

Neutral Citation Number: [2013] EWHC 2598 (Admin)

CO/5562/2012

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 23 January 2013

B e f o r e:

LORD JUSTICE MOSES

MRS JUSTICE GLOSTER

-

Between:
PENDER_

Claimant

v

DIRECTOR OF PUBLIC PROSECUTIONS_

Defendant

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Mr J Hingston (instructed by Powell Spencer & Partners) appeared on behalf of the
Claimant

Mr A Chalk (instructed by CPS) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE MOSES: This is an appeal against a decision of the Isleworth Crown Court recorded in a case stated dated 2 March 2012 to which was attached a note of HHJ Dean's judgment.
2. The appellant is a man of 63 years of age with a number of previous convictions for begging, most recently in July and November 2010 and March 2011. The appellant pleaded guilty on 26 October 2011 at West London Magistrates' Court to six separate offences of begging in a public place between 26 March and 3 June 2011 and District Judge Coleman imposed an ASBO on that date.
3. The order, made at the invitation of the prosecution, was not to approach anyone who is a stranger to him in a public place and ask for money in the Royal Borough of Kensington and Chelsea, and not to enter any London underground railway, except for the purpose of travel in the Royal Borough of Kensington and Chelsea. The appellant appealed to the Crown Court and the appeal was dismissed, but the prohibition was (...) saying you are not to beg in London.
4. At the Crown Court, the primary contention on behalf of the appellant was that the ASBO should not be ordered because the appellant neither had the capacity to understand the prohibition contained in the order nor the capacity to comply with it. It was accepted that the requirements of section 1C(2)(a) of the Crime and Disorder Act 1998 were satisfied in that the appellant had acted in a manner likely to cause harassment, alarm or distress to members of the public.
5. In the note of the judgment, coupled with the case stated, the court concluded that the appellant did understand the nature of the order. It did so on the basis that it found on the evidence that the appellant knew that he should not be begging and that this was demonstrated by his seeking to hide from police officers when they caught him carrying out this persistent and aggressive begging. He not only had the capacity to understand an order forbidding him from begging, as the judge and the justices found, but he understood the consequences of ignoring the order. This appeal has been advanced on the basis, however, that even if he understood the consequences of disobeying the order and that he was not to beg, as witnessed by the fact that he sought to evade arrest, he nevertheless had no capacity to comply.
6. The basis of the appeal was advanced by deploying the decision of this court in R(Cooke) v DPP [2008] 172 JP [2008] EWHC 278 (Admin). In that case, Dyson LJ drew attention to the importance of distinguishing between a likelihood or inevitability of disobeying an ASBO and the lack of capacity to obey it. The distinction draws from the very nature of an ASBO. ASBOs are designed to protect the public. They should not be ordered unless it is necessary to protect persons from antisocial acts caused by an offender, for example, and, it follows, should not be ordered in circumstances where making an order will do nothing to protect the persons such an order are designed to protect. In short, the decision in Cooke follows from those principles identified by the Court of Appeal in R v Byrne(?) [2006] 1 Cr App R (S), page 690.
7. In Cooke, Dyson LJ said this:

"12. An ASBO is, of course, not an injunction, but there are obvious similarities, even though an ASBO is a creature of statute. So far as I am aware, there is no previous authority on the question whether an ASBO can, or should, be made against a defendant whose mental health is such that he is incapable of complying with the terms of an order. In my judgment an ASBO should not be granted if the defendant is truly incapable of complying with it. That is because, for the reasons that I have given, an ASBO is not necessary for the protection of the public in such circumstances, and it would, in any event, be a wrong exercise of the court's discretion under subsection (2) to make an order in circumstances where the court knows that the defendant is not capable of complying with it. The justices should not refuse to make an ASBO on such grounds unless the defendant does not have the mental capacity to understand the meaning of the order, or to comply with it. Such an incapacity being a medical matter, evidence should normally be given by a psychiatrist and not by a psychologist or a psychiatric nurse."

