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# **30 Years of Hurt: The Evolution of Civil Preventive Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order**

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## **Abstract**

The Football Banning Order was the first Civil Preventive Order (CPO), predating the many similar measures that followed the election of New Labour to government in 1997 by 10 years. CPOs have been held by the domestic courts to be preventive rather than punitive measures that do not need to follow criminal procedures to be compliant with Arts.6 and 7 of the European Convention on Human Rights. After three decades of amendment and imaginative application, however, the original CPO has evolved into a punitive measure that is rarely utilised against those who orchestrate football-related violence and goes far beyond what is necessary to prevent low-level football disorder. It will be argued that in order to avoid breaching Arts.6 and 7, the imposition of this evolved CPO - a ‘super-Football Banning Order’ - should be restricted by amendment of ss.14A and B Football Spectators Act 1989. Further, and of wider interest, its previously undocumented incremental evolution should serve as a warning of how other CPOs could evolve similarly punitive impacts on their recipients.

## **Introduction**

Thirty years ago, the first of a new regime of Civil Preventive Orders (CPOs) came into existence.<sup>1</sup> CPOs are a state response to criminal or sub-criminal deviancy;<sup>2</sup> they restrict the activities of the alleged protagonists by subjecting them to restrictions akin to a wide-ranging civil injunction, but one that is supported by criminal sanctions when breached. There has been

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<sup>1</sup> Public Order Act 1986 s.30, which commenced 1 April 1987.

<sup>2</sup> We use this term in the sociological sense of breaking societal norms (C. Sumner, ‘Deviance’, in E. McLaughlin and J. Muncie (eds.), *The Sage Dictionary of Criminology 3<sup>rd</sup> edition* (London: Sage, 2013), 134.

considerable critique of CPOs in general,<sup>3</sup> but analysis of what are now called Football Banning Orders (FBOs) has been exceptionally limited despite their being the progenitor of these hybrid measures.<sup>4</sup> There are two potential explanations for this marginalising of the importance of studying FBOs. First, the FBO's predecessor orders were introduced some 10 years before the CPOs that were a cornerstone of the New Labour project from 1997 onwards and cannot be conceived of as being part of the 'Third Way' approach to regulating deviant behaviour. Secondly, they were introduced for very different underlying and theoretical reasons to the more recent CPOs. Whereas the newer CPOs were justified as necessary to address growing feelings of 'vulnerable autonomy' amongst threatened communities,<sup>5</sup> the justification for the introduction of Exclusion and Restriction Orders and their subsequent evolution into FBOs was to break the 'link' between football matches and violent 'hooligans', and protect the international reputation of the UK. FBOs provided a pre-emptive solution, preventing anyone known to be orchestrating football-related disorder from engaging with other supporters. This, it was assumed, would prevent the scenes of riots involving English football supporters from being broadcast around the world.<sup>6</sup> To a certain extent, this leaves the FBO as an inconvenient anomaly that does not conform well to the analyses of its CPO offspring. Nevertheless, it still has the potential to provide lessons on how other orders could evolve.

This article critically reviews the evolution of the FBO to the point of its first major legal challenge in *Gough and Smith v Chief Constable of Derbyshire Constabulary*.<sup>7</sup> It then analyses the subsequent statutory and non-statutory developments underpinning the emergence of what we are calling a 'super-FBO'.<sup>8</sup> Finally, we apply the human rights jurisprudence relied

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<sup>3</sup> See for example, A. Ashworth, 'Social control and 'anti-social behaviour': the subversion of human rights?' (2004) 120 L.Q.R. 263, and further 'Four Threats to the Presumption of Innocence' (2006) 10(4) *International Journal of Evidence and Proof*, 241; A. Ashworth and L. Zedner, 'Prevention Orders: A problem of undercriminalisation?' in R Duff et al (eds.) *The Boundaries of the Criminal Law* (Oxford: OUP, 2010), Ch.3; A. Von Hirsch and A. Simester, 'Regulating Offensive Conduct through Two-Step Prohibitions' in A. Von Hirsch and A. Simester (eds.), *Incivilities: Regulating Offensive Behaviour*, (Oxford: Hart, 2006), Ch.7; J. Gardiner et al. 'Clause I – The Hybrid Law from Hell?' (1998) 31 C.J.M. 25; P. Ramsey, *The Insecurity State* (Oxford: OUP, 2012); H. Wright and T. Sagar, 'Out of Sight, Out of Mind' (2000) N.L.J. 1792; L. Etherington, 'Statutory nuisance and 'hybrid orders': True crime stories?' (2012) 33(3) *Statute L.R.* 390.

<sup>4</sup> For example, Ramsey *The Insecurity State* mentions FBOs once in 240 pages and J. Hendry and C. King's more recent 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2016) *Criminal Law and Philosophy* 1 fails to mention FBOs in their list of civil processes targeting criminal behaviour.

<sup>5</sup> Ramsey, *The Insecurity State*.

<sup>6</sup> Our article will focus solely on FBOs in England and Wales, but administrative bans bearing many similarities also exist elsewhere in Europe as a response to football disorder (see A. Tsoukala, G. Pearson, and P. Coenen (eds) *Legal Responses to Football 'Hooliganism' in Europe* (The Hague: TMC Asser, 2016)).

<sup>7</sup> [2002] EWCA Civ 351.

<sup>8</sup> See further on the development of legal 'super' measures, M. James and G. Osborn, 'Guilty by association: Olympic law and the IP effect' [2013] I.P.Q. 97.

on in *Gough* to the new super-FBO and consider whether the Court of Appeal would still find these enhanced orders lawful today. Unless specifically noted, references to FBOs include orders applied for ‘on complaint’ and post-conviction as both are imposed following the same civil procedure. This is in contrast to most previous work which has focussed on the former.

The argument developed here is twofold. First, that the super-FBO is fundamentally different to the preventive measure originally designed by Parliament and held to be compliant with EU and human rights law in *Gough*. Secondly, that the operation of these super-FBOs in the lower courts<sup>9</sup> is contrary to fundamental principles of human rights meaning that their legitimacy must be called into question.<sup>10</sup> Their punitive nature has evolved incrementally, through legislative amendments and the creativity of applicants, and must serve warning of the risk that similar expansionism could affect other CPOs, particularly the Criminal Behaviour Order, which shares many of the characteristics of the FBO regime. We argue that when considering their nature and severity, rather than merely their stated legislative purpose and categorisation,<sup>11</sup> FBOs are punishments that are incompatible with Arts.6 and 7 European Convention on Human Rights (ECHR)<sup>12</sup> and, unless the legislation is amended to include improved safeguards, should only be imposed as part of the sentencing process on conviction for a football-related offence.

The validity of the judgment in *Gough* will not be revisited, nor will the proportionality arguments based on EU law as these have been discussed elsewhere.<sup>13</sup> Further, we do not engage here with arguments concerning the proportionality of using such restrictive civil orders as a response to football crowd disorder, despite the compelling evidence that incidents both domestically and abroad have been diminishing,<sup>14</sup> and the questionable utility of using FBOs

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<sup>9</sup> The authors draw upon court observations carried out from 18 unreported post-*Gough* s.14B cases in four different force areas. Support for our arguments is also drawn from local press reports from unobserved cases, and interviews with counsel representing both applicants and respondents.

