Chapter 19
Football and Crowds: *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213

Geoff Pearson

Abstract In 2000, the Chief Constable of Derbyshire applied to a Magistrates' Court for banning orders against Gough and Smith under section 14B of the Football Spectators Act 1989. The Chief Constable adduced evidence that Gough had been convicted of common assault in March 1998 and that Smith had been convicted of assault with intent to resist arrest in November 1990. The Chief Constable also adduced in evidence "profiles" gathered by the police from information supplied by informant "spotters" at football matches. The spotters purportedly described incidents at domestic football matches involving Derby County FC between September 1996 and June 2000 in which Gough and Smith had participated. On the balance of probabilities the district judge was satisfied that the preconditions for making an order pursuant to section 14B(4)(a) and (b) of the Football Spectators Act 1989 were met, and namely that Gough and Smith had caused or contributed to violence or disorder in the United Kingdom or elsewhere and that there were reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football match. The district judge accordingly made banning orders against Gough and Smith for the minimum period of two years. Gough and Smith appealed to the High Court (and on dismissal there to the Court of Appeal) inter alia on three grounds: (i) whether the restrictions on their freedom of movement were compatible with EU law; (ii) whether the restrictions on their movement were otherwise at odds with the principle of proportionality and (iii) whether the procedural and evidential rules in section 14B, including its low standard of proof, violated the requirements of procedural fairness applicable to criminal charges contained in Article 6 ECHR. A decade or so after the judgment, this chapter reviews the Court

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of Appeal's decision and looks at its impact upon the human rights of football fans and policing tactics to prevent football crowd disorder.

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19.1 Introduction

In the summer of 2000, I was carrying out crowd observations amongst England fans in Charleroi town square shortly before England beat Germany in a UEFA European Championships Group Stage match. The crowd in that square, around 2,000 England fans interspersed with tourists and locals, had just been subjected to water-cannon and baton-charge dispersal by the Belgian riot police. This show of force had been a response to a very minor incident of disorder in one corner of the square and, although some England fans retaliated to the draconian police response by throwing chairs, the vast majority of those who were subjected to it had not been involved in any disorder.[1] Around 1,500 England fans including myself were subsequently corralled by Belgian police and detained in the square until shortly before the match when those with tickets were allowed through the police cordon. Corralled with me that day was a Derby County FC fan called Gary Smith, and the evidence of this containment was subsequently used to help obtain a Football Banning Order ("FBO") under section 14B of the Football Spectators Act 1989 (as amended by the Football Disorder Act 2000). The disorder in the square that resulted from the ill-advised intervention by the Belgian riot police was to be a key factor in the introduction of that amending legislation.

Smith, and another Derby fan Carl Gough, appealed against their bans and the case reached the Court of Appeal in 2002. Lord Phillips MR's judgment in that case was to set the precedent for the imposition of s14B FBOs, ruling them lawful under the EU law and the European Convention of Human Rights ("ECHR"), but setting down strict standards about under what circumstances they could be

[1] For background see generally Crabbe 2003; Stott and Pearson 2007 and Weed 2001.

granted.[2] This chapter returns to *Gough and Smith v Chief Constable of Derbyshire*[3] ten years after the judgment and looks at the impact of the case upon the human rights of football fans and policing tactics to prevent football crowd disorder.

19.2 The Football Disorder Act and the Football Banning Order Scheme

It is clear that the Charleroi incident was pivotal in justifying the introduction of the legislation amending the Football Spectators Act 1989 by way of the Football (Disorder) Act 2000,[4] though, arguably, enough political momentum had already been gathered following the more serious disorder involving England fans in Marseilles at the 1998 FIFA World Cup to ensure that the changes brought about to the FBO scheme would have occurred at some point that decade.[5] The media response to the disorder, and the arrest of 965 England fans in Belgium that week, was to place immediate pressure on the New Labour government to find a way to ban "known hooligans" who had not previously been convicted of a football-related offence and could at the time therefore not be subjected to a FBO. Within a month of Charleroi, the Football (Disorder) Act 2000 had entered the statute book.[6] The 2000 Act radically extended the existing FBO regime, introducing FBOs "on complaint" and thus enabling magistrates and judges to impose orders on fans who did not possess a previous "football-related" conviction, as had previously been required under the scheme initiated by the Public Order Act 1986 and the Football Spectators Act 1989. For the purposes of this review, the key amendment to the Football Spectators Act was the insertion of a new section 14B:

[2] See further Pearson 2002.

