Reconsidering the punishment-prevention divide

Jerome Jones v Birmingham City Council and Secretary of State for the Home Department [2018] EWCA Civ 1189 concerned the grant of an interim injunction, *ex parte* without notice, against Jones. The injunction was made pursuant to section 1 of the Anti-social Behaviour, Crime and Policing Act 2014 (the 2014 Act) and section 34 of the Policing and Crime Act 2009 (the 2009 Act). It prohibited Jones from the use or threat of violence; harassment or intimidation; entering substantial parts of Birmingham city centre; associating with 10 named people; possessing drugs; and appearing in specified types of gang-related music videos (at [12]). Two issues arose in the Court of Appeal. First, whether proceedings for the injunction constituted a criminal charge for the purposes of article 6 of the European Convention on Human Rights – the right to a fair trial. Secondly, if the proceedings were not in respect of a criminal charge, whether the evidential standard for imposition should nonetheless be the criminal standard of beyond reasonable doubt.

Before we engage with the decision of the Court, some context is needed on the development of the above types of injunction and their predecessor – the anti-social behaviour order (ASBO). The ASBO was enacted by section 1 of the Crime and Disorder Act 1998. It could be granted as a standalone order if two conditions were met: the person had acted in manner that caused or was likely to cause harassment, alarm or distress; and the order was necessary to protect relevant persons from further anti-social acts by the recipient. Breach of an ASBO was an offence, with a maximum sentence of five years' imprisonment. In 2002, the hybrid procedure of the ASBO was challenged in the House of Lords: *R. (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39; [2003] 1 A.C. 787. The Law Lords held that proceedings for the imposition of an ASBO did not constitute the bringing of a criminal charge and, as such, hearsay evidence could be relied on when an ASBO was sought (at [40] (Lord Steyn), [84] (Lord Hope), [115] (Lord Hutton)) The Law Lords also clarified that the first condition had to be proven beyond reasonable doubt by the applicant (at [37], [81]-[83], [114]). The second condition was left as a matter of judicial evaluation (at [37], [83]).

In 2008, the Court of Appeal held that a court could not grant an injunction in circumstances where an ASBO would be available save perhaps in an exceptional case: *Birmingham City Council v Shafi* [2008] EWCA Civ 1186; [2009] 1 W.L.R. 1961. To do so would run contrary to the detailed legislative scheme for the grant of ASBOs and its safeguards (at [60]). Birmingham City Council had sought injunctions – which it unsuccessfully argued would require lesser evidential standards than the ASBO – as part of a response to gangs in the city (at [20]-[21] and [49]-[50]). The combined effect of *Shafi* and *McCann* was that a council would have to satisfy the criminal standard before it could impose a coercive preventive measure on a suspected gang member.

In response to *Shafi*, Parliament enacted the 2009 Act, section 34 of which introduced one of the types of injunction at issue in *Jones*: the gang injunction. A court may grant an injunction under section 34 of the 2009 Act, as amended, if two conditions are met. First, the court must be satisfied, on the balance of probabilities, that the person has engaged in, encouraged, or assisted either gang-related violence or gang-related drug-dealing activity. Secondly, the court must think it is necessary to grant the injunction to prevent the recipient from engaging in the above listed behaviours or to protect the recipient from those behaviours. The conditions for granting a gang injunction are largely paralleled in section 1 of the 2014 Act which enacts the more direct replacement of the ASBO: the anti-social behaviour injunction. The Court must be

satisfied, on the balance of probabilities, that the person has engaged in or threatened to engage in anti-social behaviour; and must consider it "just and convenient" to grant the injunction to prevent the respondent from engaging in anti-social behaviour. Both gang injunctions and anti-social behaviour injunctions can contain prohibitions and/or requirements (2009 Act s 34(4)(a)-(b); 2014 Act s 1(4)(a)-(b)). Both can be granted in the High Court or the county court (2009 Act s 49(1); 2014 Act s 1(8)(b)), and breach of either is a contempt of court. This brief history sets the stage for the appeal in *Jones*. The current position, as a result both of the general admissibility of hearsay in civil cases under s.1(1) of the Civil Evidence Act 1995 and of the drafting of the two statutory models, surpasses the compromise position previously reached by the appellate courts: it allows for the imposition of coercive conditions backed by imprisonment based on hearsay evidence and an evidential standard of balance of probabilities.

The first question for the Court of Appeal in *Jones* was whether proceedings for the interim injunction constituted a criminal charge. Article 6 provides heightened fair trial safeguards for those who face a criminal charge these include the presumption of innocence and the right to cross-examine witnesses. The European Court of Human Rights (ECtHR) gives the term "criminal charge" an autonomous meaning to protect against states mislabelling proceedings so as to circumvent these heightened safeguards. Ashworth describes this as the "anti-subversion doctrine" ((2004) 120(Apr) L.Q.R. 263, 268). The three-part test for whether proceedings constitute a criminal charge derives from *Engel v the Netherlands* (No.1) (1979–80) 1 E.H.R.R. 647 at [81]. The first criterion is of less importance, it asks whether the provisions are criminal as a matter of domestic law. The second criterion enquires into the nature of the offence, and the third into the severity of the penalty imposed.

