

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Briefing on the draft Football (Disorder) Bill

July 2000

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Summary of conclusions

Liberty condemns each of the four main measures introduced in the Bill.

- Abandoning domestic football banning orders in favour of the much enhanced, longer lasting and more intrusive international football banning orders;
- Requiring the surrender of passports as part of a banning order;
- Using a civil procedure with a civil burden of proof to impose football banning orders on those who have committed no criminal offence whatsoever - let alone, any offence related to football;
- Empowering police to commence such civil procedure banning orders summarily and to require on the spot confiscation of passports.

Each of these measures has significant human rights implications for all those who may be affected by them - not just the tiny minority of violent football hooligans but for the very many who might find themselves ensnared by these indiscriminate measures.

1 Introduction

Liberty notes that:

- Powers to exclude from football matches have been available to the courts since 1986
- Incidents of football violence have substantially reduced following the Popplewell Inquiry Report of the same year and the subsequent Taylor Inquiry Report and its recommendations for all-seater stadia.
- Reviews of the operation of the power to exclude took place in 1989, 1991, 1994, 1998 and 1999 .
- Reviews appear to have been associated with efforts of home nations to secure attendance at or hosting of international football competitions.

Increasingly draconian legislation which resulted from these reviews has already given the courts unprecedented powers which have the potential to impact very seriously on human

rights. The existing provisions - brought into effect since only 1st September of last year - are already likely to be in breach of the Human Rights Act 1998 and of this country's international obligations .

No figures have been produced for the use of exclusion and restriction orders, both of which were available to the courts for a decade. We are not persuaded of the case for enhancing what are already very considerable powers. Liberty believes that increasing the scope of Banning Orders in the further very significant ways proposed is likely to be very harshly felt by those affected by them, but ineffective at tackling organised hooliganism, particularly abroad.

The bid by England to host the 2006 World Cup has now prompted yet a further review. In this respect the current bill is apparently being used to send the message that recent incidents of violence at the European championship might have been a key element in the failure of the World Cup bid. This may or may not be so.

Liberty believes that legislators should consider whether the newly enhanced powers (September 1999) should be widened still further, or whether their operation should be assessed over a further period.

2 Specific proposals

(a) Combining banning orders

Domestic Banning Orders were last reviewed and updated only in September 1999 by the Football (Offences and Disorder) Act 1999. The effect of the current proposal is to abandon domestic football banning orders altogether in favour of the much enhanced, longer lasting and more intrusive international football banning orders. Liberty condemns proposals which take away from the courts the power to use their own judgement to make the punishment fit the crime.

Liberty notes that these proposals are likely to be hopelessly over-inclusive. Given that the threshold for imposition of the banning order is that the court is satisfied merely that there are reasonable grounds to believe that making the order would help to prevent violence or disorder, (as opposed to the test before September 1999 of being satisfied to the criminal standard that the order would prevent violence) one might expect professional players as well as spectators to risk substantial bans from attending matches following conviction of a football related offence.

Liberty fears that:

- genuine football fans caught up in very minor offences will become subject to lengthy banning orders which may be quite out of proportion to the offence,
- players - both professional and amateur - will risk substantial bans which will inevitably affect their playing career.
- in some instances persons with no interest in football and who do not ever anticipate going to a football match in the future may find themselves subject to banning orders with very stringent and intrusive restrictions involving, for example, reporting to a police station during football matches for an extensive period.

The definition of relevant offence has been extended (see Schedule 1) which makes clear that offences such as drink driving to or from a football match could attract a 10 year ban from all football matches, restriction of foreign travel, and perhaps de facto imprisonment at a police station during domestic football matches.

The required condition - police station reporting - is in practice a very serious infringement of a person's freedom of movement since it limits the person's ability to travel, and to live a normal work or home life, during designated international tournaments (both for domestic clubs, such as the Champions League, and for international tournaments such as the World Cup) even though the person concerned will not, in fact, be travelling to see the game. Liberty believes that if physical restraint is deemed necessary by the court, then the conditions of enforcing it should be as benign as possible, bearing in mind the offender has already been punished once for the substantive offence which gave rise to the order. The banning order should be no more nor less than a means to ensure that the offender does not attend matches, and complying with it - by time-consuming, rigorous and intrusive administrative procedures - should not be seen as an additional punishment in itself.