[3] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213.

[4] See the House of Lords Debate on the Football Disorder Bill, HL Deb, 20 July 2000, vol 615, cols 1182–1262.

[5] In November 1998, the British Government issued a consultation document, entitled the *Review of Football-Related Legislation*, which set out suggested changes to improve and strengthen the existing legislation relating to football. The measures proposed included recourse to the law to prevent a range of offenders from attending matches domestically and travelling to and attending designated matches abroad. Subsequently, a private members bill led to the enactment of the Football (Offences and Disorder) Act 1999, though the provisions on banning orders were very much a "watered down" version of what was to follow.

[6] FBOs on complaint can be seen as part of New Labour's wider policy of introducing "hybrid" measures to deal with low-level criminality and most notably Anti-Social Behaviour Orders. See generally Ashworth 2004; Brownlee 1998; Crawford 2008, 2009 and Duff and Marshall 2006. Note in particular Von Hirsch and Simester 2006 who refer to such "hybrid" provisions as "two-step prohibitions" and launch a strong criticism on the constitutional legitimacy of Anti-Social Behaviour Orders in particular.

Banning orders made on a complaint.

(1) An application for a banning order in respect of any person may be made by the chief officer of police for the area in which the person resides or appears to reside, if it appears to the officer that the condition in subsection (2) below is met.
(2) That condition is that the respondent has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere.
(3) The application is to be made by complaint to a magistrates' court.
(4) If—(a) it is proved on the application that the condition in subsection (2) above is met, and (b) the court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches, the court must make a banning order in respect of the respondent.

This meant that rather than FBOs being imposed upon those proven to have committed football-related offences, the police could now also pursue orders against those they suspected were involved in football-related violence or disorder but against whom they had insufficient evidence to gain a criminal conviction. Once banned, fans would be prevented from attending matches, or the immediate geographical area around matches, for between two and three years[7] and would have to surrender their passports to the police when England or their club side played abroad, preventing them from travelling. It was claimed that the legislation would have prevented the disorder seen at Marseilles and Charleroi, but this was not supported by the evidence as to why that disorder occurred or who was involved. In both incidents, UK Football Intelligence Officers ("FIOs") present at the scene noted that "known" (but not banned) hooligans were typically *not* involved, and in Belgium only 3 % of those arrested were known to the UK authorities as potential troublemakers.[8] In short, there was no evidence that FBOs on complaint would have prevented or reduced the disorder that was used to justify the introduction of the provision.

19.3 *Gough and Smith* at the Court of Appeal

The Chief Constable of Derbyshire applied to a magistrates' court for the imposition of FBOs on Gough and Smith. In order to satisfy the requirements of section 14B of the Football Spectators Act 1989, the Chief Constable as the applicant needed to demonstrate that Gough and Smith had first been involved in previous disorder or violence. The Chief Constable adduced evidence that Gough had been convicted of common assault in March 1998 and that Smith had been convicted of assault with intent to resist arrest in November 1990. More

[7] This was increased to three to five years by the Violent Crime Reduction Act 2006. See in particular s52 and Schedule 3 of that Act.

[8] See generally Stott and Pearson 2007.

problematic was the need to prove, pursuant to section 14B(4)(b) of the 1989 Act, that there were "reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches". Here, the applicant relied upon police "profiles" gathered on the defendants, noting their presence in groups that were considered by the police to be "risk", and their association with others who had been involved in football-related disorder. In fact, the local FIOs believed that Gough and Smith were "prominent" in a group calling itself the "Derby Lunatic Fringe". This "risk" group had been under observation at and around football matches for some time, but, although the group and some of the defendants' "associates" had been involved in disorder with rival risk groups during this period, neither defendant had been seen directly involved in violence or disorder.

