Neutral Citation Number: [2020] EWHC 412 (Admin)

Case No: CO/3629/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Family and Civil Justice Centre,
Bull Street, Birmingham B4 6DS

Date: 25/02/2020

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

Anthony Taylor

Appellant

- and -

Solihull Metropolitan Borough Council

Respondent

- -
- -

Ramby de Mello (instructed by **McGrath & Co**) for the **Appellant**
Jonathan Manning (instructed by **Solihull MBC, Legal Services**) for the **Respondent**

Hearing dates: 19 February 2020

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Approved Judgment

Mr Justice Chamberlain :

Introduction

1 This is an appeal by case stated pursuant to s. 111 of the Magistrates' Courts Act 1980 ('the 1980 Act') from a decision of 17 July 2019 made by three justices in the Birmingham and Solihull Local Justice Area (Mrs J. Lyle, Mr T. Chauhan and Mrs M. Pittaway). The justices made a closure order under s. 80(3) of the Anti-social Behaviour, Crime and Policing Act 2014 ('the 2014 Act') in respect of the appellant's flat at 47 Clare House, Smiths Wood, Birmingham.

2 Mr Ramby de Mello, for the appellant, filed his skeleton argument with the bundle on 12 February 2020. Mr Jonathan Manning, for the respondent, filed his skeleton argument on 18 February 2020, the day before the hearing. The appellant made an application to extend time for the filing of the skeleton argument. The Administrative Court lawyer, acting under powers delegated pursuant to CPR r. 54.1A, said that the appellant had been required by CPR 52B PD, §6.3 to lodge the skeleton argument and bundle within 35 days of the filing of the appellant's notice. The lawyer noted that the extension sought would severely curtail the respondent's opportunity to respond to the skeleton argument and refused it. However, CPR 52B PD §1.1 indicates that that practice direction does not apply to appeals by case stated from a magistrates' court. The applicable practice direction is CPR 52E PD. That contains nothing about the filing of skeleton arguments or hearing bundles. It follows that there were no time limits for the filing of skeleton arguments. So, no extension of time was required by either party.

3 This discloses a lacuna in the rules and practice directions. The effect is that, once the magistrates or Crown Court have stated a case, there is no requirement to file anything other than the appellant's notice (which, as in this case, may be a very short and uninformative document) and the documents required by §2.3, i.e. (a) the stated case, (b) a copy of the judgment, order or decision in respect of which the case has been stated and (c) where the judgment, order or decision in respect of which the case has been stated was itself given or made on appeal, a copy of the judgment, order or decision appealed from. This is not satisfactory. Case stated appeals often raise important points of law. In a civil case, the decision of the High Court is final: s. 28A(4) of the Senior Courts Act 1981. Consideration should be given to an amendment to CPR 52E PD to impose a general requirement for the filing of skeleton arguments, agreed hearing bundles and authorities bundles. In the meantime, it may be sensible for directions to that effect to be made under delegated powers when the appellant's notice and other documents are received in accordance with CPR 52E PD §§2.2 & 2.3. I understand that this already happens in some cases.

Statutory framework

4 Section 76 of the 2014 Act confers on a police officer of at least the rank of inspector, or the local authority, the power to issue a closure notice if satisfied on reasonable grounds (a) that the use of particular premises has resulted, or (if the notice is not issued) is likely soon to result, in a nuisance to members of the public, or (b) that there has been, or (if the notice is not issued) is likely soon to be, disorder near those premises associated with the use of those premises, and that the notice is necessary to prevent the nuisance or disorder from continuing, recurring occurring.

5 The effect of a closure notice is to prohibit access (a) by all persons except those specified, or by all persons except those of a specified description, (b) at all times, or at all times except those specified, (c) in all circumstances, or in all circumstances except those specified: s. 76(3).

6 When a closure notice is issued, an application must be made to a magistrates' court for a closure order: s. 80(1) of the 2014 Act. The application must be heard by the magistrates' court not later than 48 hours after service of the closure notice: s. 80(3). The magistrates may make a closure order if satisfied (a) that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises, or (b) that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public, or (c) that there has been, or (if the order is not made) is likely to be, disorder near those premises associated with the use of those premises, and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring.

7 The effect of a closure order is similar to that of a closure notice. It may prohibit access to the premises for a period, not exceeding three months, specified in the order.

