Neutral Citation Number: [2020] EWCA Civ 1488

Case No: A2/2019/1560

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
HIS HONOUR JUDGE McKENNA (sitting as a judge of the High Court)
C90BM249

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE BEAN
and
LORD JUSTICE HOLROYDE

- -

Between :

HARUN MANSOOR SHARIF	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**

- -
- -

Mr Ramby de Mello (instructed by **McGrath & Co, Birmingham**) for the **Appellant**
Jonathan Manning and **Iulia Saran** (instructed by **Legal & Democratic Services, Birmingham City Council**) for the **Respondent**

Hearing date: 3 November 2020

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Approved Judgment

Lord Justice Bean :

1. Street cruising, or car cruising, is a term used to describe a form of anti-social behaviour which has apparently become a widespread problem in the West Midlands in particular. By a claim issued on 6th September 2016 against "Persons Unknown" Birmingham City Council sought an injunction pursuant to s 222 of the Local Government Act 1972 to prohibit street cruising throughout their local authority area. On 3rd October 2016 His Honour Judge Worster, sitting as a deputy judge of the Queen's Bench Division, granted the injunction for a period of three years. On 24th May 2019 His Honour Judge McKenna, also sitting as a Deputy High Court judge, refused an application by the present appellant Harun Mansoor Sharif to discharge the injunction. The question on this appeal from Judge McKenna's decision is whether the injunction was properly granted, given what is said to be the alternative remedy available to the Council of itself making a public spaces protection order ("PSPO") under Part 4 of the Anti-Social Behaviour, Crime and Policing Act 2014.

2. Two witness statements of Mr David Bird of Birmingham's Housing Department were in evidence before Judge Worster and Judge McKenna. They provided powerful evidence that street cruising was a widespread problem and that the Council's attempts to deal with it by means short of an injunction had been unsuccessful.

3. Street cruising is not a statutory term. It was defined in a schedule to Judge Worster's order as follows:-

> "Street-Cruise"
>
> 1. "Street-Cruise" means a congregation of the drivers of 2 or more motor-vehicles (including motor-cycles) on the public highway or at any place to which the public have access within the Claimant's local government area (known as the City of Birmingham) as shown delineated in blue on the map at Schedule 1, at which any person, whether or not a driver or rider, performs any of the activities set out at para.2 below, so as, by such conduct, to cause any of the following:
>
> (i) excessive noise;
>
> (ii) danger to other road users (including pedestrians);
>
> (iii) damage or the risk of damage to private property;
>
> (iv) litter;
>
> (v) any nuisance to another person not participating in the street-cruise.
>
> 2. The activities referred to at para.1, above, are:
>
> (i) driving or riding at excessive speed, or otherwise dangerously;
>
> (ii) driving or riding in convoy;

(iii) racing against other motor-vehicles;

(iv) performing stunts in or on motor-vehicles;

(v) sounding horns or playing radios;

(vi) dropping litter;

(vii) supplying or using illegal drugs;

(viii) urinating in public;

(ix) shouting or swearing at, or abusing, threatening or otherwise intimidating another person;

(x) obstruction of any other road-user.

"Participating in a Street-Cruise"

3. A person participates in a street-cruise whether or not he is the driver or rider of, or passenger in or on, a motor-vehicle, if he is present and performs or encourages any other person to perform any activity to which paras. 1-2 above apply, and the term "participating in a street-cruise" shall be interpreted accordingly."

A power of arrest, pursuant to s 27 of the Police and Justice Act 2006, was attached to the injunction in relation to anyone participating in a street cruise as the driver or rider of, or passenger in, a vehicle to which paragraphs 1 and 2 applied.

4. The injunction came into force on 24th October 2016 and was to continue for three years. We are informed that it was renewed until 1st September 2022 by His Honour Judge Rawlings on 22nd October 2019.

5. Paragraph 5 of Judge Worster's order provided that any person served with a copy of the order could apply to the court to vary or discharge it on 48 hours' written notice to the Council. Schedule 3 to the order provided for service of the injunction to be effected by placing notices in newspapers, online and in prominent locations throughout Birmingham.

6. On 27th September 2018 the Council served a notice of application to commit for contempt of court on Mr Sharif. The application alleged that on 16th September 2018 he had breached the terms of the injunction by participating in a street cruise within the area covered by the injunction, causing danger and/or nuisance to other road users by racing his black Audi A5 motor car registration number RF63 HBJ against another vehicle dangerously and at an excessive speed. He was arrested and brought before the court.

