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Qualifying for Europe? The Legitimacy of Football Banning Orders 'On Complaint' under the Principle of Proportionality

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ABSTRACT

Football Banning Orders 'on Complaint' are now seen as an essential part of the fight against 'hooliganism' by English football supporters abroad. However, they have been criticised for infringing the fundamental rights of supporters who have not been convicted of any offence and as such they are only justifiable under EU law and the ECHR if they are proven to be a proportionate response to the problem. A fall in arrests at recent tournaments has led many to claim that 'the end justifies the means', a claim supported by the Court of Appeal's decision in Gough. This article assesses whether Banning Orders on Complaint do indeed satisfy the principle of proportionality, questioning not only the decision in Gough but also the legitimacy and value of Banning Orders as a response to football crowd disorder more generally.

KEYWORDS

Football Hooliganism - Banning Orders - European Convention of Human Rights - EC Treaty - Proportionality

FOOTBALL BANNING ORDERS AND THE FIGHT AGAINST 'FOOTBALL HOOLIGANISM'

Real football fans have been following England here and real fans do have not the slightest interest in causing trouble. The scum have not come to this tournament. It is fantastic the garbage have been left behind. These are real fans following England: nobody gets drunk or misbehaves. (FIFA's Director of Communication Keith Cooper, June 2002).²

Football Banning Orders (FBOs) are now the central tenet of the Home Office's strategy to prevent disorder abroad by English football fans.³ Although earlier forms of Banning Orders⁴ provided some support for more generic public order tactics, the introduction of the Football (Disorder) Act 2000 saw a dramatic increase in the number of fans prohibited from attending international matches and tournaments, in part because it now permitted banning orders against those merely suspected of involvement in 'football hooliganism'.⁵ The term 'fan' is used deliberately and in contrast to Keith Cooper's adherence to the long-held myth that those who become involved in football crowd disorder are not 'proper fans'.⁶ However, Cooper's statement refers directly to the fact that within two years of the Act's introduction, and in sharp contrast to previous tournaments, the 2002 World Cup in Japan/Korea had passed off peacefully. Furthermore, as the number of orders continued to rise, the high-risk 2004 European Championships in Portugal also saw little serious disorder, despite huge numbers of travelling English supporters. Statistically, the correlation between the rising number of bans on the one hand and the reduction in major incidents of disorder is startling: with only 106 banning orders in place at the Euro 2000 tournament in Belgium/Holland, nearly 1,000 England supporters were arrested but at Euro 2004, with 2,188 orders in place, there were only 53 arrests.

This correlation has resulted in many suggesting that there is a causal link between the drop in disorder and the number of banning orders in place. For example, a lack of disorder at the 2002 World Cup saw claims by the media,⁷ academics,⁸ the Football Authorities⁹ and the Home Office¹⁰ that FBOs had played a vital role in preventing hooliganism at the tournament. The apparent success of the orders at the 2002 competition saw another large increase in their number. Combined with the relative low level of disorder at the subsequent 2004 European Championships, this appeared to support the policy and led to calls for 'more of the same' in order to prevent disorder at future matches and tournaments.¹¹ It would appear, therefore, that the political and popular support for the increased use of FBOs under the 2000 Act is well established, and that the build up to the potentially problematic 2006 World Cup in Germany will see the number of travel bans against supporters who are suspected of involvement in so-called 'hooliganism' increased further.

This supposition is also supported by the failure at the Court of Appeal of a major legal challenge to the imposition of Banning Orders on Complaint in the case of *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213. This article will build upon previous debate on the case,¹² specifically asking whether imposing travel bans upon supporters who have not been convicted of any offence is a

proportionate response to the problem of football violence abroad by English fans. The author's intention is to consider the legitimacy of FBOs under the principle of proportionality espoused in EC law and in judgments relating to the European Convention of Human Rights (ECHR). This will require both an analysis of the potential problems of FBOs and a consideration of the nature and extent of the principle of proportionality, which is by no means a consistent measure. The Court of Appeal in *Gough* accepted one such test of proportionality as an appropriate way of establishing the legitimacy of the 2000 Act against the rights of citizens under the Treaty on the European Union but, as this article will demonstrate, whether it actually adhered to the test is highly debatable. Furthermore, it is argued that the principle of proportionality should also be used to assess the legitimacy of the legislation itself under the ECHR. This is because, in contrast to claims from both politicians¹³ and the judiciary in *Gough*, the legislation may infringe several of its key rights to an unacceptable extent.

