

ANTI-SOCIAL BEHAVIOUR ORDERS AND THE PRESUMPTION OF INNOCENCE

CLAIRE HAMILTON*

The Minister for Justice, Michael McDowell, has recently proposed a number of amendments to the *Criminal Justice Bill 2004*, which will significantly alter the Bill as initiated.¹

The amendments treat, *inter alia*, the following issues:

- a provision to deal with participation in organised criminal gangs;
- provisions to strengthen the existing sentencing provisions for drug trafficking and firearms offences;
- new offences of supplying drugs to prisoners;
- provisions in relation to a Drug Offenders Register;
- provisions to allow for the electronic tagging of offenders; and
- new provisions to deal with anti-social behaviour (Anti-Social Behaviour Orders or ASBOs).

If accepted, these amendments would change the original Bill beyond recognition, extending the scope of the Bill from the extension of Garda powers to matters as disparate as organised crime, sentencing and anti-social behaviour. Serious concerns must be expressed about the way in which important changes to the Bill were made *after* the introduction of the Bill to the Oireachtas. This procedure is not conducive to a full debate on the weighty issues outlined above and represents a clear departure from standard legislative processes.

Proposals to provide for ASBOs form one of the significant changes to the Bill. An ASBO is a civil order made by the court to protect the public from anti-social behaviour defined as "behaviour which causes harassment, alarm and distress". Although the order is civil in nature, breach of an ASBO does not invoke the normal contempt of court procedure for breach of a civil order, but in fact constitutes a criminal offence punishable by a maximum penalty of five years imprisonment. ASBOs were first introduced in England in 1999 through the Crime and Disorder Act 1998 and were adopted by the Labour government as a deliberate policy choice to "mix the best of the criminal and the civil law"² in order to more effectively target anti-social behaviour perpetrated primarily by young people and groups of young people. One of the main benefits of this hybrid structure, (which has been described as "sailing as close to the wind as possible"),³ was that the civil rules of evidence and procedure applied so that hearsay evidence from frightened and intimidated people within the community could be adduced in court, without such persons giving direct evidence. Another benefit clearly intended by the government was the assessment of evidence according to the civil standard of proof, thereby circumventing the presumption of

innocence and its corollary, the requirement of proof beyond all reasonable doubt. Assuming, in the absence of specific proposals, that a similar structure will be adopted by the Minister, hard questions must, therefore, be asked as to whether the procedure is being used as a means of subverting the strictures of the criminal law, including fundamental legal values such as the presumption of innocence, and it is this question which forms the focus of this article.

The issue is far from a mere academic quibble. It is salutary to note that, while concerns in England originally centred around "net widening" and the use of imprisonment for minor, non-criminal behaviour, six years of practice has shown that the orders are primarily being used for acts which already fall within the statutory definition of criminal behaviour such as burglary, criminal damage, theft and various forms of threatening and abusive behaviour.⁴ The argument becomes even more compelling when it is considered that defendants without the benefit of the presumption of innocence in ASBO proceedings can face penalties which are much more severe than those which could be imposed if the conduct had been successfully prosecuted in the criminal courts. Five years is a substantially higher tariff than can be imposed in the lower courts for the types of offences listed above.

ENGLISH LAW ON THE ISSUE

This question was considered recently by the House of Lords in *R (on the application of McCann) v*

*Manchester Crown Court*⁵ which rejected the contention that ASBO proceedings were, in "reality and in substance",⁶ criminal, albeit with the concession that the criminal standard

of proof should apply. The four issues which fell to be considered by their Lordships were:

- whether as a matter of domestic classification proceedings leading

making of an anti-social behaviour order were criminal in nature;

- whether under Article 6 of the European Convention on Human Rights (“ECHR”) such proceedings involved a “criminal charge”;
- whether under s.1 of the Act, hearsay evidence was admissible in proceedings seeking such an order; and
- what the standard of proof was in such proceedings.¹

The House held that the proceedings under the Crime and Disorder Act were civil, not criminal, both for the purposes of domestic and Convention law. This conclusion was based on various factors: proceedings were not brought by the Crown Prosecution Service; there was no formal accusation of a breach of the criminal law; ASBOs did not appear on criminal records; and there is no immediate imposition of imprisonment. In this latter regard, the House held that proceedings for breach of an order, though undoubtedly criminal in character, should be considered separately from the initial application. As Lord Steyn noted “[t]hese are separate and independent procedures. The making of the order will presumably sometimes serve its purposes and there will be no proceedings for breach. It is in principle necessary to consider the two stages separately.”⁸ Perhaps most significantly, however, for the purposes of determining compatibility with the Convention, the House held that ASBOs, unlike ordinary criminal penalties, are designed to *prevent* anti-social behaviour rather than to *punish* the offender. Lord Steyn held that the “the true purpose of the proceedings is preventative It follows that the making of an anti-social behaviour order is not a conviction or condemnation that the person is guilty of an offence. It results in no penalty whatsoever.”⁹ Lord Hope was similarly of the view that “an anti-social behaviour order may well restrict the freedom of the defendant to do as he wants and to

go where he pleases. But these restrictions are imposed for preventative reasons, not as punishment.”¹⁰