<sup>10</sup> Ashworth, *Social Control and Anti-Social Behaviour*, 265.

<sup>11</sup> *Welch v UK* (1995) 20 EHRR 247, 262, and see further below.

<sup>12</sup> Article 6 protects the right to a fair trial and Art.7 prevents a punishment being imposed in the absence of proof that a criminal offence has been committed.

<sup>13</sup> E. Deards, ‘Human rights for football hooligans’ (2002) 27(6) E.L. Rev 765; C. Stott and G. Pearson, ‘Football banning orders, proportionality and public order’ (2006) 45(3) Howard J.C.J. 241; M. James and G. Pearson, ‘Football Banning Orders: Analysing their use in Court’ (2006) 70(6) J. Crim L. 509. The EU arguments may of course become less pertinent in the event of “Brexit”.

<sup>14</sup> Although the number of FBOs has remained largely static since 2002, the number of arrests for football-related offences has halved (from 3,898 to 1,895), with the vast majority being made for low-level disorder or drunkenness (in the 2015/16 season, 1,005 of arrests were for public disorder, drunkenness or ticket touting). The official statistics on football related arrests from 2001-02 to 2015-16 are available at: <https://www.gov.uk/government/collections/football-banning-orders> (last accessed 2 May 2017).

as a tool for reducing football ‘hooliganism’ abroad.<sup>15</sup> Instead, the analysis is located in the ongoing debate about the human rights implications of CPOs<sup>16</sup> by applying the reasoning of the ECtHR in *Welch*<sup>17</sup> and the Court of Appeal in *Gough* to the super-FBOs that are currently handed down by the courts. On the 30<sup>th</sup> anniversary of the original CPO, and following the recent introduction of CBOs and Public Space Protection Orders as the latest manifestations of these hybrid measures,<sup>18</sup> it is timely and appropriate to reconsider the nature, scope and legality of the FBO in a public law context.

### **The Evolution of Football Banning Orders pre-*Gough***

FBOs originate in the Public Order Act 1986 (POA 1986), but their regulatory framework is found in the much-amended Part II of the Football Spectators Act 1989 (FSA 1989). FBOs imposed under ss.14A and B FSA 1989 are an amalgamation of two distinct powers: the Exclusion Order and the Restriction Order. These original orders were introduced by the Thatcher government as part of a package of legislative measures designed to reduce violence and disorder perpetrated by football spectators, popularly referred to as ‘football hooliganism’.<sup>19</sup> Exclusion Orders were designed to reduce football-related violence in England and Wales: s.30 POA 1986 enabled a court to impose them on any individual convicted of a ‘football-related’ offence.<sup>20</sup> Provided that the court was ‘satisfied that making such an order in relation to the accused would help to prevent violence or disorder at or in connection with

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<sup>15</sup> C. Stott and G. Pearson, *Football Hooliganism: Policing and the War on the English Disease* (London: Pennant: 2007); C. Stott and G. Pearson ‘The Evolution and Effectiveness of Football Banning Orders’ (2008) 1-2 I.S.L.J. 66-67, 70-77. This analysis is further supported by subsequent mass disorder involving England fans in Marseille at the 2016 UEFA European Championships which occurred despite FBOs being in place to prevent ‘known troublemakers’ travelling to France.

<sup>16</sup> P. Edwards, ‘New ASBOs for old’ (2015) 79(4) J. Crim L. 257; M. James and G. Pearson, ‘Public order and the rebalancing of football fans’ rights: Legal problems with pre-emptive policing strategies and banning orders’ [2015] 3 P.L. 458, 463.

<sup>17</sup> *Welch v UK* (1995) 20 EHRR 247.

<sup>18</sup> Anti-social Behaviour, Crime and Policing Act 2014, ss.22 and 59 respectively.

<sup>19</sup> This a convenient label that is used regularly by judges in their deliberations, occasionally to justify higher sentences for those convicted of football-related offences. See G. Pearson, ‘The English Disease? Socio-Legal Constructions of Football Hooliganism’, (1998) *Youth and Policy*, No.60 and also M. Salter, ‘Judicial Responses to Football Hooliganism’ (1986) 37(3) N.I.L.Q. 280.

<sup>20</sup> Defined as an offence committed during any period relevant to a football match (POA 1986 s.31(2) set this as two hours before and one hour after the advertised kick-off, including offences committed whilst entering or leaving a regulated football match, offences involving the use or threat of violence towards another person and/or property on a journey to or from a regulated football match, and offences in the Sporting Events (Control of Alcohol) Act 1985 (POA 1986 ss.31(3) and (4)).

[regulated]<sup>21</sup> football matches,<sup>22</sup> it could exclude the convicted fan from attending these games for a minimum period of three months.<sup>23</sup> Breach of the conditions of an Exclusion Order constituted a criminal offence,<sup>24</sup> creating the first hybrid order.

Restriction Orders were introduced by s.15 FSA 1989 and enabled courts to require a person convicted of a football-related offence (including one committed abroad)<sup>25</sup> to report to a police station when regulated football matches were being played abroad for a period of two-five years.<sup>26</sup> Where the court was satisfied that making the order would ‘help to prevent violence or disorder at or in connection with [regulated] football matches,’<sup>27</sup> the individual could be designated for reporting duty; failure to report was a criminal offence.<sup>28</sup> Therefore, Exclusion Orders criminalised entering a football stadium whilst banned, and Restriction Orders made failure to report as required the offence. Restriction Orders were designed to confront ‘the problem of football hooligans abroad,’<sup>29</sup> by preventing those convicted of football-related offences from travelling to matches played outside England and Wales,<sup>30</sup> an issue of major concern for the government following a series of incidents of disorder involving England fans and fans of English club sides.<sup>31</sup>

Three serious incidents involving England fans abroad questioned the effectiveness of these orders. Violence in Dublin in 1995 was blamed on there being only two ‘hooligans’ subject to Restriction Orders,<sup>32</sup> leading the Home Secretary to remind judges of their banning powers.<sup>33</sup> This was followed by two days of rioting involving England fans in Marseille at the 1998 World Cup, resulting in the Football (Offences and Disorder) Act 1999 which renamed Restriction Orders ‘International FBOs’ and increased both their length and scope. These orders would now be in place for three-ten years,<sup>34</sup> and most importantly gave courts the power

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<sup>21</sup> Previously, relevant football matches were ‘prescribed’ but are now ‘regulated’. For consistency of understanding, ‘regulated’ is used throughout this article.

<sup>22</sup> Section 30(2).

<sup>23</sup> Section 32(2). No maximum was given, although s.33 sets out how an excluded fan can apply for the termination of an order after one year.

<sup>24</sup> Section 32(3).

<sup>25</sup> Section 22(4).

<sup>26</sup> Section 16(1)(a).

<sup>27</sup> Section 15(2).

<sup>28</sup> Section 19(7).

<sup>29</sup> H.C. Deb. 27 June 1989 vol 155 c844, at 850.

<sup>30</sup> Section 14(1).

<sup>31</sup> Culminating in the 39 fatalities at the 1985 European Cup final in Belgium and serious disorder at the 1988 European Championships in Germany (H.L. Deb. 2 February 1989 vol 503 c1217).

