



Neutral Citation Number: [2019] EWHC 2180 (Admin)

Case No: CO/4702/2018

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

Civil Justice Centre, 1 Bridge Street West,
Manchester, M60 9DJ.

Thursday 11th July 2019

Before:

LORD JUSTICE IRWIN and MR JUSTICE BUTCHER

Between:

**CHIEF CONSTABLE OF MERSEYSIDE
POLICE
- and -
ANDREW DOYLE**

Appellant

Respondent

MR WELLS for the Appellant
MS PORTER for the Respondent

APPROVED JUDGMENT

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MR JUSTICE BUTCHER:

Introduction

1. This is an appeal by way of case stated against the dismissal by the Magistrates' Court of Liverpool & Knowsley of an application made by the Chief Constable of Merseyside Police ("the Appellant") for enforcement of a contingent dog destruction order made under section 4A(4) Dangerous Dogs Act 1991 ("the 1991 Act"). The issue which is raised by this appeal is as to the consequences of non-compliance with such a contingent destruction order and the powers of the court in the event of such non-compliance.

The facts

2. The facts giving rise to this appeal may be briefly stated. On 9th October 2016 at Huyton in Liverpool, Andrew Doyle's cross Staffordshire bull terrier, Eddie, injured Neil Anthony Connor. As a result of this incident, on 24th March 2017, Mr. Doyle was convicted of the aggravated offence under section 3(1) of the 1991 Act of being the owner of a dog which was dangerously out of control, and received a 12-month conditional discharge.
3. In addition, and on the same date, the Liverpool and Knowsley Magistrates' Court made a contingent destruction order in respect of Eddie. That order was in the following terms:

"Unless the dog, a cross Staffordshire bull terrier named Eddie, is kept under proper control by being muzzled and kept on a lead when in a public place.

'Eddie' shall be muzzled when in the rear garden of 48A Darwick Drive, Huyton, L36 OSP unless the boundary fence between 48A Darwick Drive and 57 Boundary Road, Huyton, Liverpool L36 is made up of concrete panelling, it must be destroyed."

Although imperfectly drafted, the intention of the order is clear and should be read to say, in relevant part, that unless Eddie was kept under proper control by being muzzled and kept on a lead when in a public place he must be destroyed.

4. Just before midnight on 21st February 2018 Mr. Doyle was seen by police officers on Meadow Drive, Huyton, walking two dogs, one of which was Eddie. As Mr Doyle has accepted, Eddie was not on a lead or wearing a muzzle. On 6th April 2018 the Appellant made a complaint before the Liverpool & Knowsley Magistrates setting out these facts and seeking "an order under section 63 of the Magistrates' Courts Act 1980; [and] a finding that Eddie on 21st February 2018 was not under proper control and therefore, the Respondent has disobeyed Court Order made 24th March 2017". The Appellant further sought that Mr. Doyle pay the costs of the application.
5. On 22nd June 2018 the Appellant issued an application for variation of the contingent destruction order as follows: (1) for the appointment of the Appellant and his nominated veterinary practitioner to undertake Eddie's destruction; (2) to require Mr. Doyle, or any other person having custody of the dog, to deliver Eddie to an officer of

Merseyside Police for that purpose within seven days of the varied order; and (3) for an order that Mr. Doyle pay Merseyside Police the sum of £100 for that purpose.

6. On 21st August 2018 DJ(MC) Andrew Shaw, sitting at Liverpool & Knowsley Magistrates' Court, dismissed the Appellant's application under section 63 Magistrates' Courts Act 1980 and also found that the magistrates' court had no power to vary a contingent destruction order in the way proposed. As part of his judgment DJ Shaw said that 1991 Act did not provide for the circumstance of a breach of a contingent destruction order where the dog was not of a prohibited breed and was not dangerously out of control. He also said, at paragraph 27 of his judgment, that section 63 Magistrates' Courts Act 1980 could not be used for this purpose because the contingent destruction order had been made in criminal proceedings.