The FBO was granted and an appeal by Gough and Smith was dismissed by the High Court.[9] The Court of Appeal, which ultimately also dismissed Gough and Smith's appeal, did not identify as problematic the fact that the magistrates' court and, later the High Court, had failed to take an objective and impartial stance on the nature and seriousness of the phenomenon of football-related disorder and the so-called "Derby Lunatic Fringe" in particular. As with the High Court, Lord Phillips MR in the Court of Appeal uncritically accepted evidence adduced by the Home Office about the organisation and seriousness of football-disorder and deemed that "the word 'warfare' is hardly too strong" to describe what took place in these confrontations.[10] The Master of the Rolls also paid particular attention to the profile noting that "Smith was seen in the square in Charleroi after the disorder had occurred corralled by the Belgium police with around 15 other Derby prominents and 1,500 other England supporters",[11] despite the fact that this proved nothing in terms of propensity to having been involved in the disorder that took place in that square. Overall, Lord Phillips MR was of the opinion: "In each case the cumulative effect of the individual observations pointed unequivocally to the appellant being one of the Derby County football 'prominents'."[12]

The appeal focussed primarily upon two arguments. First, that a consequence of the imposition of the FBOs was that they had to surrender their passports during certain "control periods" around matches abroad involving Derby County FC and England. In doing so, they contended, the FBO scheme equated to a de facto restriction on both their freedom of movement and their right to leave a member state enshrined in EU law. Lord Phillips MR felt that this restriction was only lawful if it satisfied the test of proportionality, which he identified from the case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and*

[9] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 459.

[10] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1224, Lord Phillips MR.

[11] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1229, Lord Phillips MR.

[12] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1245, Lord Phillips MR.

Housing.[13] This test required the court to determine whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it and (iii) the means used to impair the right or freedom are no more than are necessary to accomplish the objective. In applying the *de Freitas* test on proportionality, the Court of Appeal concluded:

> …it is proportionate that those who have been shown to constitute a real risk of participation in football hooliganism should be required to obtain permission to travel abroad during periods when prescribed matches are taking place and to demonstrate that the purpose of doing so is other than attendance at the prescribed match or matches. We are not able to envisage a scheme which would achieve the public policy objective that involves a lesser degree of restraint.[14]

The second key argument was that the restrictions upon liberty imposed by the orders (most notably the exclusion zones around stadia and city centres around matches and the requirement that they surrender their passports when relevant matches took place abroad) took the form of a criminal penalty and therefore, according to European Court of Human Rights' ("ECtHR") jurisprudence, could only be imposed following the correct criminal procedure.[15] In contrast, the FBO scheme under section 14B of the Football Spectators Act 1989 operated under a civil procedure providing fewer rights and protections for defendants. This argument also failed. Lord Phillips MR ruled that the purpose of the orders was preventative rather than punitive, meaning that the civil procedure did not breach article 6ECHR (right to a fair trial).[16] As a result, the appeal was dismissed and the FBOs remained in place on both defendants.

However, in reaching this decision on the second limb of the *Gough* appeal, Lord Phillips MR made what should have been a vital change to the way in which FBOs "on complaint" are awarded. The Court of Appeal observed that because FBOs "impose serious restraints on freedoms that the citizen normally enjoys" the civil standard of proof "must reflect the consequences that will follow if the case for a banning order is made out. This should lead the justices to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal

[13] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1237, Lord Phillips MR citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, Lord Clyde.

[14] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1242, Lord Phillips MR.

[15] Note the comments of the ECtHR in *Engel v The Netherlands (No. 1)* (1976) 1 EHRR 647, *Garyfallou AEBE v Greece* (1997) 28 EHRR 344 and *Lauko v Slovakia* (1998) 33 EHRR 439 where it indicated a willingness to look beyond the domestic clarification of analogous measures and instead focus on the impact of the provision upon the defendant.

[16] See the "conclusions" in *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1240–1242, Lord Phillips MR.

standard".[17] According to the Court of Appeal, this higher standard of proof should be applied to both the requirement for proof of involvement in previous disorder or violence, and evidence of past conduct and likely future conduct that could lead to disorder at or around football matches.

Construing section 14B(4) of the Football Spectators Act 1989, the Court of Appeal noted that a magistrates' court in such instances must be "satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches". In practice, the Court of Appeal went on:

> …the "reasonable grounds" will almost inevitably consist of evidence of past conduct. That conduct must be such as to make it reasonable to conclude that if the respondent is not made subject to a banning order he is likely to contribute to football violence or disorder in the future. The past conduct may or may not consist of or include the causing or contributing to violence or disorder that has to be proved under section 14B(4)(a), for that violence or disorder is not required to be football related. It must, however, be proved to the same strict standard of proof. Furthermore it must be conduct that gives rise to the likelihood that, if the respondent is not banned from attending prescribed football matches, he will attend such matches, or the environs of them, and take part in violence or disorder.[18]

In contrast to the pre-existing belief that section 14B orders required only the normal civil standard of proof (balance of probabilities), this concession appeared to provide significant protections against the risk of innocent football supporters receiving banning orders on relatively flimsy evidence.