POTENTIAL INFRINGEMENTS OF FUNDAMENTAL FREEDOMS

There are a number of potential problems with the current banning order legislation. These are a result of the fundamental freedoms and human rights that UK citizens should enjoy due to living in a state that is a signatory to the ECHR and a member of the EU. When banning orders were first introduced, they could only be imposed upon those individuals who had been convicted of 'football-related' offences, as defined in terms of proximity to a match in time and space combined with the type of offence.¹⁴ However, the Football (Disorder) Act 2000¹⁵ fundamentally extended the remit of the Football Spectators Act 1989 and allowed Magistrates to impose banning orders 'on Complaint', preventing suspected hooligans attending domestic matches and leaving the country when their team is playing abroad, even if they have not been convicted of an offence.¹⁶ The amended Section 14B of the Act gives the chief officer of police the power to apply to a Magistrates Court for a FBO on Complaint if s/he believes that the suspect 'has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere.' If this is proven, and '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 Magistrate is obliged to impose an order. 4

The judgment in *Gough* was that the FBOs on Complaint had a merely preventative purpose: 5

In my judgment it is no part at all of the purpose of any such order to inflict punishment. The fact that it imposes a detriment on its recipient no more demonstrates that it possesses a punitive element than in the case of a *Mareva* injunction. The purpose is to protect the public, here and abroad, from the evil of football violence and the threat of it.¹⁷

However, potential problems arise from the serious impact of the conditions of FBOs upon the suspected 'hooligans'. The Court of Appeal in particular noted that although the legislation was considered to have a preventative rather than punitive *purpose*; FBOs imposed 'serious restraints on freedoms that the citizen normally enjoys.'¹⁸ Therefore, although the court felt able to make the case that the imposition of a banning order should follow a civil rather than a criminal law procedure, it did acknowledge the clear punitive *effect* upon individuals subjected to FBOs. Those subject to FBOs face a ban on attending all football matches and on leaving the country when English teams are playing abroad for a minimum of two years. For many, the ban on attending football matches is more than a mere inconvenience, with the practice of attending live matches and supporting a club often being described in terms of being a ritual¹⁹ or even a religion,²⁰ rather than a simple pastime. Furthermore, in addition to losing the ability to leave the U.K. at certain times during the year, the 2000 Act provides the authorities with further powers that can restrict the freedom of suspected hooligans. The amended Section 14G of the 1989 Act permits a court to impose any additional requirements it sees fit to prevent disorder at matches. These requirements may include restrictions on association with other alleged hooligans and exclusion zones around football stadia and city centres. Indeed, where an individual lives in close proximity to the stadium, it is feasible that they may find themselves under house arrest during matchdays. In addition, Section 21A-B gives the police additional powers to detain suspects attempting to leave the country during the 'control period' surrounding a match or tournament even if they have not previously been served with an FBO. If an officer in uniform has reasonable grounds to suspect that an individual has previously contributed to disorder and is intending to cause disorder at the event in question, they may detain the individual so that a Magistrates Court hearing can take place to determine whether to impose a Section 14B order. 6

It would initially appear that there are a number of problems arising from FBOs on Complaint with regard to the rule of law, the presumption of innocence, EU rights and the ECHR. First, the ban on foreign travel and the confiscation of passports of individuals issued with banning orders raises problems regarding the right of UK citizens to leave their territory as granted by the EC Treaty.²¹ The appellants in *Gough* argued that member states could only deny citizens their fundamental rights under the Treaty on public policy grounds if this denial could be justified under the principle of proportionality. So whilst it is accepted that member states have the right to limit cross-border movement for legitimate public policy aims (e.g. on 7

the grounds of national security or public health), it was argued that this could only be legitimate if it was a proportionate response to the problem in question.

There are also a number of potential problems arising from the ECHR and the integration of its Articles into domestic law by the Human Rights Act 1998. Most obviously, restrictions on movement of suspected hooligans, up to and including house arrest under Section 14G, potentially breach article 5 (the right to liberty). Whilst a state has the ability to curtail this right 'in accordance with a procedure prescribed by law' (for example by use of a prison sentence following a guilty verdict in a criminal case), the use of FBOs to restrict the liberty of individuals who have not been convicted of any offence is limited. Furthermore, the use of general surveillance to compile 'profiles' upon suspected hooligans, including CCTV and the use of police 'spotters' also has the potential to breach article 8 of the ECHR (the right to privacy). However, if the infringements of articles 5 and 8 are seen as insufficiently severe, then interference with them is likely to be justifiable on public policy grounds, but only if football 'hooliganism' is a serious enough problem in terms of public order and crowd safety to warrant such a response. A final potential challenge for FBOs on Complaint, and the one that caused the most debate in *Gough*, comes from the manner in which they are imposed. The appellants in *Gough* claimed that the restrictions placed on them amounted to a criminal penalty that was being imposed upon a civil law procedure, therefore limiting their protections in terms of the standard of proof utilised and the admissibility of evidence

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They challenged the procedure used to impose the FBOs on Complaint under article 6 of the ECHR, which provides for the right to a fair trial and grants additional protections to those under a 'criminal charge'. In particular, article 6(2) states that, 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law,' and article 6(3)(d) grants the right, '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' to anyone in a criminal trial. The determination of whether the procedure to impose FBOs is civil or criminal therefore can be important in terms of the standard of proof necessary to impose an order²² and the type of evidence that is admissible.²³ Although it is clear from the legislation and statements of the Home Office that FBOs on Complaint can be imposed by way of a civil procedure, ECtHR jurisprudence requires a court assessing this issue in line with the Convention to go further than merely accepting the domestic classification in order to prevent a national authority subverting article 6.²⁴ The decisions 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, established that a court should take into account the nature of the problem the legislation was introduced to remedy, the nature of the offence in question and the nature and degree of severity of the potential penalty. They concluded that where purportedly civil procedures could result in a penalty with a significant punitive effect, they should adhere to criminal law protections in order to satisfy article 6.