8 The 2014 Act replaced a previous statutory regime under the Anti-social Behaviour Act 2003. The proper approach to hearsay evidence was considered by the Divisional Court in relation to that regime in *R (Cleary) v Highbury Corner Magistrates Court* [2006] EWHC 1869 (Admin), [2007] 1 WLR 1272. At [27]-[29], May LJ (with whom Langstaff J agreed) pointed out that hearsay evidence is in principle admissible under section 1 of the Civil Evidence Act 1995. However, under s. 2(1), a party proposing to adduce hearsay evidence in civil proceedings has to give the other party notice of that fact and, on request, such particulars of or relating to the evidence as was reasonable and practicable in the circumstances for the purpose of enabling him to deal with any matters arising from it being hearsay. Section 3 envisages a procedure under which the other party can apply to the court to call and cross-examine the maker of the hearsay statement. Thus, May LJ said, 'to expect to adduce, as hearsay, evidence of a person who is not identified offends the spirit if not the letter of section 3, since the defendant cannot seek leave to call and cross examine the witness whose identity is not revealed'. Section 4 of the 1995 Act specifies certain factors to which regard may be had in estimating the weight, if any, to be given to hearsay in civil proceedings. These include: (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness; (b) where the original statement was made contemporaneously with the current existence of the matter stated; (c) whether the evidence involves multiple hearsay; (d) whether any person involved had any motive to conceal or misrepresent matters; (e) whether the original statement was an edited account, or was made in collaboration with another for a particular purpose; (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

9 At [30], May LJ said this:

> 'In my view, it may too easily be supposed that people who give information about drug dealers should not be required to come to court to give evidence. In individual cases, the fear may be genuine. But an easy assumption that this

> will always be so and that hearsay evidence is routine in these cases risks real injustice. After all, defendants to an application for a closure order may risk being dispossessed from their home for up to 6 months, and the statute for obvious reasons expects both that witnesses will be identified and they may have to attend for cross-examination. In this context the judgement of Brooke LJ in *Moat Housing Group South Ltd v Harris* [2006] QB 606, paras 131-140 is in point. Brooke LJ was rightly critical of anonymous hearsay witnesses stating that they do not wish to identify themselves for fear of reprisals without, in many cases being at all specific about the reasons for their fear. The willingness of a civil court to admit hearsay evidence carries with it inherent dangers. It is much more difficult for a court to assess the truth of what they are being told if the original maker of the statement does not attend to be cross-examined. More attention should be paid by claimants to the need to state by convincing direct evidence why it is not reasonable and practicable to produce the original maker of the statement as a witness. Justices should have these matters well in mind. The use of the words "if any" in section 4 of the [Civil Evidence Act 1995] shows that some hearsay evidence may be given no weight at all. Credible direct evidence of a defendant in an application for a closure order may well carry greater weight than uncross-examined hearsay from an anonymous witness or several anonymous witnesses.'

Background

10 On 4 July 2019, a closure notice was authorised by a senior officer of the local authority pursuant to s. 76(4) of the 2014 Act. The notice related to 47 Clare House, Smiths Wood, Birmingham, the respondent's home. It prohibited access to all persons save for staff, employees, contractors or agents of the Solihull Metropolitan Borough Council or of Solihull Community Housing or the emergency services.

11 On 5 July 2019, there was a hearing before a deputy district judge in the magistrates' court. The proceedings were adjourned to 17 July 2019. The evidence of what happened comes from the oral reasons given by the magistrates at the time and from the case stated drafted by the justices' clerk and approved by the justices on 3 September 2019, with amendments suggested by the appellant and approved by the justices on 23 December 2019.

12 There was a preliminary application about the admissibility of certain facts, namely: '(1) Whether the [appellant] was stopped on 16/11/2018. (2) The execution of a drug warrant on the 1/6/2019.' There was some discussion before me about what this meant. It is not entirely clear from the documents I have seen. Reading the reasons and case stated as a whole, however, I conclude that:

(a) The respondent wished to rely on (1) the fact that the appellant had been arrested for a drugs offence on 16 November 2018 and what he had said when interviewed under caution for that offence; and (2) the fact that the police had executed a search warrant at his flat and what had been discovered in that search.

(b) The appellant contended that none of these matters should be admitted in evidence because they related to an ongoing criminal investigation.

(c) The justices considered this argument and rejected it. In doing so, they noted: 'we do not need to be satisfied that the respondent was in any way directly or indirectly engaged in drug dealing which led to him being stopped on the 16/11/2018 and subsequent execution of the warrant'.

13 In the light of that ruling, the respondent called evidence from PC Garner of the West Midlands Police and from Ms Poonam Badhan of Solihull Community Housing. PC Garner confirmed the content of statements filed and served on 13 June 2009 and 16 July 2009. Ms Badhan confirmed the content of statements filed on 4, 15 and 17 July 2019. The respondent, Mr Taylor, also gave evidence and confirmed the content of his signed and dated statement. I have not seen these witness statements, nor have I seen a transcript of the oral evidence, because neither party thought it necessary to show me any of them. The only indication I have of the contents of this evidence therefore comes from the justices' reasons and the case stated. This has certain consequences to which I shall return when I come to consider the criticisms made of the justices' findings and conclusions by Mr de Mello.

