Case No: B2/2012/3144

Neutral Citation Number: [2013] EWCA Civ 552
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BIRMINGHAM COUNTY COURT
His Honour Judge Worster
2BM01021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 May 2013

Before :

LORD JUSTICE MAURICE KAY
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE JACKSON

- -

Between :

BIRMINGHAM CITY COUNCIL	**Claimant/ Respondent**
- and -	
GAVIN JAMES	**Defendant/ Appellant**
- and -	
THE SECRETARY of STATE for the HOME DEPARTMENT	**Intervener**

- -

(Transcript of the Handed Down Judgment of
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Mr. Ramby de Mello and Mr. Trevor Browne (instructed by **Shelter (West Midlands)**) for the **appellant**
Mr. Jonathan Manning and Miss Sarah Salmon (instructed by **Birmingham City Council**) for the **respondent**
Mr. Duncan Atkinson (instructed by the **Treasury Solicitor)** for the **intervener**

Hearing date : 17th April 2013

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Judgment

Lord Justice Moore-Bick :

1. This is an appeal against an order made by His Honour Judge Worster granting the respondent, Birmingham City Council ("the Council"), an injunction under section 34 of the Policing and Crime Act 2009 against the appellant, Gavin James. The injunction prohibits the appellant from entering a prescribed area of the city (save for certain limited purposes) and from associating with 19 named persons or gathering with them in any public place within the city. It also requires him to engage, and to maintain engagement, with The Centre for Conflict Transformation in relation to the drawing up of a programme of activities for him to undertake. A power of arrest has been attached to the order.

2. For some time Birmingham and some other major cities have suffered from the activities of urban street gangs composed of large numbers of young men. In most cases the gangs are identified by the particular neighbourhoods in which they are based and which they regard as their own territory. In some cases gang members wear clothing of a distinctive type or colour as a mark of membership. Street gangs are responsible for a large amount of crime, particularly violent crime and crime involving drugs and the use of firearms. Violence of a very serious kind, including the use of automatic weapons, is liable to break out when one gang invades the territory of another or when one gang takes reprisals for actual or perceived slights by another.

3. Birmingham suffers from the activities of two main urban street gangs, the 'Johnson Crew' and the 'Burger Bar', each of which has a number of subsidiary or affiliated gangs. The Johnson Crew is based in the Newtown area of the city, the Burger Bar in the Handsworth area. The Johnson Crew is associated with the colour blue.

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 parts of the city and associating with other gang members. However, in *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, [2009] 1 W.L.R. 1961 this court held that section 222 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 for an Anti-Social Behaviour Order ("ASBO").

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 undertaking prescribed activities . It provides as follows:

> "**34 Injunctions to prevent gang-related violence**
>
> (1) A court may grant an injunction against a respondent aged 14 or over under this section if 2 conditions are met.

(2) The first condition is that the court is satisfied on the balance of probabilities that the respondent has engaged in, or has encouraged or assisted, gang-related violence.

(3) The second condition is that the court thinks it is necessary to grant the injunction for either or both of the following purposes—

(a) to prevent the respondent from engaging in, or encouraging or assisting, gang-related violence;

(b) to protect the respondent from gang-related violence.

(4) An injunction under this section may (for either or both of those purposes)—

(a) prohibit the respondent from doing anything described in the injunction;

(b) require the respondent to do anything described in the injunction.

(5) In this section "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 3 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."

6. The appellant grew up in Newtown and his mother still lives there, although he does not. It was the Council's case that he was a senior and influential member of the Johnson Crew or one of the subsidiary gangs affiliated to it. On 17th April 2011 the appellant had been stabbed in the thigh while waiting for a friend to be released from detention, that attack being carried out by way of some form of gang-related reprisal. On 29th December 2011 he and one of his associates had been the victims of a gang-related shooting in Aston, in the course of which they were both hit by a number of bullets fired from an automatic weapon. The Council sought to establish that the appellant had been involved in one way or another in gang-related violence on a number of occasions, but in the end the judge was satisfied that he had been engaged in, or had encouraged, gang-related violence on only one occasion when he and a group of about 30 other young men, all wearing some item of blue clothing, had gone to a carnival in Handsworth Park, deep in Burger Bar territory, on 7th August 2011.