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However, the Court of Appeal in *Gough* only briefly considered the effect of the banning orders upon the defendants. Whilst there may be an argument to suggest that in the case of *Gough* the effects of the banning orders were not sufficiently severe to warrant classification as a criminal penalty, the Court instead focused primarily on the intention behind the imposition of the Football (Disorder) Act (that was preventative and not punitive), and the stated (civil) court procedure, before ruling that article 6 had not been infringed. The judgment was therefore highly contentious on the grounds that it did not pay sufficient attention to the nature of the offences or the penalty and instead relied in a circular way upon the domestic classification of the proceedings by the legislature. As a result, this article will not limit itself merely to a discussion of proportionality under EU law. It will also consider whether potential breaches of article 6 and article 5 of the ECHR could be justified on the grounds of proportionality. This leads us onto the more general question of whether restrictions on civil liberties and fundamental rights that occur as a result of the 2000 Act are a proportionate, and therefore justifiable, response to the problem of football-related disorder.

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IDENTIFYING THE PRINCIPLE OF PROPORTIONALITY

The exact meaning and extent of the principle of proportionality is the subject of considerable debate, but it appears that its origins can be traced back to the ancient Greek dictum of Pan Metron Ariston ('everything to the best measure', i.e. everything in moderation). The principle was developed in continental legal systems, especially Germany and France, in the twentieth Century, 'anchored' in international law and then developed in EU Law.²⁵ Jacobs traces the use of the concept in European law back to 1970²⁶ and Tridimas notes its use in EC law for derogations of fundamental freedoms.²⁷ Although the principle of proportionality is not specifically referred to in the text of the ECHR (or its additional Protocols), it has been identified as a 'central principle'²⁸ or 'dominant theme'²⁹ when Convention rights are applied in the courts. The aim of the test in the ECHR is to allow courts to find a fair balance between public interest and individual rights: '... the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the

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Convention...³⁰

The principle has therefore been used in both EU and ECHR law to assess whether actions of a state that infringe fundamental freedoms under either the Treaty or the Convention can be justified on the grounds that they are a 'proportionate' response to the problem in question. 'It must be ascertained whether the means which (the state) employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it'.³¹ The relationship between proportionality and the 'Margin of Appreciation' should be noted at this stage. The 'Margin' is that permitted under EU and ECHR law to allow states to temporarily escape their obligations in cases where there is a 'pressing social need' that requires interference by state in rights.³² The difference between the Margin of Appreciation and the Principle of Proportionality has been the subject of some debate, especially as at times it would appear that they are identical.³³ Arai-Takahashi states the key difference as being the intention of the principles; the Margin indicates the measure of discretion allowed member states to take into account national circumstances, whilst on the other hand, proportionality restrains the power of the state.³⁴ Furthermore, although the Margin should not supplant the doctrine of proportionality,³⁵ it has been claimed that on occasion it has diminished the significance and effectiveness of the principle of proportionality, 'some times to a worrying degree'.³⁶

The exact substance of the principle of proportionality is the subject of some debate and Emerson and Ashworth warn against 'treating it as if it were a term of art'.³⁷ However, although it has seen slightly different applications in EU, ECHR and International Law, it is generally agreed that it goes further than common law tests of 'reasonableness' or the *Wednesbury* principles.³⁸ Tridimas suggests 'it has become clear... that far from dictating a uniform test, proportionality is a flexible principle which is used in different contexts to protect different interests and entails varying degrees of judicial scrutiny'.³⁹ At its most basic level, the test has two branches, 'Suitability' (i.e. is the state response under scrutiny likely to achieve its objectives?) and 'Necessity' (i.e. are the consequences justified in view of the importance of the objective pursued?).⁴⁰ However, a more comprehensive version of the concept contains an additional test of whether the results could be achieved by other means that are less restrictive to individual rights. This 'Less Restrictive Alternative Doctrine' is considered 'one of the most stringent forms of proportionality appraisal',⁴¹ as it goes beyond merely considering whether the problem in question requires action that could restrict fundamental rights and suggests an obligation on the part of the state to search for methods that infringe rights to the least extent when responding to social problems.

