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Case Comment

Human rights for football hooligans?

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Legislation: Football Spectators Act 1989

Football (Disorder) Act 2000

Case: Gough v Chief Constable of Derbyshire [2002] EWCA Civ 351; [2002] Q.B. 1213 (CA (Civ Div))

***E.L. Rev. 765** *The Court of Appeal in* Gough *has ruled that banning orders made under the Football (Spectators) Act 1989 are compatible with European Community law and the ECHR. In doing so, it has upheld the decision of the Divisional Court in* Gough & Smith v. Chief Constable of Derbyshire, Miller v. Leeds Magistrates Court, Lilley v. Director of Public Prosecutions.

The facts and procedure in the lower courts

The Football (Disorder) Act 2000 ("the 2000 Act"), which amends the Football Spectators Act 1989 ("the 1989 Act"), is the most recent in a series of legislative measures designed to combat football hooliganism by British fans at home and abroad. Section 14B of the 1989 Act as amended provides for the making of a banning order against a person who has "at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere" if the court is:

satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder in connection with any regulated matches.

Gough and Smith were alleged, on the basis of convictions for assault and police "profiles" concerning their behaviour as part of a group of football hooligans, to have caused or contributed to violence or disorder. Deputy District Judge Aujla in the Derby Magistrates Court imposed two year banning orders on both Gough and Smith under section 14B of the 1989 Act. The orders applied to areas within a radius of grounds at which Derby County were playing. Gough and Smith were subsequently notified by the Football Banning Orders Authority ("FBOA") that they must report to a police station during regulated matches played abroad and surrender their passports. Their appeal to the Divisional Court was rejected on the ground that the orders complied both with European Community law and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).[1]

The judgment of the Court of Appeal

Gough and Smith argued that the banning orders imposed on them were not justified on public policy grounds and were therefore in breach of Community law, in particular ***E.L. Rev. 766** Article 2 of Directive 73/148[2] which provided that Member State nationals who wished to go to another Member State as recipients of services must be granted the right to leave their home Member State and have issued or renewed a passport or identity card. The Court of Appeal[3] addressed, first, the issue of whether the right of free movement was subject to derogations on grounds of public policy; second, whether such a derogation justified the banning orders; and, third, whether Article 8 ECHR had been breached.

There was an exception on grounds of public policy to the right of free movement

The Court of Appeal ruled that Article 8 of Directive 73/148 enabled Member States to derogate from the rights in Article 2 on grounds of public policy, public security or public health. The express derogation in Article 46 E.C. permitting the special treatment of "foreign" nationals on such grounds

did not imply that a Member State could not impose non-discriminatory restrictions on free movement on those grounds. For example, the High Court had jurisdiction under section 37(1) of the Supreme Court Act 1981 to restrain a party from leaving the jurisdiction and require his or her passport to be surrendered where this was necessary to prevent court proceedings being deprived of their purpose.[4] The possibility of such restrictions had also been recognised by Council Resolution of 6 December 2001, which provided that countries with the legal possibility of preventing potentially disruptive fans from travelling abroad should take all possible measures to do so.

The measures taken were proportionate to the legitimate aim of preventing football hooliganism

The Court of Appeal ruled that section 14B of the 1989 Act was compatible with Community law according to the test of proportionality adopted by Lord Clyde in *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [5] and cited by Lord Steyn in *R v. Secretary of State for the Home Department, ex parte Daly.* [6]

a) The objective of the banning orders was sufficiently important to justify restrictions

The Court stated that preventing football hooligans from taking part in violence and disorder in foreign countries was an imperative reason of public interest which was capable of justifying restrictions on their freedom of movement. However, the justification was not the need to protect nationals in other Member States, since in *Alpine Investments BV v. Minister van Financien* [7] the Court of Justice had ruled that Dutch restrictions on cold calling of consumers in other Member States could not be justified by the protection ***E.L. Rev. 767*** of consumers in other Member States because this was not a matter for the Dutch authorities. Instead, the Court of Appeal ruled that the restrictions were justified by a number of factors relating to the United Kingdom's own interests in preventing hooliganism abroad. First, since other Member States had requested the United Kingdom's help in preventing its football hooligans from creating disorder at matches in their countries, it should as a matter of international solidarity endeavour to comply with those requests. Second, hooliganism by English and Welsh fans abroad tarnished the reputation of the United Kingdom. Third, hooliganism could lead to the banning of English and Welsh clubs from international competitions, which would have serious financial implications for those clubs and for associated businesses.