14 In their *ex tempore* reasons, the justice recorded the evidence they heard as follows:

> 'We heard evidence from PC Garner confirmed the contents of his statements as being true.
>
> PC Garner gave a history of antisocial behaviour logs recorded in relation to 47 Clare House between 2009 and 2019.
>
> He further stated that following the execution of a drugs warrant, cannabis and cocaine, the latter awaiting forensics, were covered together with scales, plastic bags, bowls with residue, mobile phones and £500 cash, all paraphernalia associated with the supply of drugs.
>
> He also identified known criminals associated with drug dealing attend the premises.
>
> We also heard evidence from Poonam Badhan who confirmed the contents of her statements as being true.
>
> She conceded during cross-examination that the information she was relying on was from other agencies and local residents but maintain the information taken together evidences criminal behaviour and continued nuisance to the community.

15 In their reasons, the justices said this:

> 'We acknowledge that there is no evidence to show statements adduced by the applicants are sufficiently contemporaneous and that the information applicant seeks to rely on is primarily hearsay and untested.
>
> Notwithstanding this, what is clear is that substantial drugs and items associated with drug dealing, phones, cash, scales were found on premises

> for which the respondent does not give a plausible explanation, either in court or during consultation for initial closure order.
>
> Furthermore, sufficient evidence has been adduced in our view that known drug dealers involved in criminal activity have attended the property either by fob exclusive to number 47 or by being allowed entry into the premises by the occupant of the premises.
>
> We further note the respondent in certificate of consultation B65, when arrested in November 2018, claimed during interview that he was exploited and coerced into dealing whereas in his statement dated 16/7/2019 paragraph 25 maintains this is inaccurate but acknowledged "delivers things".
>
> We appreciate that the items recovered are awaiting forensics and the officer who has given evidence based on his skills and experience, stated what was recovered was illegal drugs and we accept his evidence. We note that cannabis found on premises consistent with personal use was not disputed by [the appellant].
>
> Having weighed up the evidence we are satisfied on balance of probabilities that the criteria for the making of the closure order pursuant to section 80(5) paragraph a and B Anti-social Behaviour Crime and Police Act 2014 is made out.
>
> The respondent in our view has engaged in criminal behaviour, substantial drugs and paraphernalia, for which no explanation has been provided were found on the premises. Known criminals have frequented his premises. We also conclude that if an order is not made, the respondent is likely to continue with such behaviour.
>
> We go on to consider the second limb and once again are satisfied that such continued behaviour will impact adversely on other residents and the order is necessary and proportionate being mindful of the respondents right under article 8 of the European Convention on Human Rights.
>
> We make it clear that in coming to a decision we have not inferred that the respondent is in any way involved in drug dealing which we understand is subject to ongoing criminal investigation by the police and Crown Prosecution Service.'

16 After reading out these reasons the appellant's solicitor invited the justices to consider the length of the order and who should be excluded from the premises under it. In particular, it was submitted that the appellant himself should not be excluded from his home. The justices found that it was proportionate and necessary to make an order for three months. They also agreed with the respondent's view that, in view of the appellant's evidence that he had been exploited and coerced into dealing drugs on behalf of another, and that there was an ongoing criminal investigation, he should be included among those prohibited from accessing the premises.

17 In the case stated, the justice summarised their findings as follows:

'(a) Evidence pertaining to arrest of the appellant on the 16th November 2018 and the subsequent execution of drugs warrant on the 1st June 2019 at the appellant's address was admissible and should not be excluded as asserted by the appellant. We were not considering whether the appellant was involved directly or indirectly with drug dealing. We acknowledged that this was subject to an outstanding criminal investigation. The admission of such facts in our view was not prejudicial to such an extent that it should be excluded and more significantly the admission of the above facts had no bearing on the criteria we need to be satisfied of the making of a closure order pursuant to section 80(5)(a) and (b) Anti-social Behaviour, Crime and Policing Act 2014.

(b) We were satisfied on the balance of probabilities that the criteria for the making of a closure order pursuant to 80(5)(a) and (b) Anti-social Behaviour, Crime and Policing Act 2014 was made out. Substantial drugs and items associated with drug dealing were found at the appellant's address. There was sufficient evidence that known drug dealers involved in criminal activity had attended the appellant's address over a significant period and this was impacting on residents and other members of the public. We were therefore satisfied that appellant has engaged, and if order not made, is likely to continue to engage in disorderly, offensive or criminal behaviour and the use of the premises has resulted and is likely to result, if order not made, in serious nuisance to members of public.

(c) We acknowledged that the case depended substantially on hearsay evidence, but such evidence is admissible in civil proceedings. We were mindful at all times that conjecture, possible inference or suspicion is not enough to satisfy the requisite threshold for the making of a closure order. It is not unusual in our experience, given the nature of what was being investigated, that witnesses do not wish to identify themselves for fear of reprisals and the case therefore rests only on hearsay evidence. If such evidence is excluded, or as it was suggested, that we should 'attach no weight at all' than [sic] in absence of direct evidence from witnesses who are willing to attend and give direct oral testimony, there would be no prosecutions [sic] brought. Admission of the hearsay evidence was therefore just and appropriate. We had no direct credible evidence from the appellant in relation to his conduct. We therefore attached such weight to the hearsay evidence as we considered appropriate in the circumstances.