<sup>32</sup> *The Guardian* 27 February 1995. The Home Secretary concluded ‘Restriction Orders haven’t really worked’ *The Guardian* 22 October 1997.

<sup>33</sup> *The Guardian* 27 December 1997.

<sup>34</sup> Section 4 amending FSA 1989 s.16.

to impose additional conditions beyond the duty to report to a police station. This latter power was generally limited to the surrender of the banned person's passport during a 'control period' around regulated matches taking place abroad.<sup>35</sup> Exclusion Orders became Domestic FBOs and extended the definition of a 'football-related' offence to include disorder committed abroad that fell outside its original definition.<sup>36</sup> Finally, judges were now *duty bound* to impose FBOs where there were reasonable grounds to believe it would *help* to prevent football-related violence and disorder.<sup>37</sup>

The following year, 965 England fans were arrested at the 2000 European Championships in Belgium, resulting in the Football (Disorder) Act 2000 establishing the current FBO framework. Domestic and International FBOs were amalgamated ensuring that regardless of where an offence was committed, the ban would extend to regulated matches both at home and abroad. Further, conditions could now be attached to what had previously been domestic-focused FBOs, even though evidence suggested that disorder in England and Wales was already reducing.<sup>38</sup> Equally significant was the introduction of the complaint procedure under s.14B FSA 1989, enabling the police to apply for a FBO against individuals who had not been convicted of any offence. This final development was sufficiently controversial for the government to agree to a 'sunset clause' that enabled Parliament to review the need for, and effectiveness of, s.14B.<sup>39</sup> After 12-months, the sunset clause was revised to a single five-year period, to ensure that FBOs were operational for the FIFA World Cup 2006 in Germany, on the basis that it had, 'proved to be an effective but proportionate response to the undoubted menace of English football disorder abroad.'<sup>40</sup> During the accompanying Parliamentary debates, the focus was on the forced surrender of the banned person's passport; there was no discussion of the impact of additional conditions being included in FBOs. The sunset clause was eventually removed by s.52(1) Violent Crime Reduction Act 2006 without further debate. The final amendment made by the 2000 Act was to increase the maximum penalty for

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<sup>35</sup> Section 3 amending FSA 1989 s.15(5A-5C). The previous Conservative government had been of the view that the removal of passports via civil preventive orders was 'impossible' (H.C. Deb. 27 June 1989 vol 155 c850).

<sup>36</sup> Football (Offences and Disorder) Act 1999 s.7 amending POA 1986 s.32.

<sup>37</sup> If the court wished to exercise its discretion for not doing so, then it must state in open court the reasons for not imposing a banning order, ss.6(1) and 5(3) respectively. However the private members bill failed to introduce FBOs without conviction (see H.C. Deb. 11 June 1999 vol 332 cc904-905).

<sup>38</sup> From 6,147 arrests in the 1987/8 season, arrests dropped every season (with two exceptions) to 3,307 in 1997/8 (Football Intelligence Unit/Home Office statistics).

<sup>39</sup> Hansard, H.L. Deb. 24 July 2000, c174, Football Disorder Bill.

<sup>40</sup> Hansard, H.L. Deb. 20 December 2001, vol 630 cc357-384, at 357.

breaching an FBO from one to six months and/or a fine not exceeding level 5 on the standard scale.<sup>41</sup>

By 2002 a single, universal FBO was available to the courts that could be imposed by two virtually identical civil procedures. Under s.14A, a FBO could be imposed on a person convicted of a football-related offence and under s.14B it could be imposed at the request of a Chief Constable where an individual was alleged to have been involved in any acts of violence or disorder in the preceding 10-years. This differentiates the FBO regime from other CPOs, which have focussed on *either* imposing a post-conviction order (CBOs) *or* regulating pre-conviction misbehaviour (ASBOs, PSPOs). Under both s.14A and s.14B, the court was under a duty to impose an FBO where it was satisfied that there were reasonable grounds for believing that doing so would help to prevent violence or disorder at or in connection with regulated matches.<sup>42</sup> The ban extended to all regulated football matches in England and Wales, required the surrender of the banned person's passport and attendance at a predetermined police station for specific matches played outside of England and Wales, and could include other conditions as the court saw fit.

These amendments have caused considerable confusion in the courts and the legislation has been criticised on a number of occasions by the Court of Appeal. In *R v Boggild & Others*,<sup>43</sup> the hybrid nature of FBOs forced the Criminal Division of the Court of Appeal to reconstitute itself in its civil form because an 'anomaly' in the legislation precluded it from hearing an appeal and cross-appeal against the same FBO at the same time. Later in *R v Doyle & Others*, Hughes LJ opened his judgment by commenting that, 'not for the first time, the complexity of legislation enacted in pursuit of an entirely necessary objective has caused no little trouble.'<sup>44</sup>

### ***Gough and Smith v Chief Constable of Derbyshire***

The legality of s.14B FBOs was analysed by the courts in *Gough*. The two appellants were suspected of involvement in organised football violence with Derby County's hooligan gang (or 'firm') and, based on evidence contained in police dossiers outlining their presence at various incidents of disorder, were subjected to FBOs. These particular orders banned the

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<sup>41</sup> FSA 1989 s.14J.

<sup>42</sup> Sections 14A(2) and 14B(4)(b) respectively.

<sup>43</sup>[2011] EWCA Crim 1928.

<sup>40</sup> [2012] EWCA Crim 995.



respondents from all matches involving their team, imposed a limited exclusion zone around Derby's home stadium when matches were taking place there, required that they surrender their passports for all England away games (and any others as directed by the Football Banning Orders Authority) and report to a local police station at the start of each relevant control period. The appellants challenged the legality of these FBOs on the grounds that they were incompatible with Art.7 ECHR (at trial), Art.6 ECHR (on appeal), and EU law.

In the High Court,<sup>45</sup> it was held that there was no breach of Art.7 as FBOs were not punitive in nature. The Court accepted that 'penalty' is an autonomous Convention concept and applied the reasoning of the ECtHR in *Welch v UK* when analysing their status.<sup>46</sup> This required the court to take into consideration five factors: whether the measure followed a criminal conviction; the nature and purpose of the measure; its characterisation in national law; the procedures involved in the implementation of the measure; and its severity. In answering these points, the High Court in *Gough* held that: a s.14B FBO does not inevitably follow a criminal conviction as there is an element of judicial discretion; there is no need for a criminal conviction, only evidence of previous engagement in violence or disorder; that FBOs are not designed to punish past misconduct but to prevent the 'evils of football hooliganism';<sup>47</sup> that FBOs are characterised as civil preventive orders, not punishments that form part of the sentencing process; that FBOs can be terminated early on application by the respondent; and that the impact of a FBO on an individual is not severe enough to constitute a punishment. The court considered that being subject to a FBO was not punitive in any way.

The Court of Appeal reiterated that as FBOs were preventive in nature and imposed by a civil law procedure, there was no requirement to adhere to the evidential and procedural standards required in a criminal trial. It is clear that the Court considered that the purpose of the legislation was to prevent those suspected of engaging in serious football gang violence from attending matches. Indeed, in the facts of the case before them, the allegation was that both respondents were members of an organised and violent hooligan 'firm' called the 'Derby Lunatic Fringe'. Despite this interpretation of the mischief that the amended FSA 1989 was designed to confront, Lord Phillips MR was still sufficiently concerned about the impact that FBOs could have on a banned individual that he essentially read down the provision and

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<sup>45</sup> [2001] EWHC Admin 554 [30]-[42] in particular (Laws LJ).