It appears that the power to require reporting 'between specified times' is a power to detain the individual during a football match, during the build up and also its aftermath. For an order lasting up to ten years this should be recognised for what it is - a very substantial penal sanction. For banning orders which follow civil proceedings this amounts to a criminal punishment for behaviour leading to the order which may have had no element of criminality.

The Bill would also give the courts important new powers to:

- require the confiscation of passports during specified periods ,
- impose any other condition whatsoever which it sees fit

These provisions would:

- take away the discretion of the courts to impose banning orders of appropriate length
- take away the discretion of the courts to vary orders in the light of changed circumstances
- risk breaching accepted human rights standards as to proportionality in restricting freedom of movement and depart from obligations to protect the liberty and security of the individual, and to ensure freedom of movement, expression and association, as guaranteed by the European Convention on Human Rights, and under EC law.

The sheer scale of these orders are likely to be out of all proportion to the offence that triggers them. Examples of their operation are set out below, but we believe that it is worth stressing that there can be no possible justification for the courts being required to refuse to consider any application - no matter how well-founded - for variation before the expiration of two-thirds of the order . Examples of illness, bereavement, or other special circumstances can be expected to arise in practice. The inability of the courts to effect a just response will tend to bring the entire regulatory regime into disrepute.

Banning orders - operation in practice

Liberty is dismayed by these provisions because little consideration appears to have been given to how they will operate in practice.

Eric Cantona's infamous kick of a spectator would inevitably be classified as a 'relevant offence'. If the court by which he was convicted felt that there were reasonable grounds to suggest that an order would help to prevent violence or disorder at subsequent matches (perhaps by reference to his disciplinary record) it would make a banning order against him. Indeed, following the classification of the case as a relevant offence the court would be bound to make such an order unless it could state in open court that it was not so satisfied, and could give reasons for this view. At first instance Eric Cantona was sentenced to

imprisonment, which would have been associated with a minimum six year / maximum ten year ban from domestic football matches. With his sentence reduced on appeal to community service, his ban would be limited to a minimum of three years and maximum five years.

Paulo Di Canio's push of referee Paul Alcock might have been charged as common assault. On conviction Di Canio would have faced up to a ten year ban from football. This would have operated indiscriminately on him as a player, a spectator, a commentator or even, in years to come, as a manager. The ban would not be reviewed until the expiration of two-thirds of its length, whatever the change in circumstances might be.

Where a player makes an offensive gesture to the crowd, it would be open to anyone in the crowd to launch a private prosecution for a minor offence such as disorderly conduct, perhaps supported by video or photographs. This would be classified as a relevant offence. On conviction the player concerned could be banned from domestic football for five years. Similarly, disorderly conduct alleged to have been committed by players in the tunnel at the end of a Premiership game would be classified as a relevant offence. If convicted the players concerned would risk a ban from domestic football for five years.

A player who commits a drink drive offence whilst driving home from a football ground may be considered to have committed a relevant offence and would have to argue why a banning order should not follow. A court may impose additional conditions - at their absolute discretion.

When a prominent member of the England national football team was sentenced some years ago to imprisonment for his part in disorder at a night club whilst celebrating a football victory, he might have expected a ten year ban from attending football matches, which would not have been subject to any review until after six years, well after his playing career might be over. In fact, because of the retrospective nature of the civil procedure banning order (see below), that behaviour could still be used against him now to support a banning order against him of at least two years.

If the England team coach is searched on arrival at Wembley stadium, for a designated match for which alcohol has been banned under Sporting Events (Control of Alcohol etc.) Act 1985, and a miniature bottle of brandy is found under the manager's seat, he might, if charged with the offence, expect a substantial ban from football.