8. Dyson LJ then drew the important distinction between the lack of capacity to comply with an order and a personality disorder on account of which a person may be liable to disobey and the word disobey is in emphasis (...) (see paragraph 13).
9. That distinction will often be difficult to draw and is a matter of fact for the fact-finding tribunal, be it the magistrates, the district judge or a crown court. The mere fact that it is almost inevitable that a person will disobey is not a basis for refusing to make an ASBO. But in this case the appellant relies upon the uncontradicted evidence of Dr Lord that was adduced at the hearing to which was supplemented oral evidence from Dr Lord and, we were told, it was never challenged.
10. The evidence of Dr Lord should normally not be the subject matter of dispute, save only that it be recorded in the case stated. One should not need in this court (...) cannot go outside the parameters of the case stated. But in this case, very fairly, Mr Chalk on behalf of the prosecution does not dispute the attempt or challenge the attempt of the appellant to rely upon the terms of the report. Indeed, the prosecution is compelled to do so since the court (...) although it concluded that this appellant had the capacity to comply with the order did not set out any finding of fact, let alone any part of the report on the basis of which it reached that factual conclusion.
11. There is complete silence in the findings to explain why it was that the court reached the factual conclusion that it did. That, in my judgment, is a defect in the case stated. If the judge was going to disagree with the conclusion of Dr Lord that this appellant did not have the capacity to comply with the order, the judge ought to have pointed out, at least in outline, those parts of the report on which she based herself and on which the justices based themselves to disagree with the conclusion of the Doctor.
12. In the absence of that being set out in the case stated, the prosecution has been compelled itself to refer to that report. I shall for my part adopt the same course. The report sets out a sad, tragic history of this man who inherited attributes which led him to beg from his mother. He has been suffering from borderline learning difficulties and

diagnosed as someone who suffers not only from schizophrenia but nicotine addiction. He is described as suffering from such an addiction that it has given rise to problems throughout his life, due to his:

"28. (...) Struggling to get access to sufficient amount of cigarettes to satisfy his craving and addiction leading to concerns about begging behaviours in particular."

13. He has what the Doctor describes as a very severe cigarette addiction, having smoked a very high number of cigarettes for 40 or 50 years. The Doctor continues:

"Nicotine addiction cannot be underestimated in its severity and the controlling (...) overcoming nicotine addiction (...) persons with learning disabilities and chronic psychiatric (...) such as paranoid schizophrenia is inevitably far more difficult because the former mitigates against (...) ability to deploy willpower and the latter diagnosis is also very much associated with nicotine addiction."

14. The Doctor continues that it was not difficult to see why the appellant's cigarette addiction had become so great and all-consuming as being difficult to treat. He describes how this acquisition of the addictive substance had become the primary behaviour goal of someone suffering from the addiction as this appellant did (see paragraph 35). He says:

"The imperative to gain nicotine grows and takes over his behaviour subrogating all other needs until satisfied."

15. The Doctor then set out the past forensic history. The satisfaction of various dependent criteria and criteria in relation to mental retardation and records again that this appellant has a longstanding historical diagnosis of paranoid schizophrenia. The Doctor then continued:

"57. Mr Pender has a profound physiological need leading to an imperative need and drive to acquire it at levels that sustain him without going into withdrawals(...)

"59. His begging behaviour is directly driven by his addiction and the imperative to stave off withdrawal symptoms by acquiring nicotine when his supply of cigarettes by legitimate sources is exhausted. The only way he can achieve this is to acquire more cigarettes or financial means to do so by begging. He does not have the capacity to acquire or earn money in any other legitimate way because he is incapable of working due to his mental retardation.

60. The begging therefore can be seen by extension to be a behavioural manifestation of his addiction to nicotine. Begging in this case is a behavioural response determined and obligated by his very limited repertoire of resources due to his mental retardation rather than simply a lifestyle choice."