7. The judge referred to the evidence of a number of police officers who were present in Handsworth Park at the relevant time. He recorded that one of them, P.C. Rose, had

said that she had seen a large group of black men walking in the park and recognised the appellant among them. She said that the group walked to the centre of the park with the appellant in the middle surrounded by about 30 men, each wearing some sort of blue clothing. Her impression had been that they were protecting the appellant and walking "like a pack". On the basis of that and other evidence the judge was satisfied that the appellant had been in the park on the afternoon of 7th August 2011 and that is not now disputed. What is disputed, however, is whether on that occasion he engaged in or encouraged gang-related violence. Mr. Manning for the Council submitted that the presence of the group in the park in the heart of Burger Bar territory itself constituted a threat of gang-related violence.

8. The judge expressed his conclusion in the following terms:

> "106. That evidence satisfies me that Mr James was indeed in Handsworth Park on the afternoon of the Carnival on 7 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. Mr James was part of a group of men who were affiliated to the Johnson Crew, 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. . .
>
> . . .
>
> 109. 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 to fight. In the context of one gang marching into the territory of another it is unnecessary for there to be one aggressor and one victim. The one gang is there to attack and/or to provoke and to respond to an attack from the rival gang. Mr James' group presented an aura of menace; that is what he and the others in the group intended and that is how their presence and intent would have been understood by those affiliated to the Burger Bar."

9. In the event, that was the only occasion on which the judge found that the appellant had engaged in or encouraged gang-related violence, but if that finding is sustainable it was sufficient to satisfy the requirement of section 34(2) and open the way to the grant of an injunction if the judge thought that it was necessary to do so for either of

the purposes set out in subsection (3). Having referred to various factors, including the prevalence of gang culture in Birmingham, the concerns of the police and others about the appellant's involvement in it, his powerful personality, which made him a leader rather than a follower, and his previous unwillingness to comply with supervision and court orders, the judge had no difficulty in concluding that it was necessary to grant an injunction both to prevent Mr James from engaging in, encouraging or assisting gang related violence and to protect him from it. He therefore made the order to which I have referred.

10. Mr. de Mello submitted, first, that the judge was wrong to find that the appellant had engaged in gang-related violence at the carnival on 7th August 2011. There was no evidence that he had himself engaged in violence or made threats of any kind, nor had he assisted or acted in any way to encourage violence or the threat of violence by others. He submitted that the acts to which section 34(2) refers all require what he described as 'mens rea', by which he meant an intention to promote gang-related violence or recklessness as to whether his conduct promoted it. In particular he submitted that encouraging gang-related violence required a deliberate act of some kind, not merely passive presence at the scene. There was no evidence, he said, that the appellant had deliberately encouraged violence of any kind at the carnival.

11. I do not think it helpful to introduce the concept of mens rea into section 34(2). Although the section is clearly directed primarily to deliberate conduct amounting to participation in, or encouragement of, gang-related violence, it is possible that in some, no doubt unusual, cases it could be held to apply to certain kinds of conduct which could be said to amount to inadvertent encouragement. However, the question does not arise in this case and it is neither necessary nor desirable to explore precisely where the boundary lies. In my view Mr. de Mello's submission fails to take proper account of what occurred in Handsworth Park. Those present were all members of a group consisting of more than three people, identifiable by name, by the colour blue and by its association with the Newtown area of Birmingham. Moreover, they were acting together as members of that group rather than in any other capacity. The evidence fully supported the judge's finding that the group, including the appellant, walked through the park in a deliberately provocative demonstration that they were willing to defy the Burger Bar in its own territory, by force if necessary. The judge was therefore entitled to find that the actions of the group constituted a threat of gang-related violence. Although the evidence suggested that the appellant was the leader of the group, the statement of defiance was made by all those involved acting as a body and therefore every member was engaged in what the group was doing. In my view the appellant, as one member of that group, was actively and deliberately engaged in gang-related violence together with all the others. There was no question of his being present in a purely passive capacity.