This author has been critical of the Court of Appeal's approach in *Gough* on a number of grounds, of which two are of note. First and with reference to the article 6ECHR argument, this author believes that the Court of Appeal concentrated too much on the legislative *intention* rather than the statutory *effect* when it determined that the orders were preventative rather than punitive.[19] Second, I have also been critical of the application of the *de Freitas* proportionality test, arguing that the court did not apply it in any meaningful way, and that if it had done, Lord Phillips MR would have found the justification for section 14B wanting under point (iii) and arguably (ii) of the *de Freitas* test.[20] My view on this second point has in fact strengthened in the years that have followed as I have witnessed, researched and written about a number of "least restrictive alternatives", most notably through changes in police tactics, which have led to the successful supervision and policing of large crowds of English football supporters home and abroad.[21]

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[17] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1242–1243, Lord Phillips MR and citing *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354 and *R (McCann) v Crown Court at Manchester* [2001] 1WLR 1084, 1102.

[18] *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, 1243, Lord Phillips MR.

[19] See generally Pearson 2006.

[20] See generally Pearson 2005 and Stott and Pearson 2006.

[21] See generally Stott and Pearson 2007 and Stott et al. 2012.

Nevertheless, it must be acknowledged that, in contrast to the hard-line stance taken by both the Home Office and the High Court, the Court of Appeal's approach was much more mindful of the argued principles of EU and human rights law. Moreover, the requirements for a standard of proof akin to beyond reasonable doubt in determining whether a defendant was causing or contributing to football-related disorder and would do so in the future, should have ensured a greater onus on the police to provide evidence of actual involvement in instances of disorder on behalf of defendants, rather than mere evidence of association in "risk groups" or with "known hooligans". Per force, this should, in theory at least, have also obliged magistrates to more carefully scrutinise applications for FBOs.[22] In the remainder of this chapter, the extent to which this requirement from *Gough* has been followed in magistrates' and Crown Court will be reviewed. The analysis is based upon court observations of contested section 14B hearings and correspondence with pressure groups such as *The Football Supporters Federation* and *Liberty*.

19.4 Impact of *Gough* Upon the Lower Courts and the Football Banning Order Scheme

Establishing, even against a criminal standard of proof, that a "risk supporter" has been engaged in past disorderly or violent conduct at or around football matches should not, one would think, be difficult. Football-matches are highly regulated areas. All major UK stadia are saturated with CCTV cameras and there is a heavy presence of police at and around the stadia environs, at train stations and on popular routes to the stadium.[23] FIOs from the host police force and that of the visiting team are present in addition to the normal officers charged with maintaining order. FIOs monitor groups of "risk supporters" on match days and are usually able to prevent groups confronting each other. The movements of supporters are recorded by CCTV, static and handheld video cameras and sometimes police helicopters with infrared capability. When this level of regulation and evidence-gathering capability is combined with laws prohibiting behaviour

[22] See further *Doyle and Others v R* [2012] EWCA Crim 995, where the Court of Appeal ruled that the definition of violence or disorder "in connection with" football should not include behaviour that merely happened to occur at or around a match event. In *Doyle*, three defendants who assaulted a train passenger who had objected to their behaviour as they returned from a football match had their FBO revoked because the offence was not football related and no evidence had been provided that the order would prevent disorder at football in the future. *Doyle* was used successfully to contest the imposition of a s14B FBO in the observed case of *Commissioner of Police for the Metropolis v Melody*, Unreported, Tower Bridge Magistrates Court, 9 July 2012.

[23] In the 2009 football season, the Association of Chief Police Officers estimated that policing of designated matches in England and Wales cost around £25million per year. See further Stott et al. 2012.

considered to be breach of the peace, or disorderly or threatening behaviour[24] and making it an offence to be drunk upon entering a football stadium[25] or to engage in "indecent" chanting[26]; it is very difficult for any supporter who wishes to engage in disorderly or violent conduct to do so without committing a criminal offence and leaving a pursuable trail of hard evidence.