The stated case

7. On 15th November 2018 DJ Shaw stated the case. That statement of the case referred to the fact that Eddie was not of a forbidden breed of dog within sections 1 or 2 of the 1991 Act, and that on 21st February 2018 Eddie had not been "dangerous and out of control" nor "dangerously out of control", as defined by the 1991 Act and the Dogs Act 1871 respectively.
8. The statement of the case continued.

"The Decision of the Court.

(1) I was of the opinion that the [1991 Act] provided authority to the Court to make a Contingent Destruction Order. The Act did not create an offence of breaching a Contingent Destruction Order, nor any mechanism to enable the police to seize the dog, or to compel the owner/keeper to deliver it up in the event of a breach.

(2) The order did not itself provide as to seizure, surrender or nominate a person to undertake destruction in the event of breach.

(3) A breach of this order could occur without the knowledge or participation of the owner/keeper, eg where a third party walked the dog off its lead or unmuzzled.

(4) The purpose behind the Contingent Destruction Order was to protect the public by providing for the dog's behaviour to be controlled.

(5) The sanction envisaged for breach would be destruction.

(6) The 'person' in charge of the dog at the relevant time would commit no criminal offence by breaching the order (in contrast to a person breaching a control or destruction order contrary to section 1(3) of the Dangerous Dogs Act 1989 who commits an offence punishable summarily by a Level 3 fine).

(7) Section 63 Magistrates' Courts Act 1980 exposed 'a person' in breach of an order to the risk of a fine or ultimately imprisonment.

(8) The Magistrates' Court could not use section 63 in the circumstances of this breach.

(9) Even if the breach was proven the court would have no power to deal with the dog under the authority of the original order.

(10) The order itself made no provision as to what would happen if a breach occurred. The 1991 Act provides no power of seizure to the police unless there was a fresh offence under the Dangerous Dogs Act. The court could not compel the owner/keeper to surrender the dog and the court would have no power to appoint anyone to undertake the destruction.”

9. DJ Shaw then formulated three questions for the opinion of the High Court as follows:

“(1) Does the power under section 63(3) of the Magistrates' Courts Act 1980 to punish disobedience to an order of a magistrates' court made under any Act passed after 31st December 1879 to do anything other than the payment of money or to abstain from doing anything extend to disobedience of the terms of a contingent destruction order made under section 4A(4) of the Dangerous Dogs Act 1991?

(2) When an order is made under sections 4A(4) and 4A(5) of the Dangerous Dogs Act 1991 that ‘unless a dog is kept under proper control by being muzzled and kept on a lead while in a public place it must be destroyed’ and where breach of that order is proved, does the magistrates' court have the power to require the destruction of the dog under the authority of the original order?

(3) If the answers to questions (1) and (2) are “yes” does there remain a discretion in the magistrates' court to allow a contingent destruction order to continue, or is the dog's destruction under the original order automatic?”

The appeal

10. The Appellant filed his appeal on 23rd November 2018. The matter came before the Divisional Court on 15th April 2019 but was adjourned at the request of Mr. Doyle, with directions given. In particular, the Appellant was ordered to serve an additional skeleton argument and it appears that the Court indicated that that skeleton argument should deal in particular with sections 4A(4) and 4A(6) of the 1991 Act and their effect when read together. Mr. Doyle was given permission to serve a skeleton argument in response. A further skeleton argument was submitted by the Appellant on 3rd May 2019 and a skeleton argument from Ms Porter was submitted on behalf of Mr. Doyle on 17th May 2019.

The statutory provisions

11. At this point it is helpful to set out the statutory provisions which are pertinent to this appeal. The most relevant statutory provisions are those of the 1991 Act as follows:

“[Section] 3: Keeping dogs under proper control

(1) If a dog is dangerously out of control in any place in England or Wales, whether or not a public place –

(a) the owner; and

(b) if different, the person for the time being in charge of the dog,

is guilty of an offence, or, if the dog while so out of control injures any person or assistance dog, an aggravated offence under this subsection.

...