16. The Doctor continued that the appellant knew that if he begged he would get into trouble, but he concluded that he believed the ASBO would be "unhelpful" because he:

"(...) lacks the capacity to understand the prohibition properly and in turn lacks the capacity to appreciate the consequences of breaching those prohibitions. Furthermore, because of his essentially untreatable condition and the aggravating effect of his mental retardation he is compelled to seek nicotine by the only means available to him: begging. He will inevitably breach the ASBO and face the consequences."
17. Mr Chalk, on behalf of the prosecution, rightly points out that if the evidence showed no more than it was extremely likely that Mr Pender would disobey the order, that is no basis for refusing to make the order. After all, as the courts have emphasized, the importance of an ASBO is that it enables someone who is the subject of it to be arrested before they commit any criminal offence and certainly before they behaved in this seriously antisocial way as exemplified by the behaviour of this appellant.
18. It cannot be right that the courts decline to make an ASBO merely because someone suffers from an addiction that makes it difficult to obey an order and most likely that it will be disobeyed. I agree with all those sentiments. But the fact remains that the Doctor's evidence, unchallenged as it was, went much further, for the detailed reasons he gave, his conclusion was that this man simply could not resist begging in order to feed his addiction in those circumstances where he had not sufficient money.
19. Mr Chalk's primary submission was that this appellant had a choice, as demonstrated by the fact that when he had enough money to buy cigarettes, he did not beg. That, in the context of the report on a proper reading of it as a whole, in my view, is no answer to the conclusion of the Doctor that he had no capacity to make the choice at all. So severe was the addiction in the context of his other mental health difficulties, the Doctor's conclusion was that he simply could not resist the impulse to beg in circumstances where he needed cigarettes and had no means of paying for them.
20. It is important always in these cases to remember that the fact finders, both the district judge and the Crown Court, are entitled to disagree with an expert as they are entitled to disagree with any other factual proposition provided that there is a basis for doing so and provided that, if only shortly, they explain the basis of disagreement. After all, explaining the basis upon which an unchallenged expert's views are disagreed with is purely a discipline of a fact-finding approach to decision making itself.
21. In the instant case, no basis for disagreeing with Dr Lord is identified whatever. All that is set out, not to be noted in the case stated but in the note of a judgment, is a factual conclusion that the appellant was capable of complying with the order with no facts found to justify that conclusion. I readily appreciate, as Mr Chalk pointed out, that from time to time Dr Lord did not assist the cause that he espouses to since, from time to time, he said it was likely and almost certain and then subsequently inevitable that the ASBO would be breached. He also saw fit to make what perhaps was an obvious point but was not one adopted to make as to the lack of wisdom in seeking or making

an ASBO in cases such as this where it would be far better to focus and concentrate upon seeking to help this appellant in his unfortunate underlying mental difficulties.

22. But this was not a matter which should dissuade the court from making the order if it was necessary to do so for the protection of the public whose responsibilities and security was the primary obligation of the court to protect. In this case I am satisfied that the evidence was so carefully reasoned and set out that it was incumbent upon the judge to explain why it was that she rejected the conclusion and took the view with her colleagues that this man was capable of complying as a matter of choice with the ASBO. In those circumstances, for the reasons I have endeavoured to give, I take the view that there was no facts found justifying the factual conclusion that the appellant was capable of complying with the order and that the only true and reasonable conclusion that should have been drawn from the unchallenged evidence of Dr Lord was that this was a very rare case where the appellant was shown not to be capable of complying with the ASBO. For those reasons, the ASBO should not have been made and I would allow the appeal and quash the order.
23. MRS JUSTICE GLOSTER: I agree.
24. LORD JUSTICE MOSES: In answer to the question concluded at section 1C(2)(b) of the Crime and Disorder Act [1998], I am satisfied the (...) too heavily on the appellant's capacity to understand and gave too little consideration to the appellant's capacity to comply with the terms of the order. I for my part would not choose to answer the question directly because whether they gave insufficient consideration or not, the court failed to set out the factual basis upon which they reached factual conclusion. The only true and reasonable conclusion from the evidence was that he did not have the capacity, as I have already said.
25. MRS JUSTICE GLOSTER: I agree.
26. LORD JUSTICE MOSES: Yes. Anything else?
27. PROSECUTION COUNSEL: No, my Lord.
28. LORD JUSTICE MOSES: Thank you both very much for your assistance.