily and automatically admitted.

B 91. I was reminded by Mr Stark, finally, that there is a longstop power under Civil
C Procedure Rule 32.1 to exclude evidence that would otherwise be admissible. But, he
D submitted, that would not be available to render inadmissible hearsay evidence that is
made admissible by section 1 of the Civil Evidence Act 1995, exclusion of which would
circumvent the regime in section 4 of that Act which lists matters that go to weight of
hearsay evidence but do not permit outright exclusion of it (cf. the 2015 *White Book*,
volume 1 at page 1050 referring to David Richards J's decision in *Daltel Europe Ltd v
Makki* [2005] EWHC 749 (Ch), in which he indicated that there was no need to use the
power under CPR 32.1 in a case where section 4 of the Civil Evidence Act 1995 was
available).

E 92. In my judgment, the admissibility of hearsay evidence does not of itself entail a breach
of article 6(1) of the Convention. It is tempered by the ability of the court to direct
attendance of available witnesses, to adopt appropriate case management measures to
enable witnesses to be put at ease and to adjust the weight to be given to hearsay
evidence where the witness does not attend. In an appropriate case, that could include
deciding that the weight to be attached to such evidence is nil or negligible. That seems
to me sufficient protection for the fairness of the trial process.

F Further Directions

G 93. I conclude that the respondents' arguments founded on the Human Rights Act 1998 and
article 6 of the Convention, do not persuade me to dismiss the Chief Constable's
application as ill-founded or as invoking an inherently unfair process, and I therefore
decline to grant any declaration of incompatibility under section 4 of that Act.

H 94. Each of the respondents has also separately advanced specific factual argument to
support their contention that the case against each of them lacks evidential substance.
Mr Stark for the fourth respondent goes as far as to submit that the claim against his
client has no reasonable prospect of success on the facts and ought to be dismissed on
that ground in any event.

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95. Mr Justice Turner in his order of 15 September 2014 directed, at paragraphs (d) and (e) in his order, that it should be determined at this hearing whether, in the light of the court's findings on the human rights based arguments and on the evidence adduced by the Chief Constable, the conditions in section 34(2) and (3) of the 2009 Act can be established and what directions are thereafter necessary for the proper disposal of these applications in the light of the court's findings.

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96. It seems to me that I should do no more at this stage than give directions for the trial of the application on the facts of each case. It would not be appropriate, nor is it practical in the time available, to pronounce on the factual merits of each application at this hearing. That would require a thorough examination of the factual material deployed in each case.

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97. An application by two of the respondents to discharge the interim injunction against them has already failed and an application for permission to appeal against that decision is pending. There is no application before me to discharge or vary the interim injunctions, save the human rights based overarching challenge which has failed. The applications against each respondent should therefore be determined on their factual merits.

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98. To that end, I propose to transfer the application back to the County Court whence it came, so that a determination can be made either that the interim injunctions, with any necessary adjustments, should be made final (subject to possible review dates and the mandatory two-year time limit), or that the applications should be, if ill-founded, dismissed.

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99. I will hear the parties on what further directions, if any, are thought necessary to bring the matter back before the County Court. In particular, I will consider, in so far as practical in the time available, any direction for the attendance of witnesses for the applicant to answer questions from the respondents. It will be important for the trial judge to follow carefully the guidance of Mummery LJ in *Manchester City Council v Lee*, which I have quoted above.

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100. Finally, I endorse the following proposition in Mr Stark's skeleton argument (subject to the point that the word "guilt" is not apt in a preventive and protective, and not punitive, jurisdiction):

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Injunctions cannot be made simply on the basis of a precautionary measure for the general good for to do so risks guilt by association and the imposition of prohibitions on a person's autonomy and liberty that are not justified by the evidence against them.

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101. I will hear counsel on the form of the court's order and on other consequential matters.

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