However, if a supporter commits any of these offences, then pursing a banning order under section 14B is unnecessary, as a banning order can be obtained upon conviction of a relevant offence under the amended section 14A of the Football Spectators Act 1989. In other words, the targets of section 14B were those who, despite being under intensive surveillance at football matches, have *not* become involved in observed football-related disorder or violence. It follows from this that being able to obtain evidence approaching the criminal standard of such violence or disorderly conduct should be exceptionally difficult without also gaining evidence that should lead to a criminal conviction and a section 14A FBO. In reality what has happened is that the police have almost always only pursued section 14B applications against fans who already possess a non-football-related conviction (and thereby fulfilling the requirement in section 14B(2)). Then, as we will see magistrates and judges have accepted evidence of little more than guilt by association as being capable of satisfying the *Gough* standard on whether an individual is likely to commit acts of violence and disorder around football matches in the future.

Even in *Gough* itself it can be argued that the evidence of football-related activity engaged in by the appellants should not have been sufficient to lead to the conclusion that it was beyond reasonable doubt that they would engage in disorder or violence around football matches in the future. The evidence suggested that Gough and Smith were seen in the same groups as other supporters considered by the police to be "risk", and that they sometimes travelled on the same coaches as fans who took weapons and hooligan "calling cards" to matches. However, all the evidence suggested that neither had actually engaged in any violence or disorder at matches. The more this evidence accumulated, the harder it should have been to reach the conclusion that their observed (non-violent) actions of the appellants were atypical. Instead, the evidence of continual non-engagement in disorder was put together to build a profile to suggest that their engagement in future disorder was *more*, rather than less, likely.

Observations carried out at Magistrates and Crown Courts in Manchester, Trafford, Leeds and Bristol and London between 2006 and 2012 suggest that this pattern of application and judicial interpretation was not atypical. A more detailed account of section 14B hearings in the first two locations has been published previously by this author in the *Journal of Criminal Law* (2006 with Dr Mark James). Its findings, combined with later observations, reveal a pattern of application, interpretation and imposition of section 14B FBOs that suggest a

[24] Sections 4 and 5 of the Public Order Act 1986.

[25] Section 2(2) of the Sporting Events (Control of Alcohol etc.) Act 1985.

[26] Section 3 of the Football (Offences) Act 1991.

significant short-fall between Lords Phillips MR's ruling on the standard of proof and the reality of its application in the lower courts. It was not that the judiciary in these observed hearings were unaware of the standard of proof necessary—in all observed cases explicit reference was made to Lord Phillips's ruling in this regard; however, the following, and usually a combination of more than one of these factors, have been used by judges and magistrates in observed cases as proof to the *Gough* standard of a likelihood of engagement in future disorder and violence.

In all observed cases the key evidence of conduct indicative of engagement in violence or disorder at matches came from guilt by association. It was typical for the defendant to be identified as being part of a group that was labelled by the police as a "risk group". Sometimes this "association" went no further than evidence that they had been drinking in the same public house. The reason this group was considered "risk" was usually because the police identified some individuals within it as being "risk supporters". On a few occasions this was because a (usually unidentified) individual in that group (never the defendant) had tried to confront rival supporters or had thrown a missile. Occasionally, it was because those individuals had previous convictions or had previously served banning orders. Usually, however, it was because they had been identified in absence of conviction as being believed to engage in violence or disorder at and around matches.

Here a certain amount of circular reasoning came into play. Evidence was provided that defendants were "associating" with "risk supporters", but the very definition of what constituted a risk supporter was in most cases reached by way of their association with others labelled in the same way. When a number of section 14B cases were observed at Trafford Magistrates' Court in 2006 over the period of a week one part of the accepted evidence in a later case was that the defendant had been "associating" with a defendant given an FBO earlier that week. Furthermore, since those defined as "risk supporters" were typically not informed of this categorisation prior to the section 14B application, it was impossible for fans to avoid associating with these individuals on this basis.[27]

The importance placed upon "association" with those categorised in an extra-judicial way as "risk supporters" was also underpinned by fundamental misunderstandings of contemporary English fan culture by magistrates and judges in observed cases. At Leeds Magistrates' and Crown Courts, evidence provided by the applicant to prove that the football supporter was likely to engage in disorder at matches included the fact that they (a) attended pubs many hours in advance of kick-off; (b) did not wear their team's colours or (c) did not always possess match tickets. However, a long-term ethnographic study of English football fan behaviour at away matches by this author indicates that the first two modes of behaviour were typical of a large proportion of non-violent travelling supporters.[28] Heavy alcohol consumption and social drinking with friends formed an integral part of the match-day

[27] Again, see generally James and Pearson 2006.