In light of the above classification of the proceedings as civil, it was held that hearsay evidence was admissible pursuant to the Civil Evidence Act 1995. In the Law Lords’ estimation, the admission of such evidence is critical if magistrates were to be adequately informed of the scale of anti-social behaviour and the measures of control required. Indeed, as Lord Hutton noted, this has been key to their effectiveness:

[T]he courts have held that proceedings under section 1 [of the Crime and Disorder Act 1998] are civil proceedings and not criminal proceedings. Therefore it has not been necessary for those who allege that they have suffered as a result of anti-social behaviour on the part of the defendant to go into the witness box to give evidence against him, because hearsay evidence can be given of their complaints and allegations pursuant to section 1 of the Civil Evidence Act 1995.

In relation to the standard of proof, it is an interesting feature of the judgment that the House held that it is the criminal standard which applies in ASBO proceedings. This standard should be met, in the interests of fairness, when the allegations of criminal or quasi-criminal behaviour were made owing to the “seriousness of matters involved”.¹¹

ANALYSIS

A superficial reading of the legislation supports the Law Lords’ conclusion. Sections 1 – 9 of the Act contain many indicators of civil proceedings such as application by complaint, and none of the types of outcome that normally follow criminal proceedings result from the process. It is submitted, however, that many of the above elements, such as the absence of a formal charge and criminal record focus on form rather than substance and as such should not have influenced the decision of the

Lords. Moreover, on closer examination, it is clear that the original application for an ASBO cannot be so conveniently separated from its criminal counterpart in the event of a contravention of the order. One of the main reasons for this, as cogently argued by McDonald,¹² is that findings of fact from the initial application may have a bearing on the sentence which will be ultimately imposed. A person sentenced for breach of an ASBO will be punished, not just for one act of defiance of the order, but for the previous anti-social acts committed by that person which led to the imposition of the order. Thus, to give McDonald’s example, a “Rowdy Roger” who insists on playing his heavy metal music late at night and who is subsequently made the subject of an ASBO, will be punished, in the event of his breach, not just for one night of loud music in defiance of the order but for the effect of all the preceding nights of loud music.

McDonald supports his argument with comments made by Labour spokesperson, Alun Michael, in the Commons Standing Committee on the 1998 Bill. Mr Michael was asked to explain the maximum five year term of imprisonment for breach of an ASBO in light of the fact that the maximum sentence for affray is only three years under the Public Order Act 1986. He explained that affray “involves one incident” whereas breach of an ASBO involves “a pattern of behaviour that is damaging people’s lives over a considerable period of time”.¹³ The fact that the behaviour proven at the initial hearing contributes towards the criminal penalty finally imposed would clearly suggest that a global approach should be taken to the issue of the characterization of the proceedings and would suggest that they do have a significant punitive element.

Other commentators have taken issue with the narrow focus of the decision in *McCann* on the purpose of the proceedings under the 1998 Act. Bakalis¹⁴ notes that, “the

House of Lords, was ... rather selective in the parts of the Strasbourg judgment it chose to apply” through its excessive focus on the preventative/punitive distinction. She cites two decisions of the European Court of Human Rights, *Ozturk v Germany*¹⁵ and *Lauko v Slovakia*¹⁶ which place an equal emphasis on factors such as the existence of a deterrent element, whether the offences were aimed at the world at large, and whether the aim of the proceedings was to stop any interference with the world at large. In a similar vein, Ashworth¹⁷ has questioned the approach of the English courts to the issue and has drawn attention to the robust case law developed by the European Court of Human Rights in this area. The court has held on several occasions that, in order to prevent subversion of the procedural safeguards guaranteed in the fair trial provisions of Article 6 of the Convention, that the term “charged with a criminal offence” should be given an autonomous meaning that looks to the substance rather than the form. This is known as the “anti-subversion doctrine” and exists to prevent states simply reclassifying criminal proceedings as civil in order to avoid the protections attaching to defendants in criminal proceedings.¹⁸ In light of this approach, Ashworth argues that the Strasbourg Court will subject the new ASBO hybrid to much closer scrutiny than that undertaken by the House of Lords.¹⁹