It is submitted that this aspect of the ruling in *Alpine Investments* , and its consequences in *Gough,* are unfortunate. Directive 73/148 permits derogations on grounds simply of “public policy”, and the threat of violence and disorder clearly constitutes “a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society”[8] so as to justify restrictions on free movement. Moreover, since the rationale underlying the free movement of persons is the creation of a single internal market, the protection of citizens of other Member States should be as capable of justifying derogations as the protection of a Member State's own nationals. It is true that proving the existence of a threat in another Member State will be more difficult, but in this case the requests for assistance by other Member States could provide the necessary evidence. The *Alpine Investments* approach also risks weakening the protection of public policy since it reduces the scope for the home Member State, which is in the best position to identify and prove the risk posed by its nationals, to impose restrictions on them. In addition, such an approach in this case is contrary to Council Resolution of 6 December 2001 requiring Member States to prevent their own nationals travelling abroad and participating in disorder there.

In *Alpine Investments,* the Court of Justice concluded that the ban on cold calling could be justified by the maintenance of the good repute of the Netherlands financial markets because of the importance of these markets to the financing of economic operations. However, the factors cited by the Court of Appeal to justify the banning orders in *Gough* are not analogous. Neither international comity nor the good repute generally of the United Kingdom have an identifiable economic impact, and indeed the former supports the argument that public policy considerations should include the impact on other Member States. The financial interests of the football sector are more compelling, but exclusion from European competitions would only affect the limited number of clubs (and associated businesses) which would have qualified, and therefore there would be no substantial or widespread impact on the British economy.

b) The imposition of the banning orders was proportionate to the objective

The Court considered that the test in *De Freitas* required the banning orders to have been imposed

after giving individual consideration to each appellant, not to have been based simply upon the criminal record of each appellant, to be rationally connected to the ***E.L. Rev. 768*** objective of preventing English football hooliganism abroad, and to be no more than necessary to achieve this objective.

The Court concluded that the 1989 Act clearly required consideration to be given to the individual during the making of a banning order. First, the magistrates court must be satisfied that the person had caused or contributed to violence or disorder and that the order would help to prevent violence or disorder. Second, when considering whether to impose travel restrictions on a banned person, the FBOA must give his case individual consideration. It is submitted that although section 19(2D) allowed it to impose restrictions on a class basis and in practice they were so imposed, the fact that these restrictions resulted directly from the imposition of an individually considered banning order satisfied the requirement of individual consideration overall. Third, an individual subject to restrictions on travelling abroad could seek exemption from them and, if he did so, individual consideration would be given to his case. The Court was also satisfied that the banning orders had not been based simply upon the criminal record of each appellant.

Although the Court concluded that the measures were connected to the objective of preventing English football hooliganism abroad and were no more than necessary to achieve it, since a person likely to get involved in violence or disorder at domestic matches was as or more likely to do so at matches abroad, it disagreed with the assertion of the Divisional Court that the failure of previous measures to prevent hooliganism by English fans abroad automatically demonstrated that the more radical measures of the 2000 Act were proportionate. Indeed the Court of Appeal made a number of criticisms of the amendments to the 1989 Act introduced by the 2000 Act. The nature of the facts to be proved and the applicable standard of proof when the magistrates considered whether 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" under section 14B of the 1989 Act were unclear. The meaning of "special circumstances" and the applicable standard of proof when the FBOA considered whether there were special circumstances justifying a banned person going abroad and meaning that such a person would not attend matches were also unclear, and the onus of proof was on the banned person. The provisions were therefore open to an interpretation which would be disproportionate.

However, the Court of Appeal concluded that the question was not whether the statutory provisions could give rise to a disproportionate effect but whether they could give rise to a proportionate effect, and that they could. This approach must be correct, since if national law can be interpreted in line with Community law, national courts are obliged to interpret it in that way, regardless of whether another interpretation is possible.[9]

The Court considered that the provisions were capable of being applied proportionately because, first, a banning order should only be imposed where there were compelling grounds to conclude that the subject had a propensity to take part in football hooliganism. This reflects the approach of the Court of Justice when assessing whether restrictions on grounds of public policy are justified by criminal convictions.[10] Second, it was ***E.L. Rev. 769*** proportionate that such persons be required to obtain permission to travel abroad when prescribed matches were taking place, and to prove that their purpose was other than attendance at such matches. The public policy objective would not be met by lesser measures. Third, a reverse burden of proof was not incompatible with Community law or the ECHR.[11] The object of the foreign travel was likely to be within the exclusive knowledge of the banned person, and its proof should not be difficult so long as an appropriate standard of proof was applied.

The Court of Appeal agreed with the Divisional Court that the proceedings in which banning orders were imposed were civil proceedings, and that orders were not penalties. However, although the civil standard of proof technically applied when assessing whether there were "reasonable grounds to believe" that a banning order would help to prevent violence or disorder, the Court of Appeal ruled that this standard was flexible and must reflect the serious consequences for citizens' freedom that an order had. The necessity of imposing a restriction upon a fundamental freedom must be strictly demonstrated, and the standard of proof applied should be "hard to distinguish from the criminal".[12]