[28] Pearson 2012.

"experience" for this subculture of "carnival fans". At away matches the non-wearing, or covering-up, of "colours" was essential in order to achieve this aim safely as many pubs would not grant access to visiting supporters, and visiting supporters at some venues also believed that wearing colours would invite confrontation. Indeed at some clubs, the ethos or culture of fans is expressly *not* to wear colours.

It was rare that fans would travel without tickets, but some did, especially to the most important games where tickets were scarce and the "craic" around the match would be at its best (and high-risk and high-popularity matches also often went hand-in-hand). At these matches, the best chance to find spare tickets would be in the pub beforehand, and the more time spent in the establishment surrounded by fans, the higher the chance of obtaining a ticket. Finally, it was not always possible for fans generally to be aware of which supporters had been specifically categorised as "risk" by the police, and where only one pub was open to visiting fans (or where the police corralled visiting fans in one establishment), fans were not always given the chance to disassociate with risk supporters even if they had that knowledge and inclination. In short, being in a pub hours before kick-off, not wearing colours, not having a ticket and "associating" with those characterised as "risk supporters" was not as unlikely a combination as many applicants and judges believed. In sum, even on "achieving" all of these "risk" factors, this still should not be sufficient to prove an individual's propensity to become involved in disorder at and around football matches to Lord Phillips MR's standard of proof.

In addition to the problems about whether the totality of such circumstantial evidence could lead to a belief beyond reasonable doubt that an individual was involved in football-related disorder, observations have also consistently raised concerns about the admissibility and validity of individual elements of the police profile. Whilst magistrates and judges were sometimes observed to discount evidence that purely indicated attendance at pubs or stadia when no disorder occurred; nevertheless, facets of the evidence relied upon in the imposition of section 14B FBOs was clearly and highly unreliable. In *Chief Constable of Greater Manchester v Davies*, a hearing observed by the author at Trafford Magistrates' Court on 16 February 2006, the defendant was served with a section 14B banning order primarily as a result of being identified by a FIO as an individual who had led an attack on a group of rival supporters. Police officers on the ground did not identify the defendant at the time of the incident but video footage captured a blurred individual that the FIO subsequently alleged was the defendant. The footage was relayed on the court monitor. The judge could not identify, even on a balance of probabilities, that the individual was the defendant. However, the FIO's retrospective opinion that the blurred image was the defendant was held to be sufficient.

Another example comes from *Chief Constable of West Yorkshire Police v Ford and others*, a hearing observed by the author at Leeds Magistrates' Court on 21 June 2010. Here, a number of Leeds United fans were gathered in a pub in Manchester ahead of a high-risk match. The pub was surrounded by police and all those who did not have tickets were served with an "Alcohol Dispersal Order"

pursuant to section 27 of the Violent Crime Reduction Act 2006. Those fans served with section 27 orders and who had previous relevant convictions were then all subjected to section 14B FBO applications. One crucial piece of evidence in the awarding of these FBOs came from a number of anonymous "posts" on internet fan forums read by FIOs suggesting that some of the fans in the pubs were there with the intention of confronting rival fans. The evidence was accepted as relevant and influential despite the fact that (a) the identity and reliability of the poster(s) were unknown; (b) exaggeration and posturing to gain "reputation" for a club's hooligan firm (whether real or imagined) is a common feature of such discussions[29]; and (c) no confrontation actually occurred. Indeed, on a number of occasions it was observed that the mere serving of a section 27 order was accepted as evidence of involvement in football-related disorder even in the absence of such disorder even though there is some evidence that the orders are sometimes used unlawfully and indiscriminately by certain police forces.[30]