[Section] 4: Destruction and disqualification orders

(1) Where a person is convicted of an offence under section 1 or 3(1) above or of an offence under an order made under section 2 above the court –

(a) may order the destruction of any dog in respect of which the offence was committed and, subject to subsection (1A) below, shall do so in the case of an offence under section 1 or an aggravated offence under section 3(1) above; and

(b) may order the offender to be disqualified for such period as the court thinks fit, for having custody of a dog.

(1A) Nothing in subsection (1)(a) above shall require the court to order the destruction of a dog if the court is satisfied –

(a) that the dog would not constitute a danger to public safety; and

(b) where the dog was born before 30th November 1991 and is subject to the prohibition in section 1(3) above ...

(1B) For the purposes of subsection (1A)(a), when deciding whether a dog would constitute a danger to public safety, the court –

(a) must consider - (i) the temperament of the dog and its past behaviour, and (ii) whether the owner of the dog, or the person for the time being in charge of it, is a fit and proper person to be in charge of the dog, and

(b) may consider any other relevant circumstances.

(2) Where a court makes an order under subsection (1)(a) above for the destruction of a dog owned by a person other than the offender, the owner may appeal to the Crown Court against the order.

(3) A dog shall not be destroyed pursuant to an order under subsection (1)(a) above-

(a) until the end of the period for giving notice of appeal against the conviction or, where the order was not one which the court was required to make, against the order; and

(b) if notice of appeal is given within that period, until the appeal is determined or withdrawn,

unless the offender and, in a case to which subsection (2) above applies, the owner of the dog give notice to the court that made the order that there is to be no appeal.

(4) Where a court makes an order under subsection (1)(a) above it may –

(a) appoint a person to undertake the destruction of the dog and require any person having custody of it to deliver it up for that purpose; and

(b) order the offender to pay such sum as the court may determine to be the reasonable expenses of destroying the dog and of keeping it pending its destruction.

...

[Section] 4A: Contingent destruction orders

...

(4) Where a person is convicted of an offence under section 3(1) above, the court may order that, unless the owner of the dog keeps it under proper control, the dog shall be destroyed.

(5) An order under subsection (4) above –

(a) may specify the measures to be taken for keeping the dog under proper control, whether by muzzling, keeping on a lead, excluding it from specified places or otherwise; and

(b) if it appears to the court that the dog is a male and would be less dangerous if neutered, may require it to be neutered.

(6) Subsections (2) to (4) of section 4 above shall apply in relation to an order under subsection (1) or (4) above as they apply in relation to an order under subsection (1)(a) of that section.”

12. There has also been reference to certain other statutory provisions which it is convenient to set out here, namely the provisions of section 63 Magistrates’ Courts Act 1980. That section provides in part:

“(1) Where under any Act passed after 31st December 1879 a magistrates’ court has power to require the doing of anything other than the payment of money, or to prohibit the doing of anything, any order of the court for the purpose of exercising that power may contain such provisions for the manner in which anything is to be done, for the time within which anything is to be done, or during which anything is not to be done, and generally for giving effect to the order, as the court thinks fit.

(2) The court may by order made on complaint suspend or rescind any such order as aforesaid.

(3) Where any person disobeys an order of a magistrates' court ... to do anything other than the payment of money or to abstain from doing anything the court may

–

(a) order him to pay [certain sums]; or

(b) commit him to custody until he has remedied his default or for a period not exceeding 2 months.”