7. He applied to have the injunction discharged on the basis that it was plainly wrong to have granted it and that there was an error of principle in the reasoning which led to its grant. Mr de Mello, who appeared for him below as well as before us, relied on the decision of this court in *Birmingham City Council v Shafi* [2009] 1 WLR 1961

("*Shafi*"). In that case, as he put it, the Court of Appeal concluded that where a local authority sought an injunction on terms that were identical or almost identical to the terms that could have been sought on an application for an anti-social behaviour order ("ASBO"), which latter order was Parliament's preferred remedy for the type of conduct complained of and incorporated safeguards for defendants not available under the civil injunction regime, then while the Court retained jurisdiction to grant an injunction, it would not, as a matter of discretion, grant one save in exceptional circumstances.

8. As in the case of *Shafi,* the argument runs, Parliament has provided a remedy and a specific procedure in the form of the PSPO to combat the very type of behaviour complained about and, therefore, the Courts should give effect to Parliament's intention and only in very rare circumstances would it be appropriate for the Court to grant injunctive relief. It was pointed out that Gateshead Metropolitan Borough Council had apparently sought to deal with street cruising by making a PSPO for their area.

9. In further support of his argument, it was submitted on behalf of Mr Sharif that the sanctions under the Contempt of Court Act 1981, namely an unlimited fine and/or imprisonment for up to two years, are far more onerous than the sanctions provided for in respect of breaches of PSPOs pursuant to the 2014 Act, a result that Parliament could not have intended, and equally, it was said, that Parliament in the PSPO regime expressly provided that a person would not be guilty of an offence if there was a reasonable excuse, a safeguard lacking in respect of committal proceedings.

10. Judge McKenna dismissed the application to discharge the injunction. The essence of his judgment can be found in paragraphs 27-30 and 32-33:-

> 27. To my mind, the 16th Respondent [Mr Sharif]'s reliance on the decision in *Shafi* is entirely misplaced. PSPOs are not a specific statutory remedy designed or introduced by Parliament to tackle the specific problem of car cruising. They replace, as I have already indicated, public space orders, restricting problem drinking, gating orders and dog control orders and give local authorities a general power to tackle activities that may cause a detrimental effect to quality of life of those living in their localities. The fact that Gateshead MBC may have made use of that power to deal with similar issues to those in respect of which the injunction was sought is neither here or there.
>
> 28. Moreover, as Counsel for the Applicant submitted in respect of the argument based on the case of *Shafi*, here the choice is not between two different types of Court orders but between a remedy which requires a judicial decision and is, therefore, made by an independent and impartial tribunal on the one hand and on the other, the PSPO which the local authority makes for itself.
>
> 29. In those circumstances it does not seem to me that an intention should be imputed to Parliament that a public authority should be obliged to make PSPOs which are orders

made without recourse to the Courts and still less that the Courts should in the exercise of their discretion decline to deal with an application on the basis that the local authority should have made an order itself without coming to Court. That would be a very surprising result – even more so when it is remembered that in the *Shafi* case the 'ASBO' regime provided specific safeguards which were lacking in the alternative approach and which made it more difficult for a local authority to obtain an 'ASBO'.

30. Moreover, *Shafi* has not been followed in other cases. It was expressly distinguished and indeed held to be irrelevant by the Court of Appeal in *Swindon Borough Council v Redpath* [2009] EWCA Civ 943 where the Court held that there was no reason why a local authority should not use the 'ASBI' regime instead of the 'ASBO' regime and in respect of which a civil standard of proof would be applied. Likewise, in *Birmingham City Council v James* [2013] EWCA Civ 552, the Court of Appeal held there was no doctrine requiring one statutory remedy to be used in preference to another.

…

32. In short, it is clear from the decisions in *Redpath* and *James* that there has never been a doctrine requiring an authority to apply for the remedy representing the closest fit to the mischief aimed at and, in any event, the alternative remedy contended for on the 16th Respondent's behalf, namely the PSPO, is not identical or even remotely similar.

33. There is no general principle that only in exceptional circumstances should a court grant an injunction where an alternative, specific statutory remedy is available or the Court should not do so where breach can carry more severe sanctions than breach of a PSPO nor is there any basis for the argument that local authorities cannot seek a remedy with more serious consequences in the event of a breach or that the Court cannot grant such a remedy if it considers it justified and proportionate so to do. In this case, the Court had ample evidence of the previous attempts made by the West Midlands Police to address car cruising and to the effect that those attempts have proved inadequate and therefore to conclude that the granting of the injunction was appropriate."