<sup>46</sup> 20 E.H.R.R. 247 262-63. In *Welch*, the ECtHR ruled that the confiscation order under the Drug Trafficking Offences Act 1986 constituted a retrospective criminal penalty contrary to Art.7 ECHR and set down five tests to determine whether such an order constituted a criminal penalty. These tests are considered later.

<sup>47</sup> [2001] EWHC Admin 554 [3] and [5] (Laws LJ).

imposed an important procedural check by raising the applicable standard of proof. Thus, as 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 standard*’.<sup>48</sup> Despite this, the restrictions imposed on individuals by FBOs were not considered to have a serious enough impact on respondents to constitute a penalty.

### **The Emergence of the ‘Super-FBO’**

Since the introduction of Exclusion and Restriction Orders in the 1980s, the various legislative amendments, in combination with their interpretation in court and the creative inclusion of conditions under s.14G FSA 1989, has resulted in the emergence of a new type of order that is very different in scope and impact to the FBO that was found to be a purely preventive measure in *Gough*. Although the justification for imposing FBOs on certain football fans has remained largely the same, the impact that they have on those who are banned has changed dramatically. The evolution of this super-FBO, which creates football-specific criminal law for its subjects,<sup>49</sup> has been gradual and has gone largely unchecked. The length of time it lasts, the number of match-days it covers, and the increasingly restrictive conditions imposed on their subjects make the super-FBO far more restrictive than the FBO considered in *Gough*. Additionally, there has been a significant expansion in the type of supporters against whom FBOs are sought and a reduction in the seriousness of the behaviour triggering applications. There has been some reticence in the higher courts with regard to this last point, but little evidence that other protections required by FBO appeal cases are being followed at trial. Following *Welch*, consideration of both the nature and severity of an FBO’s restrictions is necessary when establishing whether an order is a penalty. What will be demonstrated is that the incremental development of the overall impact of the super-FBO renders it a punishment that should only be imposed as part of sentencing following conviction.

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<sup>48</sup> *Gough* [90], emphasis added. In civil trials generally, the existence of alternative standards of proof has been expressly rejected. For a recent review of this area see, *GB v Stoke City Football Club Ltd & Anor* [2015] EWHC 2862 (QB).

<sup>49</sup> James and Pearson *Public Order and the Rebalancing of Football Fans’ Rights*.

Care must be taken here, as the Court of Appeal and House of Lords have, in two cases reported in the same year as *Gough*, addressed the application of *Welch* to other CPOs and on each occasion reached similar conclusions. In *McCann*,<sup>50</sup> the House of Lords ruled that anti-social behaviour orders were not penalties because of their preventive rather than punitive purpose. In *Field*,<sup>51</sup> the same outcome was reached regarding an order that disqualified the defendant from working with children. Despite these decisions, it does not follow automatically that super-FBOs would be viewed in a similar way, even if it is assumed that *McCann* and *Field* correctly apply *Welch*, an assumption that is doubted particularly with regard to their over-reliance on the stated *purpose* of the CPOs rather than their *nature* or *effect*.<sup>52</sup>

In *McCann* and *Field*, the courts considered the CPOs analogous to an injunction designed to prevent a civil wrong but unintentionally having a negative impact on the defendant. However, while the now-defunct ASBO and the disqualification from working with children may be seen as analogous to civil injunctions in that they seek to prevent a very narrow category of behaviour, super-FBOs have gone far beyond that comparison. The FBO held lawful in *Gough* was in many ways also similar to a civil injunction, but the nature of the super-FBO is fundamentally different and significantly more generically restrictive in the following five specific ways.

### ***FBOs Affect a Much Wider Range of Individuals than Originally Anticipated***

When imposing FBOs on individuals merely suspected of engagement in football-related violence was first mooted during the passage of the Football (Offences and Disorder) Bill through Parliament, their stated target was those who, ‘commit offences or are involved in organising violence but cleverly manage not to be where they may be arrested.’<sup>53</sup> The perceived need for introducing FBOs on complaint was the aforementioned disorder in Marseille (1998) and Charleroi/Brussels (2000), which the media generally attributed to the presence of

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<sup>50</sup> *R (McCann and Others) v Crown Court at Manchester and another and Clingham v Kensington and Chelsea Royal London Borough Council* [2003] 1 A.C. 787

<sup>51</sup> *R. v Field* [2002] EWCA Crim 2913

<sup>52</sup> Ashworth, ‘Social control and ‘anti-social behaviour’.

<sup>53</sup> Then Parliamentary Under-Secretary of State for the Home Department (Kate Hoey) during the House of Commons Standing Committee Debate on the Football (Offences and Disorder) Bill, S.C. Deb. (D) 5 May 1998, available online [www.publications.parliament.uk/pa/cm/stand.htm](http://www.publications.parliament.uk/pa/cm/stand.htm) (last accessed 15 July 2016).

‘hooligans’ who had travelled to the matches with the intention and ability to ‘orchestrate’ riots.<sup>54</sup>

Despite their original aim, s.14B is now rarely used against this type of individual. In *Gough*, the appellants were referred to as ‘prominents’ because they were alleged to have been prominent in a number of disorderly events. Respondents to FBO applications are now generally referred to as ‘risk supporters.’ The term ‘risk supporter’ is used by many football intelligence officers to describe individuals who attend matches and pose a risk of engaging in violence or disorder with rival risk supporters.<sup>55</sup> In many FBO applications, the presence of the respondent amongst other ‘risk supporters,’<sup>56</sup> or within ‘risk groups’ when disorder occurs,<sup>57</sup> has been sufficient justification for the imposition of a FBO, regardless of their lack of active involvement.<sup>58</sup> Further, in the absence of disorder, presence amongst others defined as risk supporters can result in a FBO where the respondent cannot prove they possess a valid match ticket.<sup>59</sup> Indeed, the mere ‘presence and tacit support’ of a respondent within a group containing risk supporters can be sufficient for the imposition of a s.14B FBO,<sup>60</sup> as can the failure to disengage from a group that comes under unprovoked attack by rival groups when leaving a football stadium.<sup>61</sup>

The National Police Chief’s Council currently uses the rather confusing EU definition of risk supporter: ‘a person, known or not, who can be regarded as posing a possible risk to public order or anti-social behaviour, whether planned or spontaneous, at or in connection with a football event’.<sup>62</sup> Where courts allow this term to be used in FBO cases, it extends the reach

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<sup>54</sup> Stott and Pearson, ‘Football banning orders, proportionality and public order’. The authors are highly critical of this explanation for the disorder that occurred. Similar scenes of mass disorder occurred on the England national team’s next visit to Marseille for the 2016 European Championships.

<sup>55</sup> M. Hopkins ‘Ten Seasons of the Football Banning Order: Police Officer Narratives on the Operation of Banning Orders and the Impact on the Behaviour of ‘Risk Supporters’ (2014) 24(3) *Policing and Society* 285, 291.