The Court considered that such a standard was possible under the section 14B regime. First, section 14B(4)(a) required that the person be proved to have "caused or contributed to any violence or disorder in the United Kingdom or elsewhere", a standard of proof that was virtually indistinguishable from the criminal. Second, section 14B(4)(b) required that there be 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 reasonable grounds would almost inevitably consist of past conduct, which must be such as to make it reasonable to conclude that if the person was not subject to a banning order, he was likely to contribute to football violence or disorder in the future. The conduct need not be football related but must be proved to a strict standard of proof and be such that if the person were not banned, he would attend matches and take part in violence and disorder. Third, section 20(4) of the 1989 Act required the FBOA to exempt the subject of a banning order from restrictions on foreign travel if there were “special circumstances” which justified the exemption and indicated that he would not attend matches if exempted. The phrase “special circumstances” should not be interpreted as extraordinary circumstances, and provided that the reason for travel was other than attendance at a prescribed match, permission should be granted. The FBOA should merely satisfy themselves on a balance of probabilities that this was the case, and indeed the facts indicated that this had been its approach. All of the 80 or so applications made so far had been granted, including one by Gough himself.

The Court of Appeal concluded that the District Judge (Magistrates Court) had failed to apply the appropriate standard of proof. His ruling that the civil standard applied and that he need only have grounds to believe that an order would help to prevent violence or disorder indicated that he did not apply a sufficiently strict standard. However, the Court considered that this was unsurprising, since the only argument before him was whether the civil or criminal standard applied and *McCann* [13] had not yet been decided, and ruled that ***E.L. Rev. 770*** the profile of each appellant would in fact have justified making an order had the strict standard been applied.

The banning orders did not breach Article 8 ECHR

The Court ruled that although a banning order might result in a breach of the right to respect for private or family life under Article 8 ECHR, on the facts there had been no such breach. In any event, such a breach would be likely to be justified under Article 8(2) as necessary for the prevention of disorder.

The appeal was therefore dismissed. Leave to appeal to the House of Lords was refused.

Conclusion

This judgment is important for a number of reasons. First, it provides Court of Appeal authority for the proposition that banning orders under section 14B of the 1989 Act are lawful as a matter of Community law. This is despite the Resolution on hooliganism and the free movement of football supporters, which states that only a conviction for violence or a football related offence should justify a banning order.[14]

Second, the judgment also provides Court of Appeal authority for the proposition that the imposition of the banning orders was in accordance with the ECHR. Although Gough and Smith did not appeal against the ruling of the Divisional Court that the Article 7 ECHR prohibition on the retrospective application of heavier penalties did not apply because the banning orders were not penalties, the Court of Appeal nonetheless confirmed that this was correct. It also ruled that there had been no breach of Article 8 ECHR.

Third, the judgment confirms that public policy restrictions on a Member States' own nationals may be justified only by reference to its own interests. However, the latter are to be construed widely, and may include its duty to co-operate with other Member States, its international reputation generally, and the financial interests of a small sector with limited impact on other areas of the economy. While the Court of Appeal cannot be criticised for following the judgment of the Court of Justice in *Alpine Investments,* it is regrettable that the latter has excluded the protection of other Member State nationals from public policy considerations. As argued above, this could adversely affect the protection of public policy unless (and possibly even if) the artificial exercise of identifying some internal interest for a Member State to protect is carried out. It is therefore to be hoped that the Court of Justice reverses its position on this issue.

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1. *Gough & Smith v. Chief Constable of Derbyshire, Miller v. Leeds Magistrates Court, Lilley v. Director of Public Prosecutions* [2001] EWHC Admin 554, [2001] 3 C.M.L.R. 29; see Deards (2002) 27 E.L.Rev. 206.

2. Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] O.J. L172/14.

3. *Gough and Smith v. Chief Constable of Derbyshire* , [2002] EWCA Civ 351, [2002] 2 C.M.L.R. 11.

4. *B v. B (Injunction: Jurisdiction*) [1988] 1 W.L.R. 329 at 334.

5. [1999] 1 A.C. 69.

6. [2001] UKHL 26; [2001] 2 W.L.R. 1622, para. 27.

7. Case C-384/93, *Alpine Investments BV v. Minister van Financien* [1995] E.C.R. I-1141; [1995] 2 C.M.L.R. 209.

8. Case 30/77, *R. v. Bouchereau* [1977] E.C.R. 1999; [1977] 2 C.M.L.R. 800, para. 35.

9. See, for example, Case C-300/95, *Commission v. United Kingdom* [1997] E.C.R. I-2649; [1997] 3 C.M.L.R. 923.

10. *R. v. Bouchereau,* above, n. 8 at para. 29.

11. Lord Bingham in *Brown v. Stott* [2001] All E.R. 97 at 104.

12. See also *B v. Chief Constable of Avon and Somerset Constabulary* [2001] 1 W.L.R. 340 per Lord Bingham at para. 31 and *R (McCann) v. Manchester Crown Court* [2001] EWCA Civ 281; [2000] 1 W.L.R. 1084.

13. *ibid.*

14. [1996] O.J. C166/40 at para. 32.