(d) It was reasonable, necessary and proportionate to exclude the appellant from his home 47 Clare House, Barle Grove, Smithswood Solihull, B60 0UB. We considered the impact that this would have on the appellant and other persons rights to private and family life and we were satisfied that the exclusion was consistent with article 8 of the European Convention on Human Rights 1988 [sic]. We were also mindful that there was an ongoing criminal investigation and also had concerns about possible reprisals from known criminals, appellant having claimed that he was being exploited and coerced into dealing with drugs on behalf of another male.'

18 In the original version of the case stated, the justices had merely recorded that PC Garner, Miss Poonam Badhan and the appellant had given evidence and affirmed the truth of their witness statements. In the amended case stated, drafted by the appellants representatives and agreed by the justices on 23 December 2019, the following summary was added of PC Garner's oral evidence:

> 'In cross-examination PC Garners evidence in relation to the execution of the warrant on 1st of June 2019 was that:
>
> 1. He could only, from his expertise, identify the cannabis and that his expertise did not extend to the white powder and other (what is suspected to be) residue seized.
>
> 2. In relation to mobile phones, he conceded that this did not provide evidence of anything incriminating.
>
> 3. In relation to the information from anonymous sources, he graded these as 2D, which he said meant it was from untested sources.'

19 In relation to Poonam Badhan's evidence, the following summary was added:

> 'In cross examination Mrs Badhan's evidence was that:
>
> 1. She agreed that, apart from where a small number of individuals were identified in photographic evidence on isolated occasions, the evidence of entry, using the fob relating to this particular flat, simply showed that it was the respondent who was accessing it.
>
> 2. Secondly, that there are approximately 60 flats in the block.
>
> 3. Thirdly, she agreed that of the persons identified as entering the block, there was no evidence that any of them actually entered [the appellant's] flat as opposed to other flats in the block.'

20 The case stated contains no summary of the appellant's oral evidence. After summarising the submissions made by each party, the justices said this:

> '**We were of the opinion that:** We were satisfied on the balance of probabilities that the criteria for the making of the closure order was made out. The evidence, whilst substantially hearsay, was admissible and we attached weight to it as we considered appropriate. The admission of the appellant's arrest on 16th November 2018 and subsequent search of the premises on the 1st June 2019 was an our view admissible and we attached no wait to this in deciding whether the criteria for the making of a closure order was made out or not. Having decided we were going to make the closure order and following further submissions, we concluded that a three-month order was necessary and proportionate in order to achieve the aim of bringing to an end the disorder, nuisance, in relation to drug related use to which the premises had been put to. In light of potential reprisals and to some extent the ongoing criminal investigations it was wholly just appropriate to

> exclude the appellant from 47 Claire House, Smiths Wood, Birmingham B36 0UB, being mindful that the dwelling is his home and the impact of his rights under article 8 of the European Convention on Human Rights.'

21 The justices set out the terms of the closure order. They then posed three questions for this court:

(1) Were the justices correct to permit the evidence of outstanding criminal investigations to be adduced?

(2) Were the justices correct to find that they were satisfied to the requisite standard that the statutory criteria under s. 80(5)(a) of [the 2014 Act] had been met?

(3) Were the justices correct to make a closure order excluding the appellant from his home?

22 Mr de Mello, for the appellant, contends that the answer to each of these questions is 'No'.

Submissions for the appellant

Question 1

23 Mr de Mello submits as follows. A closure order has a direct effect on the right to respect for the home guaranteed by Article 8 of the European Convention on Human Rights ('the Convention'). Given the presumption of innocence, and Mr Taylor's right not to incriminate himself in the context of an ongoing criminal investigation, it was unfair to require him, in effect, to rebut the evidence adduced by the respondent of his arrest and of what was found in the search of his premises. Although the appellant did give evidence, he 'steered clear' of anything that might be used against him in any possible future criminal proceedings. Mr de Mello submits that, because the 2014 Act contains no protective provision similar to that found in (for example) s. 98 of the Children Act 1989 that a statement or admission made in proceedings for a closure order is not to be admissible in subsequent criminal proceedings against the person making it, Mr Taylor faced a dilemma: remain silent (or steer clear of the key issues) and be excluded from his home or give evidence and face the prospect of that evidence being used against him in criminal proceedings. In this case, Mr de Mello submits, the appellant chose not to give evidence for fear of incriminating himself.

24 Mr de Mello submits that the statements made by anonymous witnesses were hearsay. Although hearsay evidence is in principle admissible in proceedings of this kind, it should not be admitted 'on the nod', but should be subject to proper scrutiny. Credible direct evidence of a defendant in an application for a closure order may well carry greater weight than uncross-examined hearsay from an anonymous witness or anonymous witnesses: *Cleary* [30]. In this case, Mr de Mello submits, the justices admitted the respondent's hearsay evidence 'on the nod' and without subjecting it to proper scrutiny. By doing so, they acted incompatibly with Mr Taylor's procedural rights under Articles 6 and 8 of the Convention.