<sup>56</sup> For example, *Chief Constable of Greater Manchester v Reilly*, unreported, 14 February 2006, Trafford Magistrates Court; *Chief Constable of West Yorkshire v Nye*, unreported, 21 June 2010, Leeds Magistrates Court.

<sup>57</sup> For example, *Chief Constable of Greater Manchester v Clarke and Ors*, unreported 19 December 2012, Manchester City Magistrates Court; *Chief Constable of Greater Manchester v Robinson*, unreported 28 January 2013, Manchester City Magistrates Court.

<sup>58</sup> This is not always the case, and there are instances where judges have discounted such evidence of guilt by association and acknowledged that mixing with ‘risk supporters’ does not necessarily indicate a predisposition towards engagement in disorder (*Chief Constable of Greater Manchester v Euston*, unreported 28 January 2013, Manchester City Magistrates Court).

<sup>59</sup> *Chief Constable of West Yorkshire v Ford and Ors*, unreported 21 June 2010; *Chief Constable of West Yorkshire Police v Etherington and Punter*, unreported 6-7 June 2010, Leeds Crown Court.

<sup>60</sup> *CCGMP v Reilly*.

<sup>61</sup> *Chief Constable of Greater Manchester v Messer*, unreported, 16 December 2012, Manchester City Magistrates Court; *Chief Constable of Greater Manchester v Oldland*, unreported, Manchester City Magistrates Court.

<sup>62</sup> College of Policing, Policing football, (Internet: 2013), available at: <http://www.app.college.police.uk/app-content/public-order/policing-football/> (last accessed 01 May 2017).

of this power beyond the ringleaders targeted by the legislation to include fans who pose a ‘risk’ of engaging in conduct that is often contextually-normalised boisterous or carnivalesque behaviour.<sup>63</sup> Thus, the current definition of ‘risk supporter’, which is typically provided to the court at the start of FBO applications, captures a far wider spectrum of individuals than those who are suspected of engaging in pre-planned gang violence and the orchestration of riots who were the original focus of the legislation.

### ***FBOs Target Much Less Serious Misbehaviour than Originally Anticipated***

Inextricably linked to the previous point are the cases where FBOs have been sought for behaviour that is neither violent nor disorderly but merely anti-social, including swearing at police,<sup>64</sup> and expressing support for hooligan gangs through chants or on social media.<sup>65</sup> Even where evidence of engagement in violence or disorder was adduced, it was often supported by evidence of anti-social activity including urinating in public, chanting indecently, smoking, and standing on seats.<sup>66</sup> The ability of judges to meet a standard of proof approaching beyond reasonable doubt, but without any evidence of actual involvement in violence and disorder, is assisted by an interpretation that ‘contributing’ to violence and disorder includes being present in groups where some individuals have engaged in disorder.<sup>67</sup> Thus, the type of misbehaviour included in profiles submitted in support of applications has lessened considerably from conspiring to commit, orchestrating, and engaging in violence and disorder, and falls short of the level of misconduct considered by the Court of Appeal in *Gough*.<sup>68</sup>

Further, the Court of Appeal has held that ‘an isolated first incident’<sup>69</sup> can be sufficient to lead to the imposition of a FBO as there is no requirement ‘for either repetition or

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<sup>63</sup> G. Pearson *An Ethnography of English Football Fans: Cans, Cops and Carnivals* (Manchester: MUP, 2012).

<sup>64</sup> *Commissioner of the Police for the Metropolis v Melody*, unreported, 9 July 2012, Tower Bridge Magistrates Court.

<sup>65</sup> *Chief Constable of Avon and Somerset v Bargh*, unreported, 27 January 2011, Bristol Magistrates Court.

<sup>66</sup> For example, *Chief Constable of Greater Manchester v Spibey*, unreported, 10 October 2012, Manchester City Magistrates Court.

<sup>67</sup> This ‘guilt by association’ leading to successful prosecutions can be seen in other spheres of the criminal law, notably joint enterprise. See for example, A. Green and C. McGourlay ‘The wolf packs in our midst and other products of criminal joint enterprise prosecutions’ (2015) 79(4) J. Crim L. 280. The dangers of resorting to this diluted standard of engaging in criminal activity has been criticised, P. Mirfield, ‘Guilt by association: a reply to Professor Virgo’ [2013] Crim L.R. 577.

<sup>68</sup> James and Pearson, ‘Public Order and the Rebalancing of Football Fans’ Rights’.

<sup>69</sup> *R v Curtis* [2009] EWCA Crim 1225.

propensity<sup>70</sup> of the disorderly behaviour. This again departs from the original justification for imposing FBOs; to prevent those travelling to matches with the intention of, or pre-disposition towards, engaging in violence or disorder. Being convicted of a relevant offence is not of itself sufficient for the imposition of a FBO; the court must also have ‘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’.<sup>71</sup> This test of ‘helpfulness’ is a low threshold when compared to the ‘necessity’ test utilised in similar hybrid CPOs, such as ASBOs, Criminal Anti-Social Behaviour Orders and Sexual Offences Prevention Orders, but has recently been adopted for Criminal Behaviour Orders.<sup>72</sup> If the court finds that it would be helpful, then it must impose an order, or provide reasons in open court for not doing so. Thus, not only is less serious conduct being used as the contextual basis for imposing FBOs, but more incidents are now included within the meaning of ‘football-related’, and a lower threshold of ‘helpfulness’ is required to justify their imposition. These first two developments are significant because when generic conditions are imposed to prevent engagement in violence or disorder against those involved in much less serious misconduct, FBOs no longer look like a purely preventive measure designed to stop repetition of specific alleged mischief that may be analogous to a civil injunction.<sup>73</sup>

### ***FBOs are Activated more often than Originally Anticipated***

Originally, only a fairly narrow category of matches in England and Wales and abroad was covered by FBOs, focussing almost exclusively on the fans of professional clubs and national teams. This made sense as only fixtures involving these teams had had been the focus of previous disorder and violence.<sup>74</sup> However, the definition has now been extended to include matches where at least one of the teams represents a club from the League of Wales, the four Scottish Professional Football Leagues, is an international representative side, and for tournaments organised by FIFA or UEFA where any such team was merely *eligible* to

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<sup>70</sup> *R v Hughes* [2005] EWCA Crim 2537, para 13. See also *R (White) v Blackfriars Crown Court* [2008] EWHC 510 (Admin).

<sup>71</sup> FSA 1989 s.14A(2).

<sup>72</sup> Anti-social Behaviour, Crime and Policing Act 2014 s.22(4). See P. Jarvis, ‘The new criminal behaviour order’, [2015] 4 Crim L.R. 278, 281.

<sup>73</sup> See *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084, para.39, per Lord Phillips MR.

<sup>74</sup> Regulated matches in England and Wales were where one of the participating teams represented a club in the Football League, Premier League, Football Conference, or represented a club from outside England and Wales, or a country or territory, or was an FA Cup fixture (The Football Spectators (Prescription) Order 2000/2126, Sch. 2). Matches outside England and Wales were regulated if they involved a national team representing England or Wales, or a team representing a Football League or Premier League club (Sch. 3).

participate (or had participated but were eliminated).<sup>75</sup> In short, FBOs are now active not just for a significantly increased number of men's first-team games, but potentially for reserve, women's, and youth team matches, and finals tournaments at which no home nations' representative teams are playing. This is despite the lack of any significant disorder involving British fans being connected to match events included within this extended definition.