A scuffle in a pub which happened to be showing a televised football match might be considered to be a 'relevant offence'. Anyone convicted could face a six year banning order.

A 15 year old youth in rural Norfolk who rushes out to celebrate his team's victory and who breaks a window whilst re-enacting the winning goal, might be convicted of an offence of criminal damage and conditionally discharged. If the offence was considered a 'relevant offence' he would have to argue why he should not face a three to five year banning order - perhaps depriving him of the chance to attend any live football match until he is 20.

Liberty is concerned at the likelihood of orders which are indiscriminate in operation, impossible to vary for a substantial term, and which are wholly disproportionate to the behaviour which triggered them. The particular proposal below appears to exemplify all these concerns.

(b) Enabling courts to require the surrender of passports

The requirement to surrender a passport for international matches or tournaments directly conflicts with the UK's international obligations to guarantee freedom of movement under Article 12 of the International Covenant on Civil and Political Rights; and the separate obligation to secure freedom of travel in the EC to receive services such as tourism or being a football spectator (see for example Council Directive of 25 February 1964 (64/221/EEC)

and *Luisa and Carbone v Ministero del Tesoro* Cases 286/82 and 26/83 (1984) ECR 377). The proposal would also appear to breach the obligation to ensure peaceful enjoyment of personal possessions (Article 1 of the First Protocol of the ECHR).

(c) Banning orders following civil complaint

The effect of this proposal is to bring football banning orders under a regime akin to the Anti Social Behaviour Order (ASBO) by which Banning Orders may follow from behaviour which was not criminal, and for which the defendant could not be convicted.

The ASBO regime is bitterly resented by those who support civil liberties because its effect is to create a criminal law which is specific to the defendant without any of the safeguards associated with legislation or proper criminal procedure. On the contrary, the procedure by which the order is made is informal, local, and can be based wholly on hearsay evidence. The standard of proof is only the civil standard - the balance of probabilities.

There is no duty of fair disclosure by the authorities of material which might assist the defendant (such as the names and addresses of witnesses who would give evidence in support of the defendant, or of the previous dishonesty convictions of complainant witnesses), and there appears to be no discretion of the court to exclude evidence even if it would be grossly unfair to the defendant to admit it .

Once made, the ASBO takes effect as law. The order may specify behaviour which is otherwise unlawful - such as assaulting neighbours, or acting in a violent or disorderly manner - but may well specify behaviour which would not be criminal at all. Examples might include spitting on the ground, or visiting a particular area. Breach of any term of the ASBO - whether by behaviour which would otherwise be criminal or not - may lead to imprisonment up to five years.

Liberty vigorously opposed the ASBO regime. We argued that the preliminary proceedings should carry a criminal standard of proof, a criminal disclosure regime, and criminal procedures and rules of evidence at the ASBO hearing itself.

In some respects the current proposal is worse than the Anti-Social Behaviour Order. Although the current proposal appears to replicate all the unfairnesses inherent in that regime, the test for making the order is even lower than that for an ASBO - the court must make the order if it is satisfied that there are reasonable grounds to believe that to do so would help to prevent violence in connection with football . Given the substantial penalties for breach, Liberty believes that the court must be satisfied on a criminal standard that violence would be prevented by the imposition of the order.

Since the evidence called in support of an application for an order may pre-date the coming into force of the section, the new regime would have retrospective effect. That is, a defendant's non-criminal conduct in 1995 may properly found a Banning Order complaint in 2001, and a ban from football matches and restricted international travel until 2004. Article 7(1), European Convention on Human Rights prohibits the retroactive application of criminal offences to penalise conduct which was not criminal at the time when the relevant act occurred. The definition of 'criminal offence' has an autonomous meaning under the convention, and the fact that the proceedings may be classified as civil in the domestic jurisdiction is not conclusive of their status.