Counsel for Jones rightly accepted that the injunction was not criminal as a matter of domestic law. As such, Sir Brian Leveson P., giving judgment, focused on the second and third Engel criteria. The President blended his analysis of these criteria and held that neither was satisfied (at [38]). Two important points come out of the President's judgment. The first relates more directly to the second Engel criterion. Counsel for Jones had averred that for a gang injunction to be imposed the individual would have had to engage in, assist, or encourage criminal conduct (at [23]). Sir Brian Leveson P., however, accepted submissions from counsel for the Secretary of State that an offence did not need to form the basis of an application for a gang injunction (at [33]). Counsel gave the examples of making fun of members of a rival gang online and entering a rival gang's territory to rile them (at [28]). The second criterion of the Engel test can be hard to pin down. Whereas *Engel* itself refers to "the very nature of the *offence"* (at [82], emphasis added), *Jones* refers to "the essential nature of *proceedings*" (at [22] emphasis added). Yet Sir Brian Leveson P. must be right when he states that there is not necessarily a criminal charge simply because the underlying conduct is criminal (at [34]). The President gives the example of civil damages for an accident that could also constitute a road traffic offence (at [37]). It would be remarkable for a person to argue for heightened safeguards in a trial for compensatory damages. If a strict reading of *Engel* requires the heightened fair trial safeguards merely based on the conduct at issue, then the President has rightly taken a broader reading, and a focus on the "nature of the proceedings" as compared to "the nature of the offence" is to be preferred. Though we are left to ask what in the nature of a proceeding will make it in respect of a criminal charge?

What seems to have allowed for the blending of the second and third criterion is the underlying question of whether the measure at issue is penal. In assessing, whether the injunction at issue was penal, *Jones* places particular emphasis on the *Guzzardi*-line of ECtHR case law. In *Guzzardi v Italy* (1981) 3 EHRR 333 itself, the applicant, a suspected Mafioso, was detained

on an island. The Strasbourg Court held this detention was not penal: “On a true analysis, the order for Mr. Guzzardi's compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime” (at [100]). Later decisions from Strasbourg that concern Mafioso have also drawn such a divide between prevention and punishment: *Raimondo v Italy* (1994) 18 EHRR 237 (at [43]); *M v Italy* App no 12386/86 (Commission, 1991) 97. Sir Brian Leveson P. relies on the above quotation from *Guzzardi* and references both *Raimondo* and *M v Italy* (at [24]). The President also concludes his assessment of the injunctions at issue by commenting they fit within the *Guzzardi*-line and thus do not trigger article 6(2)-(3) (at [38]). This reliance on *Guzzardi* sets up a divide between prevention and punishment in the judgment.

With a divide drawn between prevention and punishment, it is little surprise that the injunctions at issue were held not to be penalties. The injunctions clearly have a preventive purpose: as described above, gang injunctions and anti-social behaviour injunctions can only be granted if required to prevent future harm. Yet it is questionable that the status of a measure as preventive ought to preclude it from the possibility of constituting a penalty. Another line of ECtHR case law has instead recognised that prevention is a fundamental purpose of punishment. In *M v Germany* (2010) 51 EHRR 41 – in which preventive detention was held to be punitive – the Court stated: “[T]he aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment.” (at [130]). This approach was followed in the related cases of *Jendrowiak v Germany* (2015) 61 EHRR 32 at [47] and *Glien v Germany* App no 7345/12 (ECtHR, 2014) at [126]. Beyond Strasbourg, most of the purposes of sentencing in England and Wales, as *per* section 142 of the Criminal Justice Act 2003, are preventive: crime reduction including by deterrence; reform and rehabilitation of offenders; and public protection. Neither *M v Germany* nor the 2003 Act is cited in *Jones*. The submissions of counsel instead turned on whether *Guzzardi* was applicable or distinguishable (at [24], [29]). This was not an argument that favoured the appellant. If the assessment of the second and third criteria had been informed by *M v Germany* as opposed to *Guzzardi*, a factor against finding the measure penal, that it was preventive, could have become a factor in favour of such a finding.

If we turn from *Jones* and reject a sharp divide between prevention and punishment, we face a definitional void. When will a measure constitute a penalty? Perhaps the most developed response to this question in the case law of the ECtHR is provided by *Welch v United Kingdom* (1995) EHRR 247. The case concerned confiscation and article 7 - the right not to be punished retrospectively. *Welch* sets out a list of broad factors by which to establish whether a measure is punitive: whether it was imposed after a conviction; the nature and purpose of the measure; its domestic characterization; the procedures for making and implementing the measure; and its severity (at [27]). Such a factor-based approach does not offer a definitive answer to whether a particular measure is penal, but it does offer a structure for decision-making. In a given case it would thus be easier to see what was of importance to a finding that a measure was or was not penal. *Jones* makes clear that both gang injunctions and anti-social behaviour injunctions are not penalties. If the judgment had applied a factor-based approach, it would have allowed for more insight into why.