Finally, court observations cast doubt upon the Court of Appeal's opinion in *Gough* that section 14B orders are purely preventative and do not therefore need to satisfy criminal rules of procedure in order to satisfy article 6ECHR. Observations by this author and Dr Mark James in 2006 at Trafford Magistrates' Court in 2006 indicated that a high level of costs were imposed upon those given section 14B orders, rising from £800 for uncontested cases to £1,447 for contested ones. Regardless of the intention of the orders, associated costs clearly have a significant punitive effect. Additionally, the observed hearings revealed that the length of section 14B orders varied, not in line with the risk of disorder posed by the defendant, but instead with whether the defendant chose to contest the application. This led to the absurd result that those who posed a higher risk of disorder (and against whom more evidence was available) received shorter bans than those apparently posing lesser risk (because there was little evidence and a greater chance of successfully contesting the FBO). Across the board there was a general lack of individualised consideration of the risk posed by a defendant when determining the conditions of the FBO, with courts ordering the surrendering of passports even for defendants who had never travelled abroad for football or did not even possess a passport.

19.5 Impact of *Gough* Upon Levels of Football-Related Disorder

The Court of Appeal's endorsement (at common, EU and ECHR law) of the FBO scheme under the section 14B of the Football Spectators Act 1989 meant that a

[29] Pearson 2012.

[30] See, for example, *R (on application of Lyndon) v Chief Constable of Greater Manchester Police*, Unreported, Queen's Bench Division, 15 Nov 2008.

"green light" was given to police forces to apply for FBOs against those who, although not previously convicted of a football-related offence, they believe might currently, or at some point in the future, be involved, even tangentially, in football-related disorder. Different constabularies have availed of this opportunity with varying enthusiasm. Numerous interviews with officers by the author over the period 2002–2010, have indicated that many officers involved in football crowd management are of the opinion that section 14B orders have contributed to the controlling of football-related disorder. However, this anecdotal evidence has not been supported with anything more concrete or of a validated empirical nature. Indeed, statistics of arrest for "football-related" offences have remained largely static during the period 2001–2012 and—as far as it is possible to ascertain—what might be described broadly as hooligan-related incidents have continued at largely the same rate. It may be that section 14B FBOs are helping to manage the problem, but they have certainly not stopped it. From reported and observed cases it is also clear that those being served with FBOs are not typically the "ringleaders" against whom, it was suggested during the debates on the Football (Disorder) Act 2000, these orders would be specifically targeting and excluding.[31] Anecdotally and from ethnographic study of football supporters,[32] it appears that levels of disorder tend to fluctuate at different clubs irrespective of the numbers of section 14B FBOs imposed (although increasing levels of disorder may lead to increased resources being dedicated to the obtaining of FBOs "on complaint").

Additionally, research by the Elaborated Social Identity School of social psychology contends very strongly that excluding suspected "hooligans" from football matches will not in and of itself prevent crowd disorder.[33] Proponents of this model have argued that serious crowd disorder and "rioting" is best understood as the result of the unchecked development of inter-group identities whereby even those who do not attend matches with the intention of becoming involved in disorder may engage in such actions when they feel that, as part of a group, their rights or legitimate intentions have been infringed. Conversely, this School also contends that this fact means that by managing the development of these group identities, crowd disorder can be limited even when those wishing to become involved in confrontation are present. In football crowds, it is argued that it is primarily the police who hold the power to mould this "social identity" to make disorder either more or less likely to occur. The most powerful evidence supporting the Elaborated Social Identity Model came from its application in the

[31] Note the comments of the then Parliamentary Under Secretary of State for the Home Department (Kate Hoey) during the House of Commons Standing Committee D Debate on the Football (Offences and Disorder) Bill of 5 May 1999, SC Deb (D) 5 May 1998, available online www.publications.parliament.uk/pa/cm/stand.htmcol: "The power to make banning orders in respect of people without conviction is necessary…because from football intelligence we know that some people commit offences or are involved in organising violence but cleverly manage not to be where they may be arrested. We need to find a way of dealing with those people".

[32] See in chronological order, Rookwood 2009; Stott et al. 2012 and Pearson, 2012.