Ashworth contrasts the approach of the House of Lords in *McCann* with the approach taken by the European Court in the leading case of *Welch v UK*.²⁰ In *Welch*, a confiscation order imposed upon the applicant subsequent to his conviction for drug trafficking offences²¹ was successfully challenged on the basis that it amounted to the application of a retrospective criminal penalty under Article 7 of the Convention. The significance of the decision in the current context is its designation of the confiscation order as a

“penalty”. The government’s submission related solely to the purpose of the Act: which was partly confiscatory and partly preventative. The court, however, relied on a number of elements of the order in reaching its decision, such as the power of the court to take into account the defendant’s culpability when fixing the amount of order; the wide ranging statutory assumptions about the origins of the money and the provision for imprisonment in default.²² As Ashworth notes, applying the principles adumbrated in *Welsh* to the 1998 Act would require consideration of the open-ended nature of the orders²³ (the applicant in *McCann*, for example, was prohibited from entering the area in which he lived), as well as consideration of the substantial penalties in the event of default or breach. Such an analysis did not feature prominently in the Lord’s decision in *McCann*, “[the decision] places the emphasis on the purpose of the order and appears to give far less weight to the impact and consequences of the order than did the Strasbourg Court in *Welch*. Purpose is important but, if the effects of an order are far-reaching, there must surely come a point at which they may fairly be held to override the purpose”.²⁴

It must also be noted that the judgment appears contradictory in its conclusion that the “seriousness of the matters involved” mandate a higher standard of proof, yet similarly exacting standards are not required in relation to admission of hearsay evidence. Indeed, it is a point of concern that the leading of hearsay evidence in proceedings for an ASBO may subvert the application of the criminal standard of proof as mandated by the House in *McCann* and deprive it of any practical effect. The House of Lords justified the use of hearsay evidence on the basis of the rights of the community “the general interest of the community ... represented by weak and vulnerable people ... [balanced against] the protection of the defendants’ rights

requires the scales to come down in favour of the protection of the community and of permitting the use of hearsay evidence.”²⁵ Yet, this argument could equally be made in relation to burglary and armed robbery which are equally endemic in some deprived areas. In line with the House of Lords’s logic, should not a reduced standard of proof apply here also?²⁶

This point was taken up by the Human Rights Commissioner Alvaro Gil-Robles in his recent report on his visit to the UK: “for my part, I find the combination of a criminal burden of proof with civil rules of evidence rather hard to square; hearsay evidence and the testimony of police officers or ‘professional witnesses’ do not seem to me to be capable of proving alleged behaviour beyond reasonable doubt.”²⁷ Significantly, he further notes that the use of professional witnesses and hearsay evidence (and, therefore, the poorest quality evidence) is unduly encouraged in the Home Office Guidelines on ASBOs. Even commentators more disposed to the ASBO concede that “with the right evidence, an application based solely on hearsay may well succeed.”²⁸ The Commissioner’s argument would appear to be borne out by statistics which show an overwhelming success rate for authorities in obtaining ASBOs. Of the 2,035 ASBO applications notified to the Home Office up to June 30, 2004, only 42 applications were refused, which constitutes a success rate of 98 per cent.²⁹ As observed by one commentator, “this suggests that the added protection of a higher standard of proof ... [has] not made any *practical* difference to the control of the state over the individual’s freedom.”³⁰

THE COMPATIBILITY OF THE ASBO WITH IRISH LAW

It is not yet known what form the legislation making provision for ASBOs in Irish law will take and it is difficult to determine compatibility

in a vacuum. *McCann* may certainly prove persuasive should issues arise in relation to the compatibility of the legislation with Article 6 of the ECHR³¹ subject, of course, to a ruling by the European Court of Human Rights on the issue.³²

It remains to consider the constitutionality of the legislation in the light of Article 38.1 which enshrines certain procedural protections, among them the presumption of innocence, for persons charged with a criminal offence. Should the courts find that the legislative provisions introduced by the Minister were, in reality, criminal and the necessary safeguards had, therefore, been avoided, they would be struck down as unconstitutional. Key to such a determination is the issue of whether the courts will consider the initial application for an ASBO as capable of separation from the later proceedings for breach. Despite the reasoning of their Lordships in *McCann*, there are compelling reasons for finding that they are inextricably linked: the initial hearing defines the scope of the order and therefore, determines the extent of the defendant's criminal liability, indeed, it is impossible to defend proceedings for breach without harking back to the terms of the original order. As argued by Prof. William Binchy at a recent conference on ASBOs:

... this rigorous segregation between the two stages of the ASBO process is less than convincing. There is an integration between each stage: the civil element is a necessary precondition of the criminal element: it defines the outer limits - and indeed may well define the full scope - of the conduct that can constitute a crime. There may turn out to be further interconnections, such as placing the onus on a defendant accused of breach to show that any breach was based on "just cause or reasonable excuse".³³

It must be said, however, that cause for optimism that the courts will

adopt an approach of "substance over form" would not be derived from a brief survey of the Irish case law on the characterisation of proceedings as civil or criminal. Particularly instructive in this regard is the decision of the High Court in *Gilligan v Criminal Assets Bureau*³⁴ which concerned a constitutional challenge to the novel civil asset forfeiture legislation introduced into Irish law by the Proceeds of Crime Act 1996. The principal argument advanced on behalf of the appellants in this court was that the provisions of the 1996 Act essentially formed part of the criminal law and not of the civil law and that the persons affected by those provisions were deprived of some of the most important safeguards which were historically a feature of the criminal law. Specifically, the presumption of innocence was reversed, the standard of proof was on the balance of probabilities rather than beyond reasonable doubt, and there was no provision for a trial by jury in respect of any of the issues. The High Court held that since the confiscation procedure introduced under the 1996 Act was labelled and operated as a civil process, it did not have "all the features of a criminal prosecution" and so Article 38.1 did not apply. This decision was followed by O'Higgins J. in *MF Murphy v GH*³⁵ and both these decisions were upheld by the Supreme Court in a joint appeal.³⁶ Like the High Court, the Supreme Court focused on the trappings of criminal procedure and held that the *indicia* that rendered proceedings criminal in character — the provision for the detention of the person concerned, the bringing of him in custody to a Garda station, the searching of the person detained, his admission to bail, the imposition of a pecuniary penalty with liability to imprisonment in default, the reference in the statute to a party having been "convicted of an offence" and the provision for the withdrawal of proceedings by the entry of a *nolle prosequi* — were

conspicuously absent in the 1996 Act. The narrow interpretation of "criminal" adopted in these decisions, focusing on the labels and procedures of the procedure itself, is redolent of the House of Lord's approach in *McCann*, and would suggest that the hybrid structure of which ASBOs are comprised may well pass the constitutional litmus test.³⁷

CONCLUSION

While concerns surrounding anti-social behaviour are not to be minimised, there are more effective means of meeting this social problem³⁸ which address the underlying causes of the behaviour³⁹ and which do not seek to undermine fundamental values such as the presumption of innocence and the criminal standard of proof. It is perhaps symptomatic of the casual attitude towards these core legal concepts in England⁴⁰ that the 1998 Act was silent as to the standard of proof required to obtain an ASBO and indeed, that effective judicial legislation by the House of Lords was required to resolve the issue.⁴¹ This is an unsatisfactory state of affairs in relation to such a fundamental aspect of criminal procedure and is a salutary lesson in light of their imminent arrival in this jurisdiction. ASBOs raise important questions about the role of fundamental safeguards in protecting persons accused of substantive wrongdoing. Should the Irish courts, in line with their English counterparts, sanction the use of such criminal-civil hybrids, the government will in effect be given *carte blanche* to circumvent core protections such as the presumption of innocence. Civil forfeiture procedures arguably already detract from the integrity of the criminal law in this regard. The introduction of ASBOs must lead one to question, as Ashworth has done in England, whether the criminal law really is a lost cause.⁴²

* LL.B. (Ling. Franc), Barrister-at-Law, M.Litt., Dip. Eur. Con. On Human Rights. Assistant Lecturer in Criminology, Dublin Institute of Technology.

¹ Criminal Justice Bill 2004: Second Stage, Dáil Debates, Vol. 597 No. 5, February 15, 2005.

² Jack Straw, HC Debates Vol. 287 Col 791, December 16, 1996.

³ A. Ashworth "Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?" (2004) 120 L.Q.R. 263 at 289.

⁴ See N. Padfield "The Anti-social Behaviour Act 2003: the Ultimate Nanny-state Act?" [2004] Crim L.R. 712 at 713 "In practice, the complaint is not that the law is unduly oppressive on 'sub-criminal' behaviour but that the ASBO is being used to avoid the due process protections of the criminal justice system in genuinely criminal cases."

⁵ [2003] 1 A.C. 787.

⁶ D. Tausz "Anti-Social Behaviour Order: Whether Proceedings are Civil or Criminal in Nature" [2003] Crim L.R. 269 at 270.

⁷ Ibid. at 269-70.

⁸ [2003] 1 A.C. 787, 808.