11. Mr Sharif applied for permission to appeal on three grounds.

(1) "The learned judge erred in law in holding that an intention should not be imputed to Parliament that a public authority should be obliged to make public space protection orders and still less that the court should in the exercise of their discretion decline to deal with an application on the basis that the local

> authority should have made an order itself without coming to court [para 29]."
>
> (2) "The learned judge erred in law in holding that this case was nearer the case of *Swindon BC v Redpath* [2009] EWCA Civ 943 than the case of *Shafi v BCC* [2009] 1 WLR 1961 [para 30] and that the PPO [*sic*] is not identical or even remotely similar to the remedy provided by the High Court [para 32]."
>
> (3) "The learned judge erred in law in holding "There is no general principle that only in exceptional circumstances should a court grant an injunction where an alternative, specific, statutory remedy is available or the court should not do so where breach can carry more severe sanctions than breach of a PSPO nor is there any basis for the argument that local authorities cannot seek a remedy without more serious consequences in the event of a breach or that the court cannot grant such remedies if it considers it justified and proportionate so to do". [para 33]"

12. In his main skeleton argument Mr de Mello added a further point:-

> "Section 130 of the Highways Act 1980 was inapplicable. [That section] is concerned with the protection of the legal rights of the public at large to use the public highway and with legal rights of access, not with the safety of the condition of the public highway (*Ali v Bradford MDC* [2012] 1 WLR 161) at [39] or for that matter car cruising on the highway. The court refused to impose liability through the law of private nuisance as it would amount to the use of a blunt instrument to interfere with a carefully regulated statutory scheme and would usurp the proper role of Parliament.

13. Permission to appeal to this court was granted by Floyd LJ in an order sealed on 23 December 2019. He wrote:-

> "The grounds of appeal have a real prospect of success and, even if they did not, the legality of the practice of granting injunctions of this character is of sufficient general importance to amount to a compelling reason for the issue to be considered at this level."

Public spaces protection orders

14. Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014 (the "2014 Act") introduced new powers for community protection, including PSPOs. PSPOs replaced designated public place orders, gating orders and dog control orders.

15. Section 59(4) of the 2014 Act provides that a PSPO is an order which identifies a public place ("the restricted area") and:

a) prohibits specified things being done in the restricted area,

b) requires specified things to be done by persons carrying on specified activities in that area, or

c) does both of those things.

16. By s 59(1)-(2) of the 2014 Act, a local authority may make a PSPO if satisfied on reasonable grounds that:

    a) activities carried on in a public place within the authority's area have had a detrimental effect to the quality of life of those in the locality, or

    b) it is likely that activities will be carried on that will have such an effect.

17. The effect of the activities must be, or be likely to be:

    a) of a persistent or continuing nature; and

    b) such as to make the activities unreasonable; and

    c) must justify the restrictions imposed by the notice (s 59(3)).

18. By s 59(5), the only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order:

    a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or

    b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence."

19. Before a PSPO may be made, there are various consultation requirements that must be complied with (s 72). There are also restrictions on the orders that may be made in respect of highways (ss 64-65).

20. Parliament neither repealed nor amended s 130 of the Highways Act 1980, nor any of the other statutory provisions relied on by the Council, when introducing PSPOs. The 2014 Act repealed and replaced the ASBO regime with, among other things, criminal behaviour orders ("CBOs").

21. Breach of a PSPO, without reasonable excuse, is a criminal offence (s 67(1)), punishable with a fixed penalty notice (of up to £100) (s 68) or a fine, on summary conviction, not exceeding level 3 (currently up to £1,000) (s 67)(2)).

Section 222 of the Local Government Act 1972

22. The centrepiece of Mr de Mello's argument before us, as it was before Judge McKenna, was *Shafi,* in which it was held that an injunction restraining gang-related activity by three named defendants should not have been granted under s 222 in terms identical or nearly identical to those which could have been included in an ASBO granted by a criminal court under the Crime and Disorder Act 1998.