The submissions of the parties

13. The submissions of the parties which have been made to this court have been, in brief, as follows. The Appellant contends, firstly, that in the case of non-compliance with a contingent destruction order under section 4A(4) of the 1991 Act, but where the dog has not been dangerously out of control again, the magistrates' court may make an order under section 63 Magistrates' Courts Act for the destruction of the dog. It is contended that a contingent destruction order under section 4A(4) of the 1991 Act is not part of the punishment of an offender who has committed an offence under section 3(1) of that Act, but falls instead within the civil jurisdiction of the magistrates' courts and that accordingly, pursuant to section 63 Magistrates' Courts Act 1980, the magistrates may make an order to give effect to the contingent destruction order.
14. Secondly, it is submitted that the “unless” wording of a contingent destruction order means that, if the dog is not kept under proper control, it is to be destroyed. The Appellant's submissions recognised, however, that there may need to be recourse to the court if, for example, there is a factual issue as to whether the dog was being kept in accordance with the conditions imposed by the contingent destruction order, and also - at least if there was no specification of this in the original contingent destruction order – for the determination of who is to carry out the destruction. The Appellant's submission was that such recourse would be by means of an application under section 63 Magistrates' Courts Act 1980 and also that an application could be made by the owner or keeper of the dog for a suspension or rescission of the contingent destruction order under section 63(2) Magistrates' Courts Act 1980.
15. For Mr. Doyle it is submitted that the 1991 Act contains no provision to deal with a breach of a contingent destruction order; that an attempt to circumvent this lack of provision may lead to injustice; and that the only relevant cure for the suggested lacuna in the legislation is by amendment of the statute by Parliament. It is argued that section 63 Magistrates' Courts Act is of no application because that section concerns the magistrates' courts' civil jurisdiction, whereas it is contended that the present contingent destruction order was made following a criminal conviction; that the procedural options under section 63 Magistrates' Courts Act cannot be reconciled with the fact that section 4A(4) of the 1991 Act and the order itself do not provide any sanction against the owner; and that section 63(2) Magistrates' Courts Act, which requires a complaint, is not apposite to deal with applications by the owner to prevent implementation of a contingent destruction order.
16. Ms Porter further argues that the analogy with a civil “unless order” is inappropriate. In the case of a contingent destruction order there may, although there is not in this case, be a factual issue as to whether the dog has been kept under proper control. Ms Porter submits that to consider a contingent destruction order as an “unless order”

makes no provision for this possibility. Equally, Ms Porter submits that there is no power under the 1991 Act, or any other statute, to give effect to the contingent destruction order and, in particular, there is no power to seize the dog or to order that the dog be delivered to the police.

Discussion and Conclusions

17. The making of an order under section 4A(4) of the 1991 Act is conditional upon a person having committed an offence under section 3(1) of that Act. That, however, is simply a threshold. A contingent destruction order is not part of the penalty for the offence but is instead a measure which is to be imposed, if appropriate, for the safety of the public.
18. It is apparent from the heading to section 4A of the 1991 Act, namely “contingent destruction orders”, and from the terms of section 4A(4), namely “unless the owner of the dog keeps it under proper control, the dog shall be destroyed”, that Parliament intended that the court should be able to make an order whereby, in the event of non-compliance with the condition, destruction should follow. It is also clear and not disputed that what constitutes proper control may be affected by what, if any, measures have been specified under section 4A(5), such that a failure to comply with those measures may constitute a failure to keep a dog under proper control.
19. A contingent destruction order is an alternative to an order for immediate destruction under section 4(1)(a). It nevertheless remains an order for destruction, albeit one which is contingent upon a dog not being kept under proper control. For this reason, by section 4A(6) subsections (2) to (4) of section 4 are applicable to such an order.
20. There has been no serious debate before this court but that the above represents the intention of the 1991 Act. What has been suggested on behalf of Mr. Doyle, however, is that that intention cannot be given effect because the Act does not lay down any mechanism whereby non-compliance with the requirements of a contingent destruction order can be tested if disputed, and does not provide for a power to seize the dog in the event of non-compliance with the terms of the contingent destruction order. Accordingly, so it is submitted, the court has no power to deal with non-compliance with a contingent destruction order.
21. In my judgment, this argument carries no conviction. When the court makes a contingent destruction order it may, by reason of section 4A(6), make an order under section 4(4) appointing a person to undertake the destruction of the dog and requiring any person having custody of it to deliver it up for that purpose, as well as make an order for the expenses of destruction. While those orders could clearly be made at the same time as the making of the contingent destruction order itself, I see no reason why they should necessarily be made at that point as opposed to later. Indeed, there may be reasons why it would not at that point be sensible to identify a person to undertake the destruction of the dog if there were to be future non-compliance with the terms of the order. As the Appellant points out, even if the person specified was the Head of a Police Force, the dog might have been taken into the area of a different Force by the time of any non-compliance and a need for destruction arose. What I consider to be permitted by the 1991 Act and which gives effect to the intention of Parliament is that in the case of a contingent destruction order under section 4A(4) orders under section 4(4) (which is made applicable by section 4(6)) may be made