The form of the principle of proportionality used in *Gough* emanated from the Privy Council's application of the doctrine in *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69. According to the *de Freitas* test, a court applying the doctrine to balance the rights of individuals against the needs of the state was required to consider 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 is necessary to accomplish the objective.⁴²

It is contended that this test, if followed, provides a fairly robust protection against unnecessary infringements of fundamental rights. Although it does not expressly require a court to consider possible Less Restrictive Alternatives, in asking whether 'the means used... are no more than is necessary to accomplish the objective,' the third branch of the test does require the court to place the legislative response in the context of other possible methods of achieving the legislative aim. The third branch of the test in effect asks whether the means chosen go beyond what is required, but without a consideration of realistic alternatives, it is impossible for a court to be sure that the means chosen were 'no more than necessary' to achieve their aims. It is the *de Freitas* version of the proportionality principle that will be employed in this article, on the basis that in a manner of an immanent critique,⁴³ both the Privy Council and Court of Appeal have recently accepted this as appropriate, and should therefore apply it as such.

In *Gough*, therefore, the Court of Appeal needed to assess whether:

- (i) Football crowd disorder is a sufficiently important problem to justify limiting the freedom of movement of those merely suspected of involvement,
- (ii) FBOs on Complaint will reduce football crowd disorder, and
- (iii) FBOs on Complaint do not go beyond what is necessary to achieve the reduction in football crowd

disorder.

One now needs to consider not only whether the Court of Appeal in *Gough* adhered to this test but also whether FBOs on Complaint generally are a legitimate method of controlling football crowd disorder despite their prima facie infringement of important rights under the EC Treaty and ECHR. 17

The Principle of Proportionality and Football Banning Orders on Complaint

Although the Court of Appeal accepted the appropriateness of the *de Freitas* test of proportionality in *Gough*⁴⁴, whether it applied it is a different matter. The fact that a court makes reference to the doctrine does not necessarily mean that it will proceed to apply the test thoroughly. As Arai-Takahashi points out, 'One must bear in mind that the notion of proportionality at times appears to play a merely rhetorical role in the case law. Express reference to proportionality does not necessarily accompany a genuine assessment, in particular, of the effects of the interference on the individual.'⁴⁵ It is contended that the Court of Appeal in *Gough* did exactly this, claiming to apply the test of proportionality but actually failing to do so. 18

THE LEGISLATIVE OBJECTIVE MUST BE SUFFICIENTLY IMPORTANT TO JUSTIFY LIMITING A FUNDAMENTAL RIGHT

The first branch of the *de Freitas* test requires an assessment of the legislative objective, namely whether reducing football crowd violence abroad is a significantly important aim to justify limiting the fundamental rights of fans who had not been convicted of any offence. This means that the first step in an application of the doctrine of proportionality should be to assess the nature and severity of the problem of football-related disorder involving English fans abroad. The lack of such a serious analysis of the contemporary phenomenon has led to a reliance upon a media-driven understanding of the issue, still couched in terms of 'football hooliganism' and 'the English disease', phrases and constructions that were applied to a very different form of football crowd disorder than exists in the present day. It is clear that an analysis of the first branch of the proportionality test did not take place either upon the introduction of the legislation, or upon its challenge in *Gough*, with both politicians and judges relying instead upon media-driven understandings of the seriousness of the phenomenon. The only evidence relating to the severity of the problem that was referred to in *Gough* came from the police and the Home Office, who have consistently backed the legislation and could hardly be deemed to be neutral in the trial of suspected football hooligans.⁴⁶ 19

In the absence of any reliable data regarding instances of violence, the number of deaths or serious injuries, or the cost in terms of criminal damage, it would appear that arrest statistics provide us with the only quantitative data that could be used to assess the severity of the problem. The Court in *Gough* for example, referred to the 965 English fans arrested at Euro 2000 as evidence of the severity of 'hooliganism'. However, as with arrest statistics generally, difficulties arise when the numbers are used to try and demonstrate the severity of a social problem rather than merely to identify fluctuations in police and CPS strategies. Evidence from Euro 2000 suggested a Belgian police policy of corralling and arresting large numbers of English supporters, even though many of them had not been involved in disorder. Indeed, following the tournament, the Belgium authorities themselves were forced to admit that a substantial number of innocent supporters (as well as bystanders) had been arrested as a result of this 'blanket' method of policing.⁴⁷ It was therefore no surprise that only one supporter from the 965 arrested was charged with a violent offence. This vital statistic was not once referred to in *Gough*. However, even if arrest statistics are taken as a reliable indicator of the level of disorder, the courts in *Gough* and the Government when introducing the Act should have taken note of the dramatic fall in football-related arrests since the late 1980s. In the 17 years following the first compilation of nationwide statistics for football-related arrests by NCIS, numbers have fallen from over 6,000 to under 4,000 (despite a criminalisation of many aspects of football fandom in this period).⁴⁸ At the same time, numbers of spectators attending matches and travelling abroad to watch their teams play has risen by almost one third.⁴⁹ A sufficiently stringent application of the first branch of the proportionality doctrine would need to address the question of why restrictive legislation is being introduced at a time when levels of football-related disorder have seen such a significant reduction. 20