23. Before examining *Shafi* I should begin with two previous authorities dealing with s 222 of the 1972 Act. The first is the decision of the House of Lords in *Stoke on Trent City Council v B&Q Retail Ltd* [1984] AC 754. That case was the culmination of an epic struggle between local authorities and DIY supermarkets and others which sought to open on Sundays in breach of the law as it then was (the Shops Act 1950) prior to the enactment of the Sunday Trading Act 1984. The maximum penalty under the Shops Act 1950 was £50 for a first offence and £200 for any subsequent offence.

24. The House of Lords held that an interlocutory injunction to restrain Sunday trading by B&Q had been properly granted. Lord Templeman said at 776:-

> "It was said that the council should not have taken civil proceedings until criminal proceedings had not persuaded the appellants to obey the law. As a general rule the local authority should try the effect of criminal proceedings before seeking the assistance of the civil courts. But the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading."

25. *City of London Corporation v Bovis Construction Ltd* [1992] 3 All ER 697 was a decision of this court concerning an injunction under s 222 to tackle nuisance caused by noise. In a well-known passage, cited by Mr de Mello in argument, Bingham LJ said at 714:

> "The guiding principles must, I think, be –
>
> (1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution: see the authority already cited;
>
> (2) that there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see the *Stoke-on-Trent* case at 767B, 776C, and *Wychavon District Council v. Midland Enterprises (Special Events) Ltd.* [1987] 86 L.G.R. 83 at 87;
>
> (3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see the *Wychavon* case at page 89."

26. Against that background I turn to *Shafi*, in which I note that Mr Manning appeared for the Council and Mr de Mello for one of the three defendants. In an attempt to mitigate the impact of a growing gang culture and accompanying serious crime in Birmingham the Council applied for injunctions under s 222 restraining the defendants from

entering the city centre, associating with named individuals or wearing green clothing, which was the colour of the gang of which they were alleged to be members. The injunctions sought were in identical or almost identical terms to ASBOs which the Council had obtained in the magistrates' court against juvenile gang members. The Council obtained interlocutory injunctions against the defendants but these were discharged following a trial in the county court before His Honour Judge MacDuff QC (as he then was). An appeal by the Council to this court was dismissed.

27. In the principal judgment given jointly by Sir Anthony Clarke MR and Rix LJ they referred to the *B&Q* case and to *City of London v Bovis.* At [33] they said:-

> "The principles summarised by Bingham LJ have been followed and to some extent broadened in later cases. For example, in *London Borough of Barking & Dagenham v Jones*, unreported, 30 July 1999, Brooke LJ, with whom May and Laws LJJ agreed, said this, with regard to Bingham LJ's principles:
>
> > "The application of those principles means that if the court is satisfied that nothing short of an injunction will be effective to restrain a defendant's unlawful operations it may grant an injunction even though he has not yet been subjected to the maximum penalty available under the criminal law."

28. After referring to the decision of this court in *Guildford Borough Council v Hein* [2005] LGR 797 they said at [36]:-

> "Those cases suggest a somewhat broader approach than some of the earlier ones, although, in our judgment the essential principles remain those summarised by Bingham LJ, in so far as the injunction is sought in aid of the criminal law, if by that is meant or includes a case where the injunction is sought to prevent the defendant from committing criminal offences. As appears below, it is our view, first that these principles are subject to any legislation which is designed to deal with the very situation which an injunction is sought to control and secondly that the ASBO legislation is designed to do just that."

29. At [43] they turned to consideration of the ASBO legislation then in force and referred to a decision of Hoffmann J in *Chief Constable of Leicestershire v M* [1989] 1 WLR 20; [1988] 3 All ER 1015. That was a case in which the police sought an injunction restraining the defendant from dealing with assets which were alleged to represent profits from fraudulent activities. Hoffmann J said in the final paragraph of his judgment: "In my judgment there is no authority for the police having any "right" in respect of such money which could found a claim for an injunction". He noted that the Drug Trafficking Offences Act 1986 had made what he described as "elaborate provision" for enabling the courts to restrain dispositions of assets suspected of being derived from dealings in drugs, and that even more recently Parliament had enacted similar provisions applicable to all indictable offences in the Criminal Justice Act 1988; but that the latter statute was not yet in force. That gives the context to the

observation at the end of his judgment, cited by this court in *Shafi* at [43], on which Mr de Mello strongly relies, that:-

> "The recent and detailed interventions of Parliament in this field suggest that the court should not indulge in parallel creativity by the extension of general common law principles".