25 Mr de Mello further submitted that evidence gathered in the course of a criminal investigation is categorically irrelevant to the issues that fall to be determined under s. 80(5) of the 2014 Act. The latter provision is aimed at combating the occurrence of egregious conduct or disorder or nuisance connected with the use of premises. The statutory criteria did not require the justices to be satisfied that Mr Taylor had engaged in criminal conduct. It followed, therefore, that the results of the criminal investigations were 'wholly irrelevant to the issues set out under s. 80(5)'.

26 Finally, Mr de Mello complained that the police had access to the material forming part of the criminal investigation and the appellant did not. This gave rise to an inequality of arms contrary to Article 6 of the Convention. This was an additional reason why evidence of the steps taken in the criminal investigation (including for these purposes the facts and products of the arrest and search) should not have been admitted.

Question 2

27 Mr de Mello identified three respects in which the reasons given by the justices were inadequate or incoherent. First, the justices said in their reasons that only a small amount of cannabis had been found and this was consistent with personal use. Yet they then went on to find that 'substantial drugs and paraphernalia' had been found. Second, the justices accepted evidence that drug dealers attended the address over significant period. Yet this was contrary to the concessions made by Poonam Badhan in cross-examination, as recorded in the case stated. Thirdly, the justices said in the case stated that they were not concerned with the question whether the appellant had been directly or indirectly involved in drug dealing. But this was contradicted by the appellant's own evidence, again recorded in the case stated, that he had been exploited and coerced.

28 Mr de Mello also relied in his skeleton argument on *Cumbria Constabulary v Wright* [2007] 1 WLR 1407 for the proposition that a court hearing an application for a closure order must be satisfied that there is at the time of the hearing a continuing problem of disorder or serious nuisance. He submits that there was, at the time of the hearing, no evidence to show that the statutory criteria continued to be met.

Question 3

29 Mr de Mello relied on *R (Smith) v Crown Court at Snaresbrook* [2008] EWHC 1282 (Admin), [2009] 1 WLR 2024, for the proposition that, in deciding whether to make or extend an order, and if so for how long, magistrates must apply the principle of proportionality. In particular they must carefully consider what period of closure order is necessary to achieve the aim of bringing an end to the disorder or nuisance to which the drug related use of the premises has given rise. Mr de Mello submits that the burden is on the respondent to demonstrate that there are no other less intrusive measures which could have been adopted to prevent the nuisance occurring. Here, the alternatives include criminal prosecution, an application for an injunction to prevent nuisance and local authority powers to stop housing-related nuisance. Because the respondent has not convincingly demonstrated why one of these powers could not have been used, it has failed to discharge its burden of showing that the interference with Mr Taylor's Article 8 rights is proportionate.

Discussion

Question 1

30 Before considering Mr de Mello's submissions in detail, I draw attention to three preliminary points. First, the conditions for the making of a closure order under s. 80(5)(a) of the 2014 Act do not include satisfaction that *the respondent to the proceedings* has engaged in, or (if the order is not made) is likely to engage in, disorderly, offensive or criminal behaviour on the premises. The condition is simply that *a person* has engaged, or (if the order is not made) is likely to engage, in such conduct. Second, given that the 2014 Act does not abrogate the privilege against self-incrimination, there is no doubt that a respondent to an application for a closure order is entitled to remain silent. That is so whether or not he is under criminal investigation. Mr de Mello accepts that Mr Taylor could have elected to say nothing at all in response to the application. In fact, he chose to give evidence, albeit the scope of that evidence was apparently limited. Third, proceedings for a closure order under s. 80 of the 2014 Act are civil proceedings for the purposes of the Civil Evidence Act 1995. This means that, as the Divisional Court said in *Cleary* and Mr de Mello accepts, hearsay evidence is in principle admissible, though it is necessary to consider carefully what weight, if any, should be accorded to it.

31 Question 1 asks whether the justices were correct to permit 'evidence of outstanding criminal investigations' to be adduced. Mr Manning criticises the phrasing of this question. I agree that it could have been clearer, but it seems tolerably clear to me that by using this phrase they meant to include both the facts of the arrest and search and the products of these – i.e. the interview after arrest and what was discovered in the search. When the reasons are read as a whole, the justices were saying that the facts of the arrest and search, as part of the criminal investigation against the appellant, whilst admissible, were in and of themselves of no probative value. I can see no error in that: the bare facts that the appellant had been arrested, that his premises had been searched and that this was part of a criminal investigation into his activities proved nothing; and in any event, there was no need to prove that the appellant had been personally involved in drug-dealing.

32 On the other hand, the products of the search *were* of probative value, not in proving that the appellant had himself been involved directly or indirectly in drug-dealing, but in proving that the flat had been used *by someone* for that purpose (which was all that had to be proved). The fact that cannabis (albeit a small quantity consistent with personal use), cash, white powder, scales, plastic bags and mobile phones had been found at his flat was evidentially significant. So was the police officer's view, based on his experience, that the white powder was cocaine. None of this was hearsay. It was all direct evidence of what the police officer had seen with his own eyes when he searched the appellant's premises.