Whilst a comparison with football-related disorder in the past indicates that the current phenomenon is not as serious as some politicians and judges have suggested, the defendants in *Gough* focussed on a comparison with other cross-border crime that had not resulted in draconian and civil liberty-infringing legislation. Although they were willing to accept that preventing disorder by English fans abroad was a legitimate public policy aim, they claimed that this did not justify infringing the fundamental rights of suspected 'hooligans'. They then proceeded to back up their argument that the Act was a disproportionate response to the problem by identifying other 'classes' of suspected criminals who did not have their freedoms interfered with in this manner but were suspected of more serious offences, such as drug dealing, paedophilia or even international terrorism.⁵⁰ In effect both arguments hinge upon the same 21

premise, namely that the construction of football hooliganism as a crisis requiring such a dramatic legislative response is one resulting from a 'moral panic' – i.e. an overreaction to a particular issue, usually fuelled by the popular media. Labelling a particular social problem a moral panic does not of course imply that it does not exist, or that attempts should not be made to confront it but, as Cohen notes, the issue is again one of proportionality. The construction of a phenomenon resulting from a moral panic results in its significance being exaggerated or being put out of proportion to other more serious problems.⁵¹ From the judicial comments in *Gough*, it is certainly clear that not only was there little attempt to assess the 'true' nature and extent of the problem of football crowd disorder abroad but that the judiciary themselves were heavily influenced by the moral panic surrounding football hooliganism. At the High Court, Laws LJ described hooliganism as being 'evil',⁵² a 'rising spectre',⁵³ 'a shame and a menace'⁵⁴ and a 'sickening ill',⁵⁵ and the Court of Appeal also failed to challenge characterisation of the phenomenon in these terms.⁵⁶ It should be no surprise that a court so influenced was unable to objectively assess the true nature and extent of the problem of football crowd disorder.

THE MEASURES DESIGNED TO MEET THE LEGISLATIVE OBJECTIVE MUST BE RATIONALLY CONNECTED TO IT

The second branch of the *de Freitas* proportionality doctrine, that the legislative objective should be rationally connected with the measures introduced, should also be carefully applied. The widest definition of 'rational connection' would merely suggest that a prohibition on movement of suspected hooligans had to be in some way reasonably connected with the aim of reducing disorder. However, a more stringent and useful test under the principle of proportionality would be to ask whether banning suspected hooligans will have a significant impact in terms of reducing disorder. Without being able to demonstrate such an impact, the third branch of the test – that the measures are necessary – would be impossible to prove. The second leg of the doctrine at first appears to be the most robust when defending FBOs on Complaint as a proportionate response to football crowd disorder abroad, in line with the original rationale for introducing the measures (i.e. that banning those the police suspected of involvement in football-related disorder would reduce the problem). 22

However, research into previous incidents of football crowd disorder abroad throws some doubt upon the 'rational' aspect of the second leg of the *de Freitas* test. The first problem with the contention that FBOs on Complaint will reduce disorder comes from the way in which the authorities identify the 'known hooligans'. In *Gough*, the defendants had been put under general surveillance along with other supposed members of the 'Derby Lunatic Fringe' over four years, but during all this time, no evidence was put forward to suggest that they had been involved in any specific disorder. Instead, evidence from the profiles focused on what was essentially guilt by association with other 'prominents'.⁵⁷ The lack of sufficient evidence for conviction of any criminal offence - despite this level of surveillance - should lead us to question whether individuals such as the Gough and Smith who are served with FBOs on Complaint are likely to become involved in criminal disorder abroad. Certainly in Gough's case, this appears doubly unlikely, as he had never travelled abroad to watch football and demonstrated no intention of doing so. His individual case would indicate anything but a 'rational connection' between the legislative aim and the means utilised to try and achieve it. 23

A second problem arises from the type of supporter that typically becomes involved in disorder abroad and those that are typically arrested. The large number of arrests resulting from the Euro 2000 tournament, demonstrate clearly that those who become involved in football-crowd disorder abroad or are arrested as a result are not usually the 'known hooligans' who would be served with FBOs on Complaint. Of the 965 fans arrested at Euro 2000, only 30 had been identified by the police as suspected 'hooligans'.⁵⁸ In the absence of any evidence suggesting that this 3% were primary instigators of the wider disorder, this suggests that had Section 14B Orders been functioning prior to the tournament the disorder would still have occurred. Indeed, extensive Home Office and ESRC funded socio-psychological research into recent football-related disorder involving England fans abroad has suggested that (in stark contrast to the organised gang violence in this country), the problem is not 'known hooligans' gathering together, but the way in which large numbers of supporters, whether they are known to the police as potential problems or not, are regulated by local police authorities.⁵⁹ The research has suggested that the decision by local police forces of when and how to intervene in different crowd circumstances can have a fundamental influence on inter-group dynamics, in turn affecting whether, and to what extent, disorder is likely to occur. The occurrence of widespread disorder involving England fans, such as occurred in Marseille in 1998 or Charleroi in 2000 is, therefore, primarily a result not of 'hooligans' gathering together, but instead of a breakdown of crowd-management, typically through inappropriate policing methods - a problem that cannot be solved by the imposition of banning orders. 24