30. Sir Anthony Clarke MR and Rix LJ continued:-

> "44. The significance of the principle stated by Hoffmann J in this appeal is this. The terms of the injunction sought in this action are typical of an ASBO and, as already indicated, on the facts of this case they are identical or almost identical to the terms of an ASBO. We have already referred to what is in our view a striking feature of the council's approach in this case, namely that it seeks ASBOs against those under 18 and injunctions in identical terms against those over 18. Parliament has laid down a number of specific requirements which apply to ASBOs, some of which may not apply to injunctions granted at common law. In so far as it may be said that it is easier to obtain an injunction than an ASBO, the granting of an injunction in such circumstances would in our view be to infringe Hoffmann J's principle. In any event, it appears to us that where, as here, Parliament has legislated in detail to deal with a particular problem, the courts should in general leave the matter to be dealt with as Parliament intended and, save perhaps in exceptional circumstances, refuse to grant injunctive relief of the kind which can be obtained by an ASBO.
>
> 45. We recognise that there is a general principle that, where a claimant in a civil action has two available rights or remedies, he is in general entitled to choose which to rely upon. However, the principle to which we have referred is an exception to that general principle and applies in the kind of case contemplated by Hoffmann J, of which this seems to us to be an example. We recognise that it may be said that in *Chief Constable of Leicestershire v M* Hoffmann J was considering what he regarded as an unprincipled extension of the common law in a field in which Parliament had already legislated and that in this case the jurisdiction to grant an injunction in aid of the criminal law (and indeed to restrain a public nuisance) is already established. However, it seems to us that the thought which underlies Hoffmann J's principle applies here. Parliament has recently legislated to restrain anti-social behaviour in a particular way and subject to particular safeguards. In our view the court should have that fact well in mind in deciding how to exercise its discretion whether or not to grant an injunction in a particular case.

31. They went on to refer to the terms of s 1 of the Crime and Disorder Act 1998 which first introduced ASBOs, and to the decision of the House of Lords in *R (McCann) v*

Crown Court at Manchester [2003] 1 AC 787 that on applications for ASBOs magistrates' courts should apply the criminal standard of proof to the question of whether it had been shown that the defendant had acted in an antisocial manner. Lord Steyn dealt with that point in particular and said that the application of the criminal standard of proof should ensure consistency and predictability in "this corner of the law". The Master of the Rolls and Rix LJ continued:-

> "51. The questions whether an injunction should be granted in this action on the one hand or whether an ASBO should be granted in identical or near identical terms on the other are surely questions which arise in what Lord Steyn would regard as the same corner of the law. It would be bizarre, not to say irrational, if the standard of proof in answering the two questions were different.
>
> 52. Suppose two identical cases in which A is under 18 and B is over 18. In one case an ASBO is sought against defendant A in the magistrates court and in the other defendant B is over 18 and an injunction is sought against him in the High Court or a county court. The orders sought are in identical or near identical terms. It would again surely be bizarre, not to say irrational, if the standard of proof in the two cases were different. What then is the solution? In our view the natural solution is for the High Court or county court to decline to grant an injunction but to leave the council to seek an ASBO in both cases. That approach seems to us to be consistent with Hoffmann J's principle."

32. They added at [59]:-

> "… The discretion of the court whether or not to grant an injunction derives from section 37 of the Supreme Court Act 1981. In this case, as already stated, the council seeks injunctions in aid of the criminal law (in the sense discussed above) or to prevent a public nuisance. However, the principles upon which such an injunction is to be granted remain to be determined. As stated above, as we see it they have been worked out to a considerable extent in the first class of case and in the classic case of public nuisance, but they remain to be worked out in a case which has elements of both and they also remain to be worked out where what is sought is in effect an ASBO. The critical factor in the present case is in our opinion that, whether the council seeks an injunction in aid of the criminal law or on the basis of an alleged public nuisance, the essential remedy sought is an ASBO.
>
> 60. It is in this context that Hoffmann J's principle (or something closely analogous to it) falls to be respected. Thus we conclude, for the reasons we have given, that the court should not indulge in parallel creativity by the extension of general common law principles. Hoffmann J did not of course

> have the ASBO in mind but it seems to us that, where (as here) a council seeks an injunction in circumstances in which an ASBO would be available, the court should not, save perhaps in an exceptional case, grant an injunction but leave the council to seek an ASBO so that the detailed checks and balances developed by Parliament and in the decided cases will apply."