33 In my judgment, there was nothing unfair in admitting this evidence. It called for an explanation. It was up to the appellant whether to provide such an explanation. If he chose not to do so, or if the explanation was not credible, the justices could draw the obvious inference from the evidence of what the police officer had seen. It is true that answers given by the appellant in evidence might be used in evidence in subsequent criminal proceedings. But I do not accept that this impaled the appellant on the horns of a dilemma or left him in an 'invidious position', as Mr de Mello suggested. There may be situations in which evidence that a person would wish to deploy in civil proceedings

would tend incriminate him. But it is difficult to see how that situation could arise here. If it had been Mr Taylor's case that the white powder found was not drugs, or was in his flat without his knowledge, he could have said that. If it was his case that the other items found were not connected with drugs, he could have said that too. None of these things would have tended to incriminate him. As it was, the appellant chose to give evidence that he had been coerced into dealing with drugs on behalf of another man. He can hardly complain if the magistrates proceeded on the footing that this evidence was true.

34 The lack of any provision in the 2014 Act similar to s. 98 of the Children Act 1989 cuts both ways. It is true that the 2014 Act contains no provision similar to that in s. 98(2) of the 1989 Act preventing the use of things said in evidence in subsequent criminal proceedings. But this protective provision is the *quid pro quo* for s. 98(1), which abrogates the privilege against self-incrimination in family proceedings. In closure order proceedings, the privilege against self-incrimination applies. This means that, if the appellant had been asked a question that would tend to incriminate him, he could not be compelled to answer it.

35 The statements from anonymous witnesses, unlike the evidence of what had been found during the search, were hearsay. Mr de Mello rightly conceded that, by s. 1 of the 1995 Act, they were admissible, though the justices had to consider carefully what weight, if any, should be accorded to them. It is plain from what the justices said that they attached significant weight to these statements, which, taken together with the evidence of PC Garner, in their view demonstrated that 'known drug dealers involved in criminal activity have attended the property either by fob exclusive to number 47 or being allowed entry into the premises by the occupant of the premises'. I was initially concerned that paragraph 6(c) of the justices' case stated (in which they said that it was 'not unusual in our experience' for witnesses to decline to give evidence through fear of reprisals) might indicate that they had not concentrated sufficiently – in accordance with the guidance given at [30] of the Divisional Court's decision in *Cleary* – on the evidence as to why the particular witnesses *in this case* had been unwilling to give evidence. But in circumstances where Mr de Mello did not show me any of the witness statements, I do not know what was said in those statements about the reasons why the deponents felt unable to give evidence. I am therefore in no position to say that the justices erred in law by placing significant weight on them.

36 Mr de Mello's submissions were based largely on the contention that the factors he identified gave rise to procedural unfairness for the purposes of Articles 6 and 8 of the Convention. In my judgment, however, none of the authorities relied upon supports the proposition that the admission of either the products of the search or the hearsay statements (or, for that matter, the appellant's interview under caution) gave rise to a breach of either Article 6 or Article 8 of the Convention. There is no dispute that the making of a closure order in respect of a person's home constitutes an interference with that person's Article 8 right to respect for his home. *Turek v Slovakia* (2007) 44 EHRR 43 is one of many cases illustrating the proposition that the decision-making process involved in measures that interfere with Article 8 must be procedurally fair and such as to ensure due respect for the substantive interests safeguarded by that Article. In some cases, the standards of procedural fairness applicable under Article 8 differ from those applicable under Article 6, but I am prepared to accept that in the current circumstances both provisions require the same high standards of fairness. Where I part company with Mr de Mello is in supposing that what happened in this case involved any kind of

violation or interference with either the presumption of innocence or the privilege against self-incrimination, the two aspects of the procedural guarantees of Articles 6 and 8 on which he relied. So far as the former is concerned, the justices went out of their way to say that the fact that the appellant was under criminal investigation, in and of itself, carried no probative weight. In that respect the presumption of innocence was fully preserved. As to the latter, the privilege against self-incrimination was maintained: the appellant (who was legally represented) could have refused to answer any question that tended to incriminate him. It is unclear from the materials before me whether he availed himself of that privilege at any stage.

37 Like the justices, I do not consider that the Court of Appeal's decision in *Carnduff v Rock* provides any material assistance. It addresses the situation where a private law claim has been brought, but, because of the operation of the doctrine of public interest immunity, the evidence the defendant would need to defend the claim is inadmissible. In *Carnduff*, this made it unfair to try the claim, with the result that it was struck out. The present situation is quite different. No rule of law made Mr Taylor's evidence inadmissible. He was able to say whatever he wanted, though he was entitled (but not obliged) to decline to answer any question if the answer would tend to incriminate him. As it happened, he chose to give evidence to the effect that he had been coerced by another into dealing in drugs.