THE MEANS USED TO IMPAIR THE RIGHT OR FREEDOM MUST BE NO MORE THAN IS NECESSARY TO ACCOMPLISH THE OBJECTIVE

Debates as to why football crowd disorder abroad occurs brings us to the third and most contentious branch of the proportionality principle, that of whether the introduction of FBOs on Complaint goes further 25

than is necessary to reduce football-related disorder abroad. As was noted above, an analysis of whether the means go beyond what is necessary to achieve the objective of a reduction in so-called 'hooliganism' requires a consideration of whether alternative methods can be employed to achieve the aim which do not infringe to the same extent the rights of football supporters. When such an analysis takes place, it is clear that there are a number of less restrictive alternatives that will have the same, or an even greater impact upon the problem. This makes it extremely difficult to argue that FBOs on Complaint do not go beyond what is 'necessary to achieve the objective'. Furthermore, this becomes even more clear when considered alongside the major problems identified in the previous section with relying upon FBOs to reduce disorder.

To illustrate, three important 'less restrictive alternatives' have been identified, although these are by no means the limits to what can be done to reduce disorder involving English football supporters abroad. First, FBOs *on Conviction* can still play an important role in preventing convicted 'hooligans' from attending matches where it is deemed likely they will cause future problems. Whilst Magistrates have the power to give a genuine assessment of the risk posed by those who have been convicted of football-related offences, and bans are set out for proportionate maximum periods, then banning orders can have a significant and legitimate role to play. Indeed, a return to FBOs on conviction only may persuade police forces to pursue prosecutions more rigorously, rather than merely relying on an FBO hearing. For the purposes of criminal justice this is surely important. *If* the defendants in *Gough* and other similar cases really were active members of a violent criminal gang, all the time operating under the watchful eye of the Football Intelligence Unit, surely a prosecution for offences under the Public Order legislation would have been more appropriate. 26

However, as has been detailed above, research has suggested that even if it was possible to ban all 'known football hooligans,' this would not eliminate the problem of disorder involving English fans abroad. A second less restrictive alternative comes in the form of altering the policing tactics of host nations, many of which have treated all travelling English football supporters as potential hooligans for decades. Such high-profile, heavy-handed tactics were employed in Belgium at Euro 2000 and appeared to have a much greater impact upon the level of disorder seen in Brussels and Charleroi than the existence of 'known hooligans' in the crowds. First, the same fans had been present for the opening match of the tournament in the Netherlands, where different Dutch police tactics of crowd management saw no serious disorder. Second, as we have seen, those who were arrested in Belgium were not typically 'known hooligans'. Similarly, a fundamental change in the way the Portuguese PSP police controlled English fans at Euro 2004 (after considerable consultation with the UK Home Office) almost certainly had a far greater impact in reducing disorder at such a high-risk tournament than the introduction of FBOs on Complaint. Participant observation comparisons of Euro 2000 and 2004 identified a number of similar incidents taking place at both tournaments but with different results in terms of whether disorder escalated. Whether disorder escalated or not appeared to be dependant on the type of response from the local police force, it being noticeable at the later tournament that what little disorder did occur took place in areas policed by the GNR force, who had not altered their policing tactics.⁶⁰ The utilisation of more appropriate methods of policing large groups of boisterous football fans therefore would in all likelihood have a significant impact in reducing disorder far greater than FBOs, not to mention improving conditions at away matches for football supporters. 27

This gives rise to a third method of reducing disorder without infringing the rights of fans, albeit one which works most effectively with the models of improved public order policing identified above. Facilitating 'self policing', whereby non-violent norms of conduct are encouraged by fans themselves and result in the exclusion of those wishing to become involved in disorder, can also play an important role. Whilst self policing (sometimes called 'fan policing') may sound fanciful, it needs to be asked why supporters of Ireland and Scotland, not to mention Glasgow Celtic at club level, can travel in large numbers, be noisy and drunk and yet typically do not become involved in disorder. Partly this is to do with police responses to non-English supporters, but self policing plays a significant role. This is also the case with Manchester United and Liverpool fans, who travel in large numbers to European matches⁶¹ and are often subject to provocative policing (usually because of the reputation of English fans generally) but yet rarely become involved in any serious disorder. Amongst these groups of fans, the norm has been to travel in large numbers, create noise and drink heavily, but to avoid confrontation with locals and ensure that any more violent elements are confronted by the majority of the fans themselves, forcing them to change their behaviour or leave the main body of support. Enabling and encouraging groups of fans to 'police' themselves, excluding any troublemakers, should make segregation between fans and any 'hooligan' element easier, in turn reducing the likelihood of large-scale disorder and making it easier for local police forces to deal with any criminal incidents. 28

CONCLUSIONS

It has to be acknowledged that the Court of Appeal in *Gough* adopted a relatively stringent version of the principle of proportionality as an appropriate yardstick for reviewing whether any infringement by Football Banning Orders on Complaint of fundamental freedoms under the EC Treaty could be justified. 29

Furthermore, this can be extended to a review of the legislation under the ECHR, most notably the potential infringements of articles 5 and 6. However, although the court paid lip service to the *de Freitas* test, it was not thoroughly applied to the contentious issue of restrictions imposed by the orders on the fundamental rights of those who have been convicted of no offence. The Court needed to address the issues of whether (a) football hooliganism abroad was a serious problem meriting infringements of rights, (b) FBOs on complaint would have a significant impact upon this disorder, and (c) there were other measures that would reduce the disorder but would not restrict individual rights. The Court of Appeal did not seriously address any of these points.