12. Mr. de Mello's next submission was that the judge was wrong to hold that it was necessary to grant an injunction in this case, because an alternative remedy was available in the form of an application for an ASBO, which would have been equally efficacious and less disadvantageous to the appellant. Since an ASBO cannot be imposed for less than two years (as opposed to a maximum of two years in the case of a gang injunction), is not subject to mandatory reviews (unlike a gang injunction imposed for more than one year) and gives rise on breach to a criminal offence punishable by a range of penalties including imprisonment for up to five years

following conviction on indictment, it is difficult to see why it should be a preferable remedy from the appellant's point of view. It is true that a breach of the injunction will constitute a contempt of court punishable by imprisonment, but the court has a discretion in relation to punishment, which is in any event limited to a maximum term of two years' imprisonment. According to Mr. de Mello, however, the critical difference, lies in the standard of proof which must be met in order to obtain the order. In order to grant an ASBO the court must be satisfied to the criminal standard that the defendant has acted in an anti-social manner, i.e. in a manner that has caused or is likely to cause harassment, alarm or distress to one or more persons not of the same household as himself (see section 1(1) of the Crime and Disorder Act 1998, and *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 A.C. 787). That higher standard of proof, he submitted, provides a greater degree of protection to the defendant and for that reason the court should not grant a gang injunction unless it is satisfied that an ASBO will not achieve the desired outcome.

13. For the reasons I have indicated I do not think that that an ASBO would necessarily involve a less serious interference with the appellant's personal or private life. That would depend on the terms of the order in each case. It is true that the standard of proof that must be met in order to obtain an ASBO is higher than for a gang injunction, but the facts that must be established are different and less serious than those required to support a gang injunction. It may, therefore, not be as difficult to prove them, even to the higher standard. However, the truth is that the two statutes are directed towards rather different social problems, which is why in my view Mr. de Mello's submission cannot succeed. Following the decision of this court in *Birmingham City Council v Shafi*, in which the view was expressed that an ASBO, rather than an injunction in support of the criminal law, was the appropriate means by which to restrain the defendant from taking part in gang-related violence, Parliament enacted Part 4 of the Policing and Crime Act 2009, which makes specific provision for the granting of injunctions for that purpose. There can be no doubt, therefore, that Part 4 represents Parliament's considered response to the particular problem of gang-related violence. Although some kinds of gang activity may be classified under the generic description of anti-social behaviour, section 1(1) of the Crime and Disorder Act 1998 was not enacted with a view to dealing specifically with the consequences of gang culture. It is much broader in nature and is apt to apply to anti-social behaviour of all kinds. Section 34, as its terms indicate, is aimed at a particular kind of mischief and the choice of the civil standard of proof appears to have been a deliberate response to the view expressed by the majority in *Birmingham City Council v Shafi* about the appropriate standard of proof in proceedings for an injunction of the kind that the Council was seeking. In those circumstances I do not think it can possibly have been the intention of Parliament that when considering whether it is necessary to grant a gang injunction the court should ask itself whether an ASBO would provide an adequate remedy. If the condition in subsection (2) is satisfied, it is sufficient that the court consider whether it is necessary to impose a restriction on the respondent's activities to achieve one or other of the purposes set out in subsection (3). The judge held that if the defendant's conduct fell within both pieces of legislation the Council could make an application under whichever it considered the more convenient or appropriate. In principle I think that is right, but in any event I am unable to accept that an application under section 34 was inappropriate. In my view, therefore, this ground of appeal fails.

14. The appellant's next ground of appeal was based on the concept of personal autonomy, that is, the principle that a person has the right, subject to any limitations imposed by law, to decide what is in his own interests and to determine the course of his own life in accordance his beliefs and wishes. This principle is reflected in article 8 of the European Convention on Human Rights, under which the state is obliged to respect a person's private life. The state also has certain obligations under the Convention to provide a reasonable measure of protection against harm likely to be caused by the criminal activities of others. Mr. de Mello submitted that for the court to grant an injunction against a person imposing restrictions on him contrary to his wishes in order to protect him from gang-related violence would be to infringe that person's right to respect for his private life.