38 There is nothing in the complaint of inequality of arms. The police were not a party to the proceedings before the justices, though PC Garner was a witness. It may be true that the respondent had access to some of the contents of the police investigation, but the justices had only that evidence adduced by one or other party. It was not suggested that there was any failure to disclose material evidence. There was nothing unfair in the way the proceedings were conducted.

39 For all these reasons, the answer to the first question is that the justices made no error of law in admitting the evidence relied upon by the respondent, including evidence of (1) what the appellant said in interview under caution, (2) what was found in the search of the appellant's flat and (3) anonymous statements from those who had observed the comings and goings at the appellant's flat. On the materials the parties have chosen to place before me (which do not include the witness statements or transcripts of oral evidence), I am unable to conclude that the justices' conclusions as to the weight to be attached to the latter involved any error of law.

Question 2

40 The way question 2 is phrased suggests that it is for me to consider afresh whether the justices were 'correct' to find the statutory criteria satisfied. This is not so. An appeal under s. 111 of the Magistrates' Court Act 1980 lies only where the decision appealed from is 'wrong in law or in excess of jurisdiction'. This includes any ground which could be raised in proceedings for judicial review, including that a finding of fact was irrational or perverse in the light of the evidence. But in order to conclude that the evidence could not rationally support a finding that the statutory criteria were satisfied, it would be necessary to see the evidence. Given that Mr de Mello has not shown me the evidence, there is no way I could properly stigmatise as irrational the justices' conclusion that it showed the statutory criteria to be satisfied. In oral argument, Mr de Mello accepted this and so concentrated on the three respects in which the justices' reasons could be shown

to be inadequate or incoherent independently of the evidence before them. I shall consider these in turn.

41 First, there is, in my judgment, no logical inconsistency between the justices' findings that (i) only a small amount of cannabis had been found and this was consistent with personal use and (ii) 'substantial drugs and paraphernalia' had been found. This is because, although the 'white powder' found had not yet been tested, it was open to the justices to find that it was cocaine. The justices' reasons, given at the hearing, indicate that they accepted the view of PC Garner, based on his experience, that it was cocaine. Given the circumstances in which it was found – i.e. together with cannabis, cash, scales, mobile phones and plastic bags – a finding to that effect on the balance of probabilities can hardly be said to be irrational, in the absence of a contrary credible explanation from the appellant. It is not satisfactory to seek to undermine the rationality of such a finding by reference to an exiguous summary of things said by PC Garner in cross-examination prepared by the appellant's representatives (even where the justices have agreed the summary), without also providing a transcript of the relevant evidence. To reach the conclusion that PC Garner's answers in cross-examination rendered reliance on his evidence irrational it would be necessary to consider exactly what he said. Since no summary of his evidence was available, the appellant has not established any inadequacy or incoherence in the justices' reasons.

42 Second, the same point can be made in relation to the claimed inconsistency between the finding that drug dealers attended the premises over a significant period and the concessions recorded as having been made by Poonam Badhan. Without seeing all the evidence (including that of PC Garner, which also touched on the informant evidence), there is simply no basis for concluding that the factual finding made by the justices on the basis of that evidence was irrational.

43 Thirdly, the justices reached the conclusion that the satisfaction of the conditions in s. 80(5)(a)-(c) of the 2014 Act did not turn on whether the appellant himself had been involved in drug dealing. This was correct. Given that the hearing took place very shortly after the search had revealed what the justices concluded were substantial drugs and paraphernalia, it was open to them to conclude that the statutory criteria continued to be met at the date of the hearing, so the decision did not involve the same error as was made in *Cumbria Constabulary v Wright* (a case concerned with the extension of a closure order). It was not incoherent or inconsistent to accept that it did not matter for the purpose of the conditions in s. 80(5)(a)-(c) whether the appellant himself was involved with drug dealing, while at the same time recording the appellant's own evidence that he had been exploited and coerced into dealing drugs on behalf of another. The latter was relevant not to the satisfaction of the conditions in s. 80(5)(a)-(c) but to the separate question whether a closure order prohibiting the appellant from accessing the flat was 'necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring'.

44 For these reasons, the appellant has not established that the reasons given by the justices were inadequate or incoherent or, therefore, that the justices were not entitled to conclude that the statutory conditions for the making of a closure order were met.

Question 3

45 On this part of the case, Mr de Mello focussed on the importance in any proportionality analysis of a measure restrictive of Convention rights of focussing on whether the objective pursued by measure could have been achieved by less intrusive means. Mr de Mello relied on the decision of the Supreme Court in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] 1 AC 700, [20] (Lord Sumption) & [74] (Lord Reed). This aspect of the test for proportionality – sometimes known as the 'minimum interference test' was, however, not a new development by the Supreme Court in the *Bank Mellat* case. The importance of ensuring that 'consideration be given to whether the legitimate aim can be achieved by a less intrusive measure without significantly compromising it' had been accepted by the Court of Appeal in the same case: [2012] QB 101, [30] (Maurice Kay LJ).