Moreover, although the supporters of FBOs on Complaint have highlighted the relatively trouble-free Euro 2004 tournament as indicative of the success of these orders, the role of policing tactics at this tournament, and other subsequent matches has played a more pivotal role in reducing disorder. Following the success of new models of crowd management policing, and the doubts cast as to the effectiveness of FBOs in general, the legitimacy of FBOs on Complaint in terms of fundamental rights is even more contestable. Alterations to policing tactics and the encouragement of 'self policing' both provide realistic alternatives to FBOs that are likely to improve the human rights of football supporters. It is clear therefore that when football crowd violence abroad appears so controllable by other means, court orders that seriously infringe the rights of fans who have been convicted of no offence cannot be considered proportionate under EU and ECHR law.

REFERENCES

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² *The Telegraph* 21/6/02.

³ To the extent that the Crown Prosecution Service and Association of Chief Police Officers have recently announced that spectators committing even the most minor of offences at football matches will now be prosecuted rather than cautioned or given fixed-penalty fines in order to enable banning orders to be imposed (*The Guardian* 12/8/05).

⁴ Exclusion Orders under the Public Order Act 1986 and Restriction Orders under the Football Spectators Act 1989.

⁵ Between 2000 and 2004, 434 FBOs 'on complaint' were issued (Figures obtained from the Home Office 23/2/05).

⁶ The view that 'fans' and 'hooligans' are mutually exclusive species has long been espoused by the media (e.g. references to 'so-called fans' after Newcastle United supporters rioted in the Bigg Market in 1996, *Newcastle Evening Chronicle* Comment 29/5/96); the police ('The troublemakers were local hooligans. They are not fans but leeches looking for trouble', police officer quoted following violence at a Birmingham City v Millwall match in 1995, *The Telegraph* 6/11/95); those working in the game, ('These are not Bristol City fans, but a hooligan element', Bristol City chairman, reported on Ceefax, 21/1/97); and politicians ('The people involved in the violence are not, in any sense, genuine football fans', MP David Crausby, Hansard HC Col.46, 19/6/00).

⁷ e.g. Henry Winter in *The Telegraph* 21/6/02.

⁸ Sugden J 'Scum Airways: Inside Football's Underground Economy': 2002 Mainstream Publishing: 191

⁹ The FA's Head of Stadia, Safety and Security Chris Whalley, Press Release Monday, 18 August 2003: <http://www.TheFA.com>.

¹⁰ Representatives of the Home Office, NCIS and ACPO all spoke of the value of banning orders in reducing disorder following the release of arrest statistics following the 2002 World Cup (see http://www.cjsonline.org.uk/news/2002/august/tackling_football_disorder.html).

¹¹ e.g. Philip Cornwall, *When Saturday Comes* No.210 August 2004.

¹² Pearson G (2002) 'A Cure Worse Than the Disease? Reflections on *Gough and Smith v Chief Constable of Derbyshire*' 1(2) *Entertainment Law* 92.

¹³ E.g. Jack Straw commending the Football Disorder Bill to the House of Commons (Hansard HC 4/7/00 Col.: 180-181).