⁹ [2003] 1 A.C. 787, 808.

¹⁰ [2003] 1 A.C. 787, 824.

¹¹ It should be noted that the criminal standard of proof is only to be applied to the first part of the test to be satisfied in ASBO proceedings, namely, whether the applicant has "acted ... in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself" (s.1 (1)(a)) and not to the second part of the test concerning whether the order is necessary. Lord Steyn said "the inquiry under s.1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation".

¹² S. McDonald "The Nature of the Anti-Social Behaviour Order -- R (McCann & Others) v. Crown Court at Manchester" (2003) 66 M.L.R. 630.

¹³ House of Commons Standing

Committee B Col 138 May 5, 1998. See S. McDonald *op. cit.* at p.633, n. 6.

¹⁴ C. Bakalis "Anti-Social Behaviour Orders — Criminal Penalties or Civil Injunctions?" [2003] C.L.J. 583.

¹⁵ (1984) 6 E.H.R.R. 409.

¹⁶ (1998) 33 E.H.R.R. 994.

¹⁷ A. Ashworth "Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?" (2004) 120 L.Q.R. 263.

¹⁸ König v Germany (1978) 2 EGRR 170 and Engel v Netherlands (1976) 1 E.H.R.R. 647.

¹⁹ Ashworth, *op. cit.* at p. 278.

²⁰ (1995) 20 E.H.R.R. 247.

²¹ Drug Trafficking Act 1986.

²² Ashworth *op. cit.* at p.280.

²³ Section 1(4) allows a court to make an order "prohibiting the defendant from doing anything described in the order" and does not therefore have to relate to the behaviour proved in court.

²⁴ Ashworth *op. cit.* at p. 281.

²⁵ [2003] 1 A.C. 787, 835.

²⁶ A. Ashworth, J. Gardner, R. Morgan, ATH. Smith, A. Von Hirsch, M. Wasik "Overtaking on the Right" (1995) 145 N.L.J. 1501 at 1502.

²⁷ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom, November 4 – 12, 2004 for the attention of the Committee of Ministers and the Parliamentary Assembly, Strasbourg, June 8, 2005, paragraph 115.

²⁸ A. Pema and S. Heels Anti-social behaviour orders: special bulletin (2004, Bristol, Jordans) at p.41.

²⁹ House of Commons Written Answers Col 1143W, February 4, 2005.

³⁰ K. Beattie "Control Orders and ASBOs: taking liberties?" Legal Action April 2005 7 – 8 at 8. Emphasis added.

³¹ Under s.2 of the European Convention on Human Rights Act 2003, Irish courts are bound to interpret Irish law in the light of the E.C.H.R. and the corresponding case law.

³² An application has been made to the European Court of Human Rights in the McCann case.

³³ W. Binchy "Anti-Social Behaviour Orders and the Constitution" paper delivered at Conference on "Anti-

Social Behaviour Orders: Social Policy and Human Rights", Trinity College Dublin, June 22, 2005 at p.15.

³⁴ [1998] 3 I.R. 185.

³⁵ Unreported, High Court, O'Higgins J., June 4, 1999.

³⁶ Murphy v GM, PB, PC Ltd, GH, Gilligan v CAB Unreported, Supreme Court, October 18, 2001.

³⁷ For a critical analysis of the case law see J. Meade, "The Disguise of Civility: Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law" (2000) Hibernian Law Journal 1.

³⁸ Home Office statistics show that 42% of ASBOs were breached up to December 2003 (an increase of 36% on the previous year) and 55% of those persons who breached their ASBO were immediately imprisoned. See Home Office Press Release 042/2005, March 1, 2005.

³⁹ See, for example, NAPO's (The Trade Union and Professional Association for Family Court and Probation Staff) criticism of ASBOs in H. Fletcher Anti-Social Behaviour Orders: Analysis of the First Six Years (April 7, 2005) which concludes at p.11 "Certain local authorities are using ASBOs to clear sink estates of problematic families and individuals. This appears to avoid dealing with wider environmental problems on those estates and also avoids putting in place wider social policies that would deal with the underlying problems of anti-social behaviour".

⁴⁰ For a more general discussion on the treatment of the presumption of innocence and burden of proof, see A. Ashworth and M. Blake, "The Presumption of Innocence in English Criminal Law" [1996] Crim Law Rev 306.

⁴¹ Beattie *op. cit.* at 7 contrasts this with the detailed discussion of standards of proof in relation to the controversial control orders under the Prevention of Terrorism Act 2005.

⁴² A. Ashworth "Is the Criminal Law a Lost Cause? (2000) 116 L.Q.R. 225.