Further, the court would be required to consider the effect of, for example, summary deportation from countries abroad. Liberty believes that there can be no objection to the calling of evidence of offences committed abroad but not evidence of non-criminal or pre-criminal procedures such as 'administrative detention' or 'summary deportation'. The latter type of information is by its nature likely to be less rigorous in its collection and distribution, and in practice very difficult to verify or challenge.

Our experience is that inaccurate information can be passed from country to country, without any means for the individual affected by it to challenge or correct it .

(d) Power to enable any police officer to commence civil proceedings 'on the spot'.

Liberty condemns this proposal as a return to 'sus law' whereby the mere suspicion by an officer may lead to the criminalisation of members of the public who are wholly innocent. Genuine fans entering a football ground might find themselves having to run the gauntlet of a police cordon any of whose members could step up to the individual and issue a notice requiring him or her to attend the magistrates court the following day to defend their right to attend football matches as they wish. Failure to comply with the notice - particularly onerous for away supporters and those in employment - would itself amount to an imprisonable criminal offence. A police officer would have the further power to arrest any individual in anticipation of a failure to comply with the notice.

This proposal, coupled with the low standard of proof and lax evidential requirements in the civil jurisdiction of the magistrates courts, will guarantee that miscarriages of justice will occur whereby innocent members of the public will become subject to long-standing and intrusive orders, entailing significant inroads on the liberty of the defendant, his/her freedom to travel abroad for work or holiday, and blemishing their characters and careers.

This is a proposal which is subject to no significant accountability. It appears to be the least well thought out provision, and the one with the most alarming consequences for civil liberties.

An important and far-reaching adjunct of this power is the proposal to allow officers to require 'on the spot' confiscation of passports, a power which could be subject to particular abuse by officers at ports, international railway termini and airports. If the subsequent complaint is refused, the procedure will nevertheless have been effective in disrupting travel, causing resentment amongst those affected and the many more who will come to hear of and have contempt for this enforcement regime.

3 Conclusion

Liberty is opposed to additional criminal provision without a clearly expressed need and without careful consideration of the use that can be made of the tools already available to police and courts. It follows that Liberty opposes in principle measures such as the imposition of criminal sanctions on those unconvicted of any criminal offence in any country, let alone any football related offence.

These proposals suggest a hastily constructed and ill-thought out response to the embarrassment of a failed bid to be international tournament hosts rather than a genuine attempt to tackle the problem of violence and offensive conduct at football matches.

There appears to have been no reference in any of the supporting materials to the considerable body of academic research into the underlying causes of football hooliganism, how and why disorder may be planned and executed, and where and in what conditions it is likely to flourish.

There has been no reference to the international experience of other countries who face similar problems with their fans abroad, and of those who have experience of hosting football tournaments involving the risk of disorder from travelling fans.

There has been no analysis of the use and effectiveness of existing powers. Accordingly it is not clear whether the new proposals for extending banning orders follow from the perception that the existing powers are working well, or on the contrary, that they are working badly.

In particular, there has been no assessment whatsoever of the impact of the very significant changes introduced as recently as last September 1999, which themselves marked very substantial inroads into human rights in this country.

The spirit of these reforms runs directly counter to the Human Rights Act 1998, and will be challengeable thereunder as soon as the latter is in force on October 2 2000. The proposals regard individual freedom of movement, and peaceful enjoyment of the game of football, as privileges to be exercised on the permission of police rather than as a right of the individual.

Liberty recognizes that a balance must be struck between protecting football supporters from the offensive and violent conduct of a small minority, on the one hand, and imposing restrictions on the public, and perhaps on football players, which will be seen as arbitrary and unfair, disproportionate to the risk the individual is perceived to pose, and which breach our international obligations to secure an open system of criminal justice in which respect for human rights is paramount.

These proposals fail to strike any meaningful balance . The reality will be that for the sake of appearing tough to the international footballing authorities, the UK would take a further step down the road of imposing headline-grabbing extensions to the criminal law, removing discretion from the courts to make punishment fit the crime, and risking breaches of its international treaty and convention obligations as well as falling foul of its own Human Rights Act 1998.