15. The right under article 8 to respect for private and family life is not, of course, absolute and an interference with that right may be justified if it is in accordance with the law and necessary in a democratic society to combat crime and disorder and to safeguard the rights and freedoms of others. In the context of gang-related violence I find it difficult to imagine circumstances in which the court might be asked to grant an injunction for the *sole* purpose of protecting the respondent, because violence of that kind directed against the respondent will invariably involve crime and disorder of some kind, in the suppression of which the public has a real interest. We are all too familiar with cases in which innocent bystanders have been injured or killed through being caught in the crossfire between rival gangs. At all events, the question does not arise in this case, because there were strong grounds for holding, as the judge did, that an injunction was necessary to prevent the respondent from engaging in, encouraging or assisting gang-related violence. As the incident at the carnival demonstrated, violence is likely to flare up when members of one gang enter the territory of a rival gang. In the judge's view it was necessary to exclude the appellant from certain areas of the city precisely for that reason. The requirement that he engage with The Centre for Conflict Transformation was necessary in the view of the judge to help him break away from gang culture and to that extent it served both statutory purposes. This is not a case in which it can be said that the injunction was granted simply for the protection of the appellant. Whether that will ever be so remains to be seen.

16. Under the terms of the injunction the appellant is excluded from the area of the city in which his mother lives, but the order does not prohibit him from having contact with her elsewhere and allows him to visit her at home on a limited number of occasions and subject to certain restrictions. He says that the limits on his freedom of movement are too restrictive and that he should be allowed to visit his mother's house whenever he wishes.

17. I am unable to accept that submission. It was for the judge to decide on the basis of the evidence before him whether in order to prevent the appellant from engaging in gang-related violence it was necessary to exclude him from the Newtown area of Birmingham altogether or whether he could be allowed to go there from time to time, and if so, subject to what restrictions. There was plenty of evidence to support the conclusion that the gang of which the appellant was a leading member had its base in the Newtown area and that for a time its leading members, including the appellant, used to meet at his mother's house. There was clearly a significant risk that, if the appellant were allowed to visit his mother at home whenever he wished, he might chance to meet other members of the gang and encourage further acts of violence in

which he might himself take part. It was for the judge to assess the magnitude of the risk which visiting that part of Birmingham posed and to decide what restrictions were necessary to counter it. This court is not entitled to interfere with his decision unless it is clear that he proceeded on a clearly inappropriate basis or that his decision is for some other reason plainly wrong. I do not think that there are any grounds for criticising the terms of the order and I would therefore reject this ground of appeal as well.

18. For these reasons I would dismiss the appeal.

Lord Justice Jackson:

19. I agree that this appeal should be dismissed for the reasons stated by Lord Justice Moore-Bick. I wish, however, to add a few words on the issue concerning overlapping remedies.

20. In recent years Parliament has provided three different procedures for pre-empting violent or other unacceptable conduct, if there is good reason to anticipate such conduct. They are:

    i) an application for an anti-social behaviour injunction ("ASBI") under chapter 3 of Part 5 of the Housing Act 1996 ("the 1996 Act");

    ii) an application for an anti-social behaviour order ("ASBO") under Part 1 of the Crime and Disorder Act 1998 ("the 1998 Act") and

    iii) an application for an injunction to restrain gang-related violence ("IRGV") under Part 4 of the Policing and Crime Act 2009 ("the 2009 Act").

    I will refer to ASBIs, ASBOs and IRGVs compendiously as "pre-emptive orders".

21. 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 ECHR article 6.2 and 6.3. But those issues do not require consideration in the present case, which is a straightforward one.

22. An ASBO may be made by a magistrates' court or a county court. An ASBI may be made by a county court or the High Court. An IRGV may be made by a county court or the High Court. The 1996 Act, the 1998 Act and the 2009 Act each set out different conditions which must be fulfilled before the court, in the exercise of its discretion, may make a pre-emptive order. There are many situations in which, on the facts, two different pre-emptive orders are available. Indeed it is possible to think of situations in which the conditions are fulfilled for making either an ASBI or an ASBO or an IRGV. One or two such scenarios were canvassed in argument.

23. The appellant's third ground of appeal is:

> "The learned judge erred in law in holding that the Respondent's application for a gang injunction instead of applying for an ASBO was the closest fit given in particular

that the evidence was that the ASBO had worked appropriately previously and achieved its purpose."

24. In support of this ground Mr de Mello relies upon *Samaroo v SSHD* [2001] EWCA Civ 1139, [2002] INLR 55 and *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, [2009] 1 WLR 1961.