Further, where FIFA and UEFA Finals tournaments are concerned, the control period during which FBOs are activated has extended from five- to 10-days before the first game of the tournament to the day after the final.<sup>76</sup> Although there are no extended control periods for other international representative tournaments, a literal reading of the 2004 Order indicates that at least the individual games in women's and age-restricted competitions are also regulated.

During the 2000-02 football season, the respondents in *Gough* were banned from attending 45 Derby County games and three England games, resulting in a total international travel ban of 18-days. The 2015-16 iteration of the super-FBO banned individuals from a minimum of 484 British club games and 10 England games (of which six were away games that would require the surrender of the banned person's passport for 30-days).<sup>77</sup> For the 2016 UEFA European Championships in France, the control period was operative from 31 May to 11 July, adding 51-days to the minimum cumulative total for which a banned person must surrender their passport.<sup>78</sup> Thus, a FBO is activated for approximately 10-times the number of games than was originally anticipated and if games other than those involving men's first teams are included within the definition of 'regulated football match', then the conditions could be operative for most days of the week for at least nine months of the year. This extension has gone entirely without comment in the courts, despite the obvious and increasingly restrictive impact of super-FBOs.

This increase in the number of regulated games for which a FBO must be operative cannot be ameliorated by the court analysing the need for a ban of such wide scope. Following individual consideration of the threat posed by the respondent in *Thorpe*,<sup>79</sup> a FBO that extended

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<sup>75</sup> The amended Football Spectators (Prescription) Order 2004/2409.

<sup>76</sup> Football Spectators (World Cup Control Period)(No2) Order 2002/1143 art.3(2) and Football Spectators (2006 World Cup Control Period) Order 2006/988 respectively.

<sup>77</sup> Further games in the UEFA Champions League or Europa League can be added to this total, as could international representative games involving teams other than England and Wales. The definition of regulated football match probably also includes games involving women's and age-group teams representing England and Wales (Order 2004/2409).

<sup>78</sup> Football Spectators (2016 European Championship Control Period) Order 2016/141 art.3.

<sup>79</sup> *Commissioner of Police of the Metropolis v Thorpe* [2015] EWHC 3339 (Admin).

only to regulated matches involving Fulham, Chelsea, and Brentford Football Clubs was imposed. On appeal to the High Court, a literal meaning of ‘any premises’ as used in s.14(4)(a) FSA 1989 was applied, meaning that even where deemed not necessary or appropriate, a court has no discretion but to impose a FBO that bans the respondent from *all* regulated football matches; there is no possibility of imposing a limited FBO. Again, unlike the individually-tailored ASBOs discussed in *McCann*, the FBO imposes a blanket restriction that goes far beyond having a merely preventive effect.

### ***FBOs Contain Much More Restrictive Conditions than Originally Anticipated***

The courts have further extended the impact of FBOs by using the power contained in s.14G FSA 1989 to impose additional restrictive conditions. *Gough* held that as FBOs were preventive in nature, any additional conditions should attempt to prevent engagement in the type of behaviour that led to the previous violence or disorder. In *Gough*, the necessary conditions were: a ban from all Derby County matches; a limited exclusion zone around Derby’s home stadium when matches were taking place there; and a requirement to surrender their passports for all England away games as there was evidence that one of the respondents had travelled abroad to support England and been corralled by Belgian police.

Where super-FBOs are concerned, it is clear that instead of applying individually-considered restrictions to prevent the repetition of the specific misconduct, standard conditions are requested by the applicant police force and imposed by courts. This is a fundamental departure from the regime assessed in *Gough*, where Lord Phillips drew attention to the role of the Football Banning Orders Authority, ‘whose duties include tailoring the requirements of a banning order to fit the particulars of the individual subject to the order,’<sup>80</sup> and highlighted the importance of the ‘individual consideration’ of conditions imposed on banned individuals under s.19 FSA 1989.<sup>81</sup> However, as the FBO regime has developed, the number and scope of the conditions requested has extended significantly. Standard FBO conditions include: preventing the individual from attending *any* regulated matches, not just those of the team supported, and potentially including youth and women’s games) excluding them from at least a one-mile zone around their home team’s stadium for up to 24-hours either side of a regulated

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<sup>80</sup> *Gough*, Para 18.

<sup>81</sup> *Gough*, Paras 70-74.



match; excluding them for the same time period from a similar zone around the main railway station and/or town centre; and requiring them to surrender their passport for control periods of up to days before their club or national team plays abroad.<sup>82</sup>

In exercising its discretion under s.14G, courts rely heavily on the applicant as there are no official guidelines on how to define the scope of the conditions that ought to be imposed. Furthermore, unless the conditions restrict the respondent's ability to work, challenges to their imposition are rare. The respondent is typically unrepresented, usually because (for s.14A) they have already pleaded guilty, or (for s.14B) because they were given a financial incentive to accept the FBO and do not understand their right to oppose its terms.<sup>83</sup> Appeals, which would need to go through a costly civil procedure, are also rare. As a result, and in a clear departure from Lord Phillips's understanding of how the system works in *Gough*, the same 'formulaic and poorly targeted'<sup>84</sup> conditions are generally included in all FBOs regardless of their specific need. The creative expansion of the restrictions imposed on respondents has transformed FBOs into orders that are unrecognisable from those imposed in *Gough*; all respondents are treated as generic, pre-disposed, and regularly-active 'hooligans' posing the same level of threat. Thus, a respondent who is the subject of the super-FBO for engagement in domestic football-related disorder will have to relinquish their passport even if they have never attended matches abroad.<sup>85</sup> Similarly, a fan who is convicted of being drunk inside a football stadium, invading the pitch to celebrate a goal, or lighting a smoke bomb in a stadium will be served with not just a stadium ban but also the full range of standard conditions that are designed to prevent those engaging in organised gang violence outside.

These conditions have, on occasion, been taken to such an extreme that banned supporters can be subjected to effective house arrest when their team is playing and denied access to the railway network on match-days,<sup>86</sup> or subjected to a two-mile exclusion zone around every football stadium in the UK when any regulated match is taking place.<sup>87</sup> The severity of such conditions, none of which prohibit inherently criminal conduct, is exacerbated by the increase in the maximum sentence for breaching a FBO's conditions from one- to six-

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<sup>82</sup> James and Pearson, 'Public Order and the Rebalancing of Football Fans' Rights'.

<sup>83</sup> Even where respondents are represented, it is often by a criminal defence lawyer who may not have experience in challenging the terms of civil orders.

<sup>84</sup> S. Hoffman and S. MacDonald, 'Should ASBOs be civilized?' [2010] Crim L.R. 457,

<sup>85</sup> Resulting in *Clarke*, a Scotland fan, having to surrender his passport for all England match abroad.

<sup>86</sup> *Birmingham Mail*, 21 October 2015 (available at: <http://www.birminghammail.co.uk/news/midlands-news/aston-villa-thug-hurled-can-10305242>, last accessed 15 July 2016).

<sup>87</sup> *CPM v Melody*.

months' imprisonment. Thus, both the nature and the severity of the FBO are significantly greater than those considered to be lawful in *Gough*.