The second question the Court of Appeal faced in *Jones* was if the proceedings were not in respect of a criminal charge – which they were not – whether the criminal standard of proof was required by article 6(1). The question, in effect, sought to establish whether the compromise position reached in *McCann* – hearsay evidence admissible, but the criminal evidential standard applied – was appropriate for the proceedings at issue. Yet *Jones* differs

from *McCann* because Parliament had explicitly set the requisite evidential standard as the balance of probabilities in the 2009 and 2014 Acts. The balance of probabilities is a fixed standard (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 [55] per Lord Hoffmann; cited in *Jones* at [48]). If article 6(1) required a heightened evidential standard, the Court would not have been able to give effect to the Acts in a manner that would make them compatible with the Convention (compare to *R. v Lambert* [2001] UKHL 37; [2002] 2 A.C. 545).

The applicant was left to seek a declaration of incompatibility. In pursuit of a declaration, counsel for Jones argued for a principle that the criminal standard must be applied when a significant restriction of liberty is at stake and the basis of the application is criminal or "quasi-criminal" behaviour (at [51]). To accept such a principle would have meant earlier authorities on care proceedings (to include, *Re D* [2008] UKHL 33; [2008] 1 W.L.R. 1499) and criminal proceeds (*Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2011] 1 W.L.R. 2760) had been wrongly decided (*Jones* at [52]-[54]). Such a principle would also have run contrary to the will of a sovereign Parliament. This too was recognised by the President (at [57]). The Court did not issue a declaration.

It is questionable, however, whether such a jurisprudential principle must exist to sustain an argument for the criminal standard. A similar, two-part argument could instead have been made: first, assessment of the fairness of a proceeding is context dependent; and, secondly, in similar contexts to the grant of the injunction there is authority that supports the application of the criminal standard. The first part of the argument would be unlikely to cause difficulty. The President, in fact, recognises the contextual nature of procedural fairness in *Jones* (at [43]). The second part of the argument could have drawn on *Gough v Chief Constable of Derbyshire [2002] EWCA Civ 351; [2002] Q.B. 1213* on football banning orders and *Commissioner of Police of the Metropolis v Ebanks* [2012] EWHC 2368 (Admin), (2012) 176 JP 751 on risk of sexual harm orders. The most prominent authority in support of the criminal standard in a similar context to the injunction at issue though remains *McCann.*

Sir Brian Leveson P. may have underplayed the importance of contextual fairness to *McCann* through his comment that the decision on evidential standards was obiter and his interpretation of Lord Steyn's rationale for the heightened standard (at [45]). The discussion of the evidential standard in *McCann* was legally obiter, but it was set out as a principal issue of the case by Lord Steyn (at [4]) and the Law Lords agreed unanimously that the appropriate evidential standard was the criminal one. The decision was also accepted in future appellate judgments such as *Shafi* at [48]. What is more, The President writes that Lord Steyn's support of the heightened standard was based on pragmatism, as opposed to fairness (at [45]). Lord Steyn though can be read as offering pragmatic reasons not for preferring the beyond reasonable doubt standard, but for describing that standard as the criminal standard as opposed to as the heightened civil standard (*McCann* at [37]). The decision to require the heightened evidential standard in *McCann* was based on procedural fairness in light of the serious consequences of imposing an ASBO.

The President rightly drew out the differences between the injunction at issue in *Jones* and the ASBO (at [55]-[56]). Perhaps foremost amongst these is that breach of an ASBO, unlike breach of the injunction, was an offence. The measures do, however, also have notable structural similarities: they impose coercive conditions for preventive purposes that if breached can lead to arrest and imprisonment. The second issue in *Jones* should perhaps have been argued not as one of what article 6(1) requires as a matter of general principle, but as one of what was

required in the specific context of the injunction at issue. Such an approach, however, would not necessarily have led to a different conclusion. When the compatibility of control orders - which shared this structure - with article 6 was considered by the House of Lords, there was no suggestion that the criminal standard was required: *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] 1 A.C. 440. Given this, the Court may not have felt able to grant a declaration even based on this narrower two-part argument. Again, it is to be borne in mind that Parliament had explicitly set the evidential standard for imposing the relevant injunctions at the balance of probabilities. Regardless of what could have been, *Jones* marks the demise of the evidential middle-ground established by *McCann* and *Shafi*. Without such a middle-ground, the above described uncertainty over when a measure will be held to be a penalty is even more troubling.

In the first paragraph of his judgment, Sir Brian Leveson P. remarked that gang-related violence can threaten not only public safety, but the rule of law itself. It does so, the President wrote, because the fear of intimidation and/or violence may make the public reluctant to assist prosecutions. Yet the rule of law can not only be threatened by gangs. Government introduced the ASBO, in part, to allow for hearsay evidence to be adduced to tackle the very fear of witness intimidation recognised by Sir Brian Leveson P. The procedurally hybrid ASBO was then replaced by the civil injunctions at issue in *Jones* which made it easier again for the state to impose coercive measures on citizens via the further thinning of evidential safeguards. *Jones* provides a timely reminder that even well-intentioned law reform can chip away at the rule of law.

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