[33] See generally Stott and Reicher 1998; Stott et al. 2001 and Stott and Pearson 2007.

training of the Portuguese Public Security Police ("PSP") prior to the 2004 UEFA European Football Championships. There, the PSP, applying this model to large crowds of drunken England fans (some of whom were identified as "risk supporters") successfully avoided any large-scale disorder and made only one arrest for a violent offence. In contrast, similar fan groups rioted at the tournament in areas controlled by the Portuguese National Republican Guard ("GNR"), a gendarmerie police force, adopting a more confrontational style of policing.[34]

My own ethnographic research with fans of Blackpool FC, England and Manchester United revealed findings supporting the model. Whilst there were a significant number of fans who attended matches with the intention of involvement in disorder; mass crowd disorder was rare and often involved both men and women who did not possess this predisposition. This was particularly notable abroad, where large crowds of English fans gathered and were confronted with styles of policing more similar to the GNRs—relying on tactics of avoiding interaction with fans followed by large numbers in riot gear attempting to disperse areas or make arrests by force. This should be no surprise, as during the instances of disorder involving England fans in Marseilles (1998) and Charleroi (2000) both the opinions of the UK FIOs at the scene and statistics of arrest demonstrated that the vast majority of those involved in the rioting were not known or suspected "hooligans".[35] Furthermore, post-*Gough*, several serious instances of disorder have occurred involving English football fans abroad, including Albufeira (2004, England); Stuttgart and Cologne (2006, England); Rome (2007, Manchester United); Seville (2007, Tottenham Hotspur) and Athens (2007, Liverpool), indicating that section 14B FBOs have certainly not been the panacea to the problem of England fans engaging in disorder abroad.

19.6 Conclusion

As with many statutory provisions rushed through Parliament on a wave of moral panic, the Football Disorder Act 2000 can be seen as a fundamentally flawed and inevitably reactionary piece of legislation. Not only was the 2000 Act, and the FBO scheme that it established, based on a false premise concerning the cause of crowd disorder abroad involving England fans, but, as was subsequently stated by the Court of Appeal in *R v Boggild and others*,[36] the relevant provisions of the amended Football Spectators Act 1989 are "rather complex"[37] and even unfairly inconsistent and uncertain in application. In *Boggild*, which concerned an

[34] Stott et al. 2007, 84–85.

[35] Stott and Pearson 2007.

[36] *R v Boggild and others* [2012] 1 Cr App R (S) 81; [2011] EWCA Crim 1928.

[37] *R v Boggild and others* [2012] 1 Cr App R (S) 81; [2011] EWCA Crim 1928, para 23, Hughes LJ.

unsuccessful application for leave to appeal brought by the prosecution that a Crown Court judge was wrong not to make a football banning order following the conviction of seven defendants for an affray which was committed in the aftermath of a football match, the Court of Appeal remarked that the FBO scheme places significant demands of proper statutory interpretation on magistrates and district judges and that the Court of Appeal's judicial colleagues "who are addressing the test of whether making an [FBO] would help to prevent violence or disorder ought…to have in mind the extent of the regime as well of course as its potentially draconian effect".[38] Moreover, and in a contemporaneous case note on *Boggild*, Thomas noted the statutory provisions relating to football banning orders "have now been amended many times and as a result have reached a point of near incomprehensibility" and that in any event, as shown by the sentencing judge in *Boggild*, alternative means, based on extant criminal law provisions, such as prevention of harassment and youth rehabilitation orders, may be more effective than the FBO scheme.[39]

Finally, a decade prior to *Boggild*, the Court of Appeal in *Gough* had been provided an opportunity to clarify some of these problems in relation to section 14B orders, but instead, through Lord Phillips MR's ruling on the standard of proof, it merely added another layer of complexity to the issue. Although Lord Phillips MR's ruling on this matter should be welcomed in tempering some of the harsher aspects of section 14B, observations of section 14B hearings have suggested that in reality *Gough* has done little to protect the rights of fans who have not been convicted of football-related offences but who are suspected by the police of being active in "risk groups". Magistrates and district judges appear confused about when section 14B orders can be imposed, and their interpretations of both the legislation and Lord Phillips MR's guidance vary widely. As a result, it seems inevitable that we will see either another case reach the Court of Appeal, or, following the prompting of the Court of Appeal in *Boggild*, that the legislation itself will be further amended to provide further clarification and guidance to judges in the lower courts, and protection against a challenge under EU and human rights law. It is hoped that should such a substantial amendment come to pass, a genuine assessment of current football fan culture and the utility of football banning orders in controlling football-related violence and disorder will also form part of the debate.

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[38] *R v Boggild and others* [2012] 1 Cr App R (S) 81; [2011] EWCA Crim 1928, para 24, Hughes LJ.

[39] Thomas 2012, 51–52.

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