33. *Shafi* was almost immediately reversed on its facts by statute: in ss 34-45 of the Policing and Crime Act 2009 Parliament created the "injunction to restrain gang-related violence". It has repeatedly been distinguished in later cases. In *Swindon Borough Council v Redpath* [2009] EWCA Civ 943 this court held that there was no reason why a local authority should not apply for an anti-social behaviour injunction under ss 153A-E of the Housing Act 1996 (the predecessor to the 2014 Act but in the context of housing) rather than seeking an ASBO in the criminal courts.

34. In *Birmingham City Council v James* [2014] 1 WLR 23; [2013] EWCA Civ 552 Jackson LJ observed that there are many situations in which, on the facts, two different pre-emptive orders are available and that there is no "closest fit" principle which cuts down the court's statutory powers to make pre-emptive orders. He advised at [31] that "in future cases the Court of Appeal should not be invited to trawl through the legislation in some quest for the closest fit". In *Mayor of London v Hall* [2011] 1 WLR 504; [2010] EWCA 817 this court upheld the grant of an injunction restraining protestors from occupying Parliament Square, in aid of the enforcement of byelaws which provided for a modest financial penalty only and had proved ineffective: see per Lord Neuberger MR at [52]-[57].

35. In the recent High Court case of *Birmingham City Council v Afsar* [2020] 3 All ER 756; [2019] EWHC 3217 (QB) the Council, again represented by Mr Manning, sought injunctions to restrain protests outside a maintained school by parents and others critical of the school's teaching of LGBT issues. The case raised issues under ECHR Articles 10 and 11 which are not applicable to the present case. One of the arguments put forward by Mr de Mello for three of the defendants was that an injunction was inappropriate given that the Council could have made a PSPO. Warby J said:-

> "Mr de Mello had an alternative submission: that if the legislation allows the Council scope to choose between a PSPO or an injunction as the means of combating anti-social behaviour, it should not be granted an injunction, thereby bypassing the statutory safeguards built into the PSPO regime. In support of that submission he cited *Birmingham City Council v Shafi* [2008] EWCA Civ 1186 [2009] 1 WLR 1961 [36], [45] and [59]. A similar argument was advanced by Mr de Mello in *Birmingham City Council v Sharif* [2019] EWHC 1268 (QB) and rejected by HHJ McKenna (sitting as a Deputy High Court Judge). I share the view expressed by Judge McKenna at [27] that the argument is entirely misplaced, for the reasons he gave at [28-33]. In short, *Shafi* is no authority for the proposition that an injunction under the 2014 Act cannot or should not be sought or granted if the authority could have imposed a PSPO, or other lesser remedy: see *Redpath v Swindon BC* [2009] EWCA Civ 943 [2010] PTSR 904,

> *Birmingham CC v James* [2013] EWCA Civ 552 [22], [28], [31]. A local authority's power to ask the Court to determine whether an injunction is a necessary and proportionate interference with Convention rights is not shackled by rigid rules of this kind. Nor can it be argued that the powers of the Court should not be invoked or exercised, on the grounds that Court procedures are inferior to the administrative procedures specified in the statute. That is manifestly not the case."

36. Mr Manning distinguishes *Shafi* on numerous grounds. Firstly, he says, *Shafi* concerned two alternative judicial remedies, one (the ASBO) with greater safeguards than the other (the injunction), whereas in the present case the choice is between a judicial remedy (the injunction) and an administrative procedure which the Council can operate itself without permission or even oversight from anyone else. Second, the ASBO available in *Shafi* was designed to address precisely the same mischief as the injunction which the Council sought, which is not the position here. Third, the intention of Parliament in creating the ASBO in the Crime and Disorder Act 1998, which is what the court considered in *Shafi,* is no longer relevant because the ASBO has been abolished. Fourth, the leading judgment in *Shafi* clearly envisages that local authorities will still be able to apply for injunctions under s 222 to restrain public nuisances (see [53] and [65]). Fifth, subsequent decisions of this court have made it clear that local authorities can seek injunctions in aid of the criminal law, and that there is no doctrine of the "closest fit".