### ***FBOs are Imposed for Much Longer Periods of Time***

The duration of s.14B FBOs was increased by the Violent Crime Reduction Act 2006 from two-three years to three-five years,<sup>88</sup> creating the curious position of it being very much in the interest of the police (in terms of time, resources, and cost), to make s.14B applications instead of pursuing suspected hooligans to conviction. As FBOs are supposed to be preventive rather than punitive, their length should be the result of judicial consideration of the risk posed by the respondent. However, there is little evidence that the duration of s.14B FBOs matches the level of risk posed by respondent.<sup>89</sup> Magistrates Court cases demonstrate that it is not the case that the more serious the threat the longer the ban, as might be expected; instead, in many cases, the opposite occurs.<sup>90</sup> This state of affairs is the result of the applicant police forces offering discounts to those respondents who agree not to contest the imposition of s.14B FBOs.<sup>91</sup> As respondents are less likely to contest FBOs where the applicant has the most cogent evidence that they have engaged in violence and disorder, it is common for those posing the greatest threat to receive the shortest bans by accepting their imposition early. In a number of observed cases, the maximum length FBO was imposed following contested s.14B hearings against respondents where the evidence suggested nothing more than that they were present without match tickets in pubs where groups of 'risk fans' had congregated. On two of these occasions disorder occurred, although the respondents were not involved.<sup>92</sup> In only two contested cases observed was the maximum duration applied for and rejected.<sup>93</sup>

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<sup>88</sup> Section 52(2).

<sup>89</sup> Although it seems that the Court of Appeal can reduce FBOs of inappropriate length: *R v Curtis* [2009] EWCA Crim 1225 [16] (McCombe J).

<sup>90</sup> This phenomenon was first observed in James and Pearson *Football Banning Orders*. Observed and reported lower court cases since then indicate the problem remains.

<sup>91</sup> Applicants also offer a reduction of court costs for those who choose not to contest applications. Contested applications can result in significant costs of up to £4,250 if the ban is awarded, *Oldland*. These costs are put towards future football intelligence operations and add weight to the view that s.14B applications are being made for financial reasons, Hopkins, 'Ten Seasons of the Football Banning Order'. In cases where the respondent is absent, reasons for the duration of the FBO are rarely given (eg *Chief Constable of Greater Manchester v Fielding*, unreported 16 February 2006, Trafford Magistrates Court).

<sup>92</sup> *CCGMP v Nye*; *CCGMP v Ford and others* and *CCGMP v Etherington and Punter*.

<sup>93</sup> *CCGMP v Oldland*; *CCGMP v Euston*.

Conversely, the minimum duration ban was often imposed despite the court accepting evidence that the respondent was engaged in serious violence and/or organised disorder that if proven in a criminal court would have led to a custodial sentence. The evidence adduced in these latter cases included: being part of a gang running down a public road to confront a rival gang;<sup>94</sup> sending mobile phone text messages to organise a violent confrontation with a rival risk group and later being seen ‘waving his fists’ in another confrontation;<sup>95</sup> and ‘swinging’ punches at the front of a group engaged in a fight with a rival football gang.<sup>96</sup> Often, such cases are dealt with in a matter of minutes, with no discussion of the appropriate length of time for which the ban should be in place or the conditions that should be attached. There is merely an assumption that because unrepresented respondents were not contesting the applications, they should be rewarded by a reduced ban (and costs award) in the same way that a guilty plea can lead to a lower sentence in a criminal case. Likewise, the use of the shortest length ban against a respondent who could have faced a charge of conspiracy to cause violent disorder was justified by the magistrate on the grounds of their youth rather than after an assessment of their threat to public order at future matches. This leads to two specific problems: first, the length of the ban imposed is not considered from the point of view of preventing the specific threat posed by its subject; and secondly, the increased period for which a FBO is operative means that it is not cost-effective to prosecute a suspect, even where there is evidence of criminality having taken place. Due in no small part to the far greater restrictions that they now place on respondents resulting from the post-*Gough* legislative creep, FBOs are being used increasingly by the police as an alternative to prosecution.<sup>97</sup>

### **Reapplying the Human Rights Jurisprudence to Super-FBOs**

The human rights implications of CPOs in general have been discussed at length previously,<sup>98</sup> but what is of specific importance here is that the FBO declared lawful in *Gough* has been incrementally replaced by a super-FBO, the human-rights compliance of which has yet to be

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<sup>94</sup> *Chief Constable of Greater Manchester v Maddox*, unreported, 13 February 2006, Trafford Magistrates Court; *CCGMP v Clarke*.

<sup>95</sup> *Chief Constable of Greater Manchester v Lannon*, unreported 14 September 2012, Wigan Magistrates Court.

<sup>96</sup> *CCGMP v Spibey*.

<sup>97</sup> While funding for police operations to manage football crowds and convict offenders has been cut nationwide for reasons connected to austerity, forces can bid for additional funds from the UK Home Office to pursue s.14B applications. Hopkins’ research suggests that instead of serving a crime control function, s.14B applications are being used in some forces to fund football policing operations (Hopkins, ‘Ten Seasons of the Football Banning Order’ at 292).

<sup>98</sup> Ashworth *Four Threats to the Presumption of Innocence*.

determined. The evolution of the super-FBO has occurred without a proper assessment of whether the extended restrictions imposed by them are individually necessary and appropriate. The resulting post-*Gough* super-FBO is a fundamentally different measure and both the amended legislative provisions, and their use in practice, are open to challenge.

Revisiting the tests from *Welch* and *Engel*,<sup>99</sup> super-FBOs are penalties. If, as is required, particular emphasis is placed on analysing the nature and severity of the impact of the sanction on the respondent, instead of focusing on its stated purpose and domestic classification, then the super-FBO is a totally different order of restriction than was originally envisaged by Parliament or the Court of Appeal in *Gough*. The super-FBO represents a significant extension in terms of its scope and impact such that punishment can no longer be seen as incidental to simply denying a football fan the ability to attend matches (or attend specific high-risk locations), as might be expected of a civil injunction. It is a penalty that is a serious, consistent, and long-term restriction on the respondent's ability to engage in day-to-day activities and human interactions that infringes their rights of free expression, assembly and association.<sup>100</sup> As a result, it can no longer be categorised as exclusively, or even primarily, preventive, notwithstanding its original purpose. With the recognition in *Gough* that the impact of the original FBO was serious enough to warrant the creation of a new standard of proof approaching beyond reasonable doubt, the evolution of the super-FBO completes its transition from civil order to hybrid order to criminal sanction.

This is a further, 'vigorous example of an attempt to exploit the civil/criminal distinction' that imposes the CPO in civil proceedings and punishes its breach by a strict liability criminal offence.<sup>101</sup> This position is exacerbated by the civil court having the power to impose restrictions that go beyond preventing the kind of behaviour identified as problematic by the applicant police force, as any conditions can be attached to a super-FBO that help to prevent any future instances of football-related violence and disorder, not just those that are relevant to the respondent. This use of generic, standardised conditions creates not just an individually-personalised criminal law for the respondent, but potentially a generally applicable criminal law for risk supporters.<sup>102</sup>

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<sup>99</sup> *Engel v Netherlands* (1976) 1 E.H.R.R. 29, 81-83.