25. *Samaroo* was a case in which two foreign nationals with leave to remain in this country committed serious crimes. The Secretary of State ordered their deportation. Both the High Court and the Court of Appeal dismissed judicial review challenges to the deportation orders. In the Court of Appeal Dyson LJ gave the leading judgment, with which Thorpe LJ and Dame Elizabeth Butler-Sloss P agreed. In considering whether the deportation orders were proportionate, Dyson LJ accepted the submission that proportionality usually had to be considered in two stages. The first question was whether the objective could be achieved by a means which interfered less with the individual's rights. If the answer to the first question was no, one came on to the second question. The second question was whether the measure had an excessive or disproportionate effect on the interests of the affected person.

26. In *Shafi* the Birmingham City Council applied to the county court for injunctions under s. 222 of the Local Government Act 1972 to restrain alleged gang members from entering the city centre. The county court dismissed that application and the Court of Appeal upheld that decision. The Court of Appeal held that, although the county court had jurisdiction to grant the order sought, it was right not to do so; the proper course was for the council to seek an ASBO in the magistrates' court. A significant feature of *Shafi* was that IRGVs were not then available: see paragraphs 4 and 5 above in the judgment of Moore-Bick LJ. Section 222 of the 1972 Act did not give councils any substantive powers. It was simply a procedural section which gave them powers (formerly vested only in the Attorney General) to apply for injunctions: see the judgment of Sir Anthony Clarke MR and Rix LJ at [24]. The council was seeking to make novel use of a general power. Since a tailor-made remedy had been provided by Parliament, namely an application for an ASBO, it was inappropriate to proceed under s. 222.

27. In the county court Mr de Mello submitted that the judge should dismiss the council's application for an IRGV because the law provided for a lesser and more appropriate remedy, namely an ASBO. The judge rejected that argument, both as a matter of principle and because an IRGV was the "closest fit" in the circumstances of this case. By his third ground of appeal Mr de Mello seeks to revive that same argument in this court.

28. In my view, although Mr de Mello presents his case attractively, the third ground of appeal is misconceived. The courts referred to in paragraph 22 above now have at their disposal three different pre-emptive orders for dealing with violent or anti-social behaviour. Defence counsel can, of course, invite the first instance court to impose a less draconian order than that which is sought by the applicant. The judge will then exercise his or her discretion to make whatever order seems most appropriate in the circumstances, provided that the statutory conditions are satisfied. The judge may direct that an application may be made either to a different court or for a different remedy from that which is claimed. On such an application, the judge may exercise his powers under s. 1B of the 1998 Act (which enables an ASBO to be made in the

course of ongoing county court proceedings). There is, however, no "closest fit" principle which cuts down the court's statutory powers to make pre-emptive orders. Such a principle cannot be derived from either *Samaroo* or *Shafi*.

29. In the present case the conditions set out in s. 34 of the 2009 Act are satisfied. Therefore the court has the power to make an IRGV. It is not a legitimate ground upon which to attack the judge's exercise of discretion that an ASBO (or in different circumstances an ASBI) is the "closest fit". If the statutory conditions are satisfied, the Court of Appeal will only set aside an IRGV in an exceptional case where the judge has erred in the exercise of his or her discretion. The judge in the county court is well familiar with local conditions. He or she knows what gangs (if any) are operating and where. Absent any error of principle, the judge's exercise of discretion should be respected.

30. This analysis is supported by the Court of Appeal's decision in *Swindon Borough Council v Redpath* [2009] EWCA Civ 943, [2010] PTSR 904. In that case the local authority obtained an ASBI to restrain a former tenant from engaging in anti-social behaviour or entering the area where he used to live. The Court of Appeal upheld that order. In doing so, the court rejected a challenge based on the proposition that an ASBO was more appropriate than an ASBI. See the judgment of Rix LJ, with which Lord Neuberger and Carnwath LJ agreed, at [51].

31. Let me now draw the threads together. I agree that this appeal should be dismissed. The purpose of this short supplementary judgment is to emphasise that in future cases the Court of Appeal should not be invited to trawl through the legislation in some quest for the "closest fit". The principal issue (and usually the only live issue) in any appeal for which permission is granted will be whether the statutory conditions were satisfied.

Lord Justice Maurice Kay :

32. I agree with both judgments.