37. The *ratio* of *Shafi*, in my view, is that it was wrong for the Council to apply for a s 222 injunction to restrain anti-social behaviour rather than applying to a magistrates' court or the Crown Court for an ASBO because (1) (as the judgment repeatedly emphasises: see paragraphs [51]-[53], [61] and [65]) the terms of the injunction sought were "identical or almost identical" to those which would be obtainable in an ASBO; (2) the criminal law could not be said to be ineffective (breach of an ASBO was punishable with imprisonment); and (3) it was unfair to circumvent the criminal standard of proof which the House of Lords had held in *McCann* was required on an application for an ASBO. This was why the court departed from what they accepted to be the general principles laid down in *B&Q* and *Bovis*. Like Judge McKenna in the present case and Warby J in *Afsar*, I do not regard it on its proper construction as being of any assistance in the present case.

38. The third written ground of appeal argues that the court below was wrong to grant, or to refuse to discharge, an injunction carrying the penalty of up to two years' imprisonment for contempt when the sanctions for breach of a PSPO are so much less severe. But that seems to me to turn the *B&Q* case on its head, and it was not the way Mr de Mello put the point in oral argument. Rather he submitted that Parliament had created a specific scheme of PSPOs with provision for consultation with persons affected, and by doing so it intended to replace any alternative remedy the Council might otherwise have invoked such as an injunction under s 222. He told us that PSPOs have been deployed against street cruising both in Gateshead (as Judge McKenna noted) and more recently in Milton Keynes.

39. There was no evidence before Judge McKenna, and there is none before us, of the scope and terms of the Gateshead PSPO, nor how it was originally made, nor of how effective it has been to prevent street cruising. But Mr Bird's evidence in the present

case was enough to indicate that a PSPO might well be ineffective. Breach of a PSPO is a non-arrestable offence carrying only a financial sanction (whether by prosecution or by service of a fixed penalty notice). As one item of evidence (among many) mentioned by Mr Bird records, "a caller complains that the vehicles go when police arrive and simply return when the police have moved on". There may also be potential difficulties about what does or does not constitute a "public space"; how large that public space can be; and whether a PSPO can properly cover the activities of those who organise or advertise street cruises.

40. Mr de Mello's case before Judge McKenna was that the Council could and should have used a PSPO rather than applying for an injunction; and, as already noted, each of the three pleaded Grounds of Appeal was to the same effect. However, in a supplementary skeleton argument and oral submissions he sought to argue that another alternative provided by Parliament, which the Council should have used rather than seeking an injunction, was to seek to have individuals such as his client prosecuted for an appropriate motoring offence. In the event of conviction, he submitted, the prosecution could apply to the court for a criminal behaviour order ("CBO") to be made under s 22 of the 2014 Act to address any problems of public nuisance.

41. I would reject that submission, not simply because it was not made in the court below. It seems to me to be as unrealistic as the suggestion of a PSPO, though for different reasons. No submissions were made as to who, in practice, would initiate and conduct such a prosecution; which individual or organisation would be specified under s 24 of the 2014 Act to supervise compliance with the requirements of the CBO; or who would prosecute for an offence contrary to s 30 of the Act in the event of a breach of the CBO. Even assuming (without deciding) that a CBO is an appropriate order to be made on conviction for a motoring offence such as dangerous driving or racing on the highway, it could only be made against an individual who had been prosecuted and convicted of an offence, a process which might well take several months. The purpose of the injunction was to prevent future nuisances, not to impose penalties for past ones.

42. Judge Worster and Judge McKenna were well entitled to conclude, in the words of Bingham LJ's third criterion in *Bovis*, that car cruising in the Birmingham area would continue unless and until effectively restrained by the law and that nothing short of an injunction would be effective to restrain them. I regard this as a classic case for the grant of an injunction.

Section 130 of the Highways Act 1980

43. On the view which I take of the judge's discretion to grant the injunction under s 222 of the 1972 Act it is unnecessary to consider whether s 130 of the 1980 Act would have provided an alternative route to the same conclusion.

The grant of the injunction against "Persons Unknown"

44. No point was taken in the court below about whether the original grant of the injunction against persons unknown and the provision for service by advertisements and prominent local notices was open to challenge. Since the order was first made, this question has been considered (though not in relation to an injunction of the same

type) in this court in *Ineos Upstream Limited v Persons Unknown* [2019] 4 WLR 100 and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. It may have to be considered again in any future case about injunctions to restrain anti-social behaviour by persons unknown. I simply record that we were told by Mr Manning that the "persons unknown" issue was the reason why Birmingham did not apply for an anti-social behaviour injunction under s 1 of the 2014 Act.

Conclusion

45. I would dismiss the appeal.

Lord Justice Holroyde:

46. I agree.

Sir Terence Etherton, Master of the Rolls:

47. I also agree.