<sup>100</sup> James and Pearson *Public Order and the Rebalancing of Football Fans' Rights*.

<sup>101</sup> Ashworth *Four Threats to the Presumption of Innocence*, 273.

<sup>102</sup> *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom* (Office of the Commissioner for Human Rights, Strasbourg, 2005) [110].

The continued characterisation of the FBO procedure as civil, despite its accepted hybrid character, leaves the applicant able to prove the need for the imposition of a super-FBO without the commensurate evidential protections provided by a truly criminal procedure. This is particularly notable with regard to the use of highly prejudicial hearsay statements from officers who would have been required by criminal procedure to offer themselves for cross-examination, or whose evidence could only be admitted once the provisions of the Criminal Justice Act 2003 had been satisfied. Thus, while the super-FBO looks increasingly criminal, its procedural standards remain steadfastly civil. Taken as a whole, the nature and severity of the restrictions imposed on respondents means that the super-FBO is a penalty that belongs in the criminal courts;<sup>103</sup> any other interpretation would fall foul of the anti-subversion doctrine.<sup>104</sup>

Further, the finding that super-FBOs are punitive in their nature renders their imposition following both the s.14A and B FSA 1989 procedures potentially unlawful. At present, s.14A FBOs are imposed following a civil application that takes place following completion of the sentencing process. Therefore, a FBO is not part of the sentence; under s.14A(4)(a) FBOs are imposed *in addition* to any sentence imposed by the trial court. Thus, if super-FBOs are penalties, then the respondent is being punished twice for the same behaviour; once by the sentencing court and then again by the civil court imposing the order. In situations such as this, the later proceedings could be barred, ‘on the well-established common law principle that where a person has been convicted and punished for an offence by a court of competent jurisdiction ... the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter.’<sup>105</sup> This exposure to double jeopardy means that it is possible for the respondent to be subjected to a higher penalty for their offence than was originally prescribed by law, resulting in a breach of both Art.7 ECHR and fundamental principles of English criminal law.

Where s.14B orders are concerned, the human rights arguments originally put forward in *Gough* come back into play. Most clearly, there is a breach of Art.7 ECHR as a punishment is imposed on the basis of behaviour that has not been proven to constitute a criminal offence at the time it was engaged in. Further, the right to a fair trial enshrined in Art.6 ECHR is

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<sup>103</sup> *Jussila v Finland* (2007) 45 E.H.R.R. 39 [31].

<sup>104</sup> *Engel v Netherlands*. See further Ashworth *Social Control and Anti-Social Behaviour*.

<sup>105</sup> *Wemyss v Hopkins* (1875) LR 10 QB 378, per Blackburn J at 381. See further, P. Richardson (ed), *Archbold Criminal Pleading Evidence and Practice 2016*, (2015 Sweet and Maxwell) [4]-[183] and generally *Connelly v DPP* [1964] AC 1254.

breached as the procedural safeguards usually expected from a criminal procedure are not in place during a FBO application. Where a punishment is to be imposed, the case should be proved beyond reasonable doubt, and hearsay evidence should only be admissible subject to one of the exceptions contained in the Criminal Justice Act 2003. Doubt has already been cast on the former protection (notwithstanding Lord Phillips' ruling in *Gough*),<sup>106</sup> and the latter is not applicable in the FBO's civil procedure. If either s.14A or 14B FBOs are to be compliant with the ECHR, then they need to lose their 'super-powers' and become more targeted in terms of both who is subjected to them and which conditions are imposed.

## Conclusions

When Civil Protection Orders are allowed to develop over three decades to serve policing strategies instead of fulfilling their original aims, they can evolve into something that is significantly more restrictive and punitive than was originally provided for. The new Criminal Behaviour Order was designed to tackle the most serious and persistent offenders,<sup>107</sup> and it too can be imposed where to do so would 'help' to prevent the offender from engaging in the proscribed conduct.<sup>108</sup> The potential for the level of creep experienced by FBOs to be replicated by the Criminal Behaviour Order must be resisted if their legitimacy is to avoid being similarly compromised.

Even if we accept the Court of Appeal's ruling in *Gough* that s.14B FBOs were compliant with Arts.6 and 7 ECHR, FBOs have developed considerably since then, both through legislative amendment and through the range of conditions that have been imposed by the courts. *Gough* is quite simply no longer applicable to the current super-FBO regime. The development of the legislation has led to confusion on the part of applicants, defence counsel, and magistrates, and there is wide regional variation in the use of FBOs.<sup>109</sup> The use of generic conditions and durations of bans that do not reflect the supposedly preventive nature of FBOs, combined with questionable application of the higher standard of proof, leaves FBOs unlawful under Arts.6 and 7 ECHR. Thirty years of adaptation and abuse have seen the first CPO develop into an intrinsically punitive state sanction that is imposed unrestricted by the rigours of

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<sup>106</sup> James and Pearson *Football Banning Orders*.

<sup>107</sup> Jarvis, 'The new criminal behaviour order'.

<sup>108</sup> Anti-social Crime and Policing Act 2014 s.22(4).

<sup>109</sup> Hopkins, 'The new criminal behaviour order', 292.

criminal evidence and procedure. Further, although the severity of the problem that a statutory provision is designed to confront cannot transform a criminal punishment into a civil order for the purposes of satisfying Arts.6 and 7,<sup>110</sup> it is worth challenging the view that FBOs have been a ‘proportionate response’ to the problem of football crowd disorder.<sup>111</sup> To contextualise the post-*Gough* creep, during the time that the FBO has been transformed into a super-FBO, all measures indicate a steady reduction in football-related disorder domestically, while questions continue to be asked about the effectiveness of FBOs for preventing disorder involving England fans abroad.

In the short term, s.3 Human Rights Act 1998 should be used to read down the relevant statutory provisions to alleviate the potential infringements of Arts.6 and 7 ECHR identified here. In the longer term, the much-criticised FSA 1989 requires significant amendment to ensure that bans with appropriate and proportionate conditions are imposed on the right people. We propose that s.14B be amended to ensure that individuals are not served with FBOs on complaint merely by virtue of guilt by association or failing to distance themselves quickly enough from ‘risk’ individuals or instances of disorder. To achieve this, the test in s.14B(2) that, ‘the respondent has at any time caused or contributed to any violence or disorder’ should be amended to reflect its original legislative purpose to capture only those who have, ‘organised, caused, or actively engaged in’ violence and disorder. Further, to rein in the ‘super-FBO’, s.14G also needs amending to ensure that courts tailor all FBOs to meet the threat posed by the specific respondent. Currently, courts must provide reasons for not imposing a FBO following conviction for a football-related offence. A corresponding duty to state in open court the reasons for imposing each condition attached to a FBO under s.14G, whether imposed on complaint or conviction, would provide an appropriate safeguard. It is hoped that in addition to ensuring that FBOs are used in line with their original statutory purpose, and do not operate as criminal penalties, such amendments may also discourage similar abuses creeping into the use of other CPOs.

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<sup>110</sup> Although the courts have been willing to discuss issues of proportionality when considering amendments to criminal procedure that water down protections under Article 6 (e.g. with regards to reverse burdens of proof, and hearsay evidence).

<sup>111</sup> Hansard, H.L. Deb. 20 December 201, vol 630 cc357-384, at 357.