46 The Court of Appeal's decision in *Bank Mellat* was among the authorities cited by Blair J in *Leary v West Midlands Police* [2012] EWHC 639 (Admin), in which, as counsel for the claimant, Mr de Mello made the same submission as he now makes to me, based on the then applicable Home Office guidance. That too was an appeal by case stated. Question 1 was whether it is 'necessary for the police and relevant Housing Authority to demonstrate that they have considered and tried other less draconian measures before applying for a Closure Order so that a Closure Order is one of last resort'. The answer was given at [23]:

> 'The correct approach for the court is as set out in [*R (Smith) v Crown Court at Snaresbrook* [2009] 1 WLR 2024] at paragraph 19 in the context of an extension. The question for the court is whether [the statutory] requirements are proved to the civil standard. Where the premises comprise someone's home, it follows from *Cleary* at paragraph 7 that Article 8 of the ECHR is engaged and the making of an order must be necessary and proportionate to achieve what May LJ described as the "obviously and plainly legitimate legislative aim of closing such premises". There is no statutory requirement on the part of the police and relevant housing authority to demonstrate that they have considered and tried other less draconian measures before applying for a closure order so that a closure order is one of last resort. The case law does not contemplate any such requirement under Article 8. Under Article 8, as Miss Josephs points out, the right to respect for home is subject to what is necessary for the prevention of disorder or crime. It is true, as Mr de Mello says, that a closure order may have a draconian effect, but the misuse of premises for class A drugs may have a grievous effect on other people, not least in a tower block community as in the present case. The guidance explains how alternative remedies may be taken into account by the authorities as a matter of good practice, but they do not thereby become additional requirements which must be satisfied before the court can make a closure order. The answer to the first question, therefore, is "no".'

47 Mr de Mello accepted that, to succeed, he would have to convince me that I should now depart from this decision, either because it was clearly wrong when made or because it had now been superseded by later authority. He concentrated on the latter, relying on the decision of the Supreme Court in *Bank Mellat*. But, as I have shown, the 'minimum interference test' was already part of the analytical apparatus of proportionality when Blair J considered this issue in 2012 in *Leary*. Although the decision of the Supreme Court explained further how the test was to be applied, it would not have made a material

difference to Blair J's reasoning. In any event, I consider that Blair J was right about how the question of the necessity (or proportionality) of a closure order should be considered.

48 There is no doubt that justices should consider carefully both the duration of the order and whether it should extend to prohibiting a person from accessing his own home. If an order of a lesser duration than 3 months would be sufficient to achieve the statutory objective (to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring), that is the order they should impose. If the objective could be achieved by limiting the class of persons prohibited from accessing the property so as to avoid keeping someone out of his home, then this too should be done. But the suggestion that the inquiry should range more widely than this, and consider whether other alternative measures might be 'less intrusive', would be – as Mr Manning submitted – a recipe for confusion and complexity. No doubt in some cases a private law injunction might be granted, but the preconditions for the grant of an injunction are very different from those for the grant of an order under s. 80(5). It would be unrealistic to expect justices to embark on the difficult question of whether, in a particular case, such relief would or would not have been available. In any event, in a case where a private law injunction would be available, it is far from clear that it would involve a lesser interference with Convention rights: that would depend on its terms. Criminal prosecution, advanced by Mr de Mello as a 'less draconian alternative', is not a true alternative at all. As is clear from the reference to 'criminal behaviour' in s. 80(5)(a), the power to make a closure order was intended as an addition, not an alternative, to criminal prosecution.

49 It is possible that the availability of other statutory powers conferred on the local authority could in principle be relevant to the proportionality of a closure order in an individual case if a specific submission were made that the statutory purpose could have been achieved in a manner less restrictive of Convention rights by a particular use of an identified alternative power. But no such suggestion was made here. I would unhesitatingly reject the suggestion that the justices are obliged, of their own motion, to consider and analyse all the possible consequences of a decision of exercise every such power before making a closure order. That would stray well beyond the words used by Parliament in s. 80(5). There is no authority to support the suggestion that such an approach is mandated by Article 8 of the Convention.

50 In the present case, the justices directed themselves that it was necessary to consider whether the closure order was necessary and proportionate in the light of the appellant's Article 8 rights. They specifically considered the duration (3 months) and the question whether the appellant should be among the class prohibited from accessing the flat. They concluded that he should, in light of his own evidence that he had been coerced into dealing with drugs on behalf of another. This was relevant because it supplied a reason to believe that the statutory purpose would not be achieved if he continued to be permitted to access the flat. Appellate courts hearing appeals on a point of law should not interfere with proportionality analyses of this kind unless an error of law or logic or approach can be identified: *Granada UK Rental and Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2019] Pens LR 20, [152]-[156] (Patten LJ). There is no such error here. I would therefore answer question 3 by saying that it has not been established that the justices erred in concluding that it was necessary and proportionate to make the closure order they made, notwithstanding that it excluded the appellant from his home.

Result

51 For these reasons, the appeal is dismissed.