- ¹⁴ Public Order Act 1986 s. 31 as amended by the Football (Offences and Disorder) Act 1999 s. 2.
- ¹⁵ Schedule 1.
- ¹⁶ Or a previous offence is 'spent'.
- ¹⁷ Per Laws LJ in *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, at para 42.
- ¹⁸ Per Lord Phillips in *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, at para 90.
- ¹⁹ King A 'The European Ritual: Football in the New Europe', 2003, Ashgate.
- ²⁰ Giulianotti R 'Football: A Sociology of the Global Game', 1999, Polity Press: 17.
- ²¹ Council Directive 73/148/EEC, Articles 1-2.
- ²² Although the Convention does not specifically set out the standard of proof in a criminal case, ECtHR decisions have indicated that a standard of proof beyond reasonable doubt flows from the presumption of innocence. (Starmer K et al. 'Criminal Justice, Police Powers and Human Rights', 2001, Oxford University Press: 171).
- ²³ Most importantly, the different procedural rules applying to the admissibility of hearsay evidence.
- ²⁴ Ashworth A (2004) 'Social Control and 'Anti-Social Behaviour': The Subversion of Human Rights?' 120 Law Quarterly Review 263 at 268.
- ²⁵ Arai-Takahashi Y 'The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR', 2002, Intersentia: 198
- ²⁶ Jacobs F 'Recent Developments in the Principle of Proportionality in European Community Law' in *The Principle of Proportionality in the Laws of Europe*, Ellis, E (Ed.) 1999, Hart: 1.
- ²⁷ Tridimas T 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in *The Principle of Proportionality in the Laws of Europe*, Ellis, E (Ed.) 1999, Hart: 65.
- ²⁸ McBride J 'Proportionality and the European Convention on Human Rights' in *The Principle of Proportionality in the Laws of Europe*, Ellis, E (Ed.) 1999, Hart: 24.
- ²⁹ Emerson B and Ashworth A 'Human Rights and Criminal Justice', 2001, Sweet & Maxwell: 92
- ³⁰ Arai-Takahashi, note 24 at 193. See *Sporrong and Lonroth v. Sweden* [1983] 5 EHRR 35 at p. 52
- ³¹ Jacobs, note 25 at 2.
- ³² *Handyside v UK* Eur Ct HR Series A, No.24, 1976.
- ³³ For example in *Silver v UK* (1983) 5 EHRR 347 the court referred to 'necessary in a democratic society' and 'pressing social need' (both terms used for the Margin of Appreciation) with 'proportionate to the legitimate aim pursued' (376-377).
- ³⁴ Arai-Takahashi , note 24 at 1.
- ³⁵ Emerson and Ashworth, note 28 at 101.
- ³⁶ Feldman D 'Proportionality and the Human Rights Act 1998' in *The Principle of Proportionality in the Laws of Europe*, Ellis, E (Ed.) 1999, Hart: 124.
- ³⁷ Emerson and Ashworth, note 28 at 97.
- ³⁸ Tridimas, note 26 at 69.
- ³⁹ Tridimas, note 26 at 76.
- ⁴⁰ Ibid.

⁴¹ Arai-Takahashi , note 24 at 15.

⁴² *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, at para 63.

⁴³ The utilization of this method of critique to identify any 'short fall' between legal rhetoric and practice emanated from the position developed by the Frankfurt School of critical social theory.

⁴⁴ *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, at para 65.

⁴⁵ Arai-Takahashi , note 24 at 15.

⁴⁶ *Gough and Smith v Chief Constable of Derbyshire* [2002] QB 1213, paras 5-7, culminating in the claims that, 'To describe what takes place by the word 'warfare' is hardly too strong' and that, 'Each incident has brought shame on our national reputation'.

⁴⁷ 'Hooligan' Part II, BBC Television, BBC 2, 19/5/02

⁴⁸ e.g. The Football Offences Act 1991, ss. 2-4 and the Criminal Justice and Public Order Act 1994 s.166.

⁴⁹ Total domestic attendances rose from 22.6m in 1989 to 31m in 2002.

⁵⁰ Para 57. The *Gough* case arose before plans for Anti-Terrorism Control Orders had been announced.

⁵¹ Cohen S 'Folk Devils and Moral Panics' (2002), Introduction to the 3rd Edition, viii.

⁵² *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, at para 42.

⁵³ *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, at heading 3.

⁵⁴ *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, at para 1.

⁵⁵ *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, at para 81.

⁵⁶ Judicial activation of this type of moral panic is certainly not a new problem: Pearson G (1998) 'The English Disease? Socio-Legal Constructions of Football Hooliganism' 60 *Youth and Policy* 1.

⁵⁷ *Gough and another v. Chief Constable of Derbyshire* [2001] 3 CMLR 29, paras 30-34 in particular.

⁵⁸ Hansard HC 13/7/00, Col.1181.

⁵⁹ See Stott C, Hutchinson P and Drury J (2001) "'Hooligans" abroad? Inter-group dynamics, social identity and participation in collective 'disorder' at the 1998 World Cup Finals' 40 *British Journal of Social Psychology* 359 and Stott C (2003) 'Police expectations and the control of English soccer fans at Euro2000' 26 *Policing: An International Journal of Police Strategies and Management* 640.

⁶⁰ See Stott C and Adang O (2004) 'Disorderly conduct: social psychology and the control of football hooliganism at Euro 2004' *The Psychologist* Vol. 17, No. 6: 318. The lack of disorder at Euro 2004 contrasts starkly with incidents the previous time large numbers of English fans arrived in Portugal. In 1997, approximately 10,000 Manchester United supporters were greeted by extremely heavy-handed policing resulting in disorder and the indiscriminate shooting with rubber bullets of 12 supporters.

⁶¹ For example in the 2004/5 season, approximately 10,000 Manchester United fans attended a match in Milan and in the region of 30,000 Liverpool fans traveled to the Final in Istanbul. In 1999 the numbers of United fans at the European Cup Final approached 60,000, yet only one arrest was reported.

Pearson, Geoff, "Qualifying for Europe? The Legitimacy of Football Banning Orders 'On Complaint' under the Principle of Proportionality", [Entertainment and Sports Law Journal](http://go.warwick.ac.uk/eslj/issues/volume3/number1/pearson/), ISSN 1748-944X, September 2005
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