after and in the event of non-compliance with the requirement to keep the dog under proper control. I do not consider that the words “where a court makes an order” in subsection 4(4) require that orders in subsections (4)(a) and (b) should necessarily be made at the same time as the making of the contingent destruction order.

22. The issue which has arisen is how, procedurally, matters can be brought before the court in the event of alleged non-compliance with the terms of a contingent destruction order. The Appellant suggests that the correct course is by a complaint invoking the powers provided for by section 63 Magistrates’ Courts Act 1980. I am of the view that it may be possible for there simply to be a complaint under section 4A(4) of the 1991 Act alleging non-compliance with a condition of a contingent destruction order.
23. Even if that is wrong, however, there can be no doubt that section 63 Magistrates’ Courts Act provides statutory jurisdiction in these circumstances. As I have said, the imposition of a contingent destruction order is not part of the punishment for an offence under section 3(1) of the 1991 Act and is not mentioned as such in section 3(4). Nor is non-compliance with the terms of a contingent destruction order of itself a breach of the criminal law, although it may (but may not) involve the commission of a fresh offence under section 3(1) of the 1991 Act. In the circumstances, I consider that such an order is part of the civil jurisdiction of the magistrates’ courts. The powers conferred by subsections 63(1) and (2) Magistrates’ Courts Act 1980 in relation to that jurisdiction are very broad. An order under section 4A(4) of the 1991 Act can properly be said to require the doing of something, namely, requiring the dog to be kept under proper control and for it to be destroyed if it is not, and that accordingly, by reason of section 63(1) Magistrates’ Courts Act, the magistrates have the power to make orders to give effect to those requirements.
24. Furthermore, by section 63(2) Magistrates’ Courts Act the magistrates could, on a complaint, suspend or rescind a contingent destruction order. As Mr. Wells for the Appellant accepts, the magistrates could also vary the contingent destruction order pursuant to section 63(2).
25. What this means in practice is as follows:
 - (1) If there is an alleged non-compliance with the condition of a contingent destruction order that the dog be kept under proper control the matter may be brought back before the magistrates by complaint.
 - (2) On hearing such a complaint it will be for the magistrates to determine, if there is an issue about it, and to the civil standard of proof, whether there has been a non-compliance with the condition that the dog should be kept under proper control.
 - (3) If there has been non-compliance it will be for the magistrates to decide in all the circumstances existing at the time of the hearing whether the contingent destruction order should be implemented by the making of any necessary orders under section 4(4)(a) and (b) of the 1991 Act or whether it should be varied, suspended or revoked.
 - (4) It is to be borne in mind that the contingent destruction order might have been made some time, indeed possibly several years, before the alleged non-compliance. What will be required is for the magistrates to consider whether it should be

implemented in the light of the circumstances at the time when such implementation is sought. This is likely to involve consideration of the facts relating to the non-compliance, including the reasons for, and the duration and the nature of, any failure of proper control. It is also likely to involve consideration of the facts as specified in section 4(1A)(a) and thus 4(1B) of the 1991 Act in the circumstances as they exist at that time. These circumstances may be significantly different from those which existed at the time of the making of the original contingent destruction order which might have been made some time before the non-compliance with the condition of proper control and at a time when the age and physical condition of the dog were significantly different.

(5) However, in cases in which there has been a failure of proper control, at least if it is more than trivial, accidental or momentary, and if there has not been any material change of circumstances since the time of the making of the contingent destruction order, then the ordinary position will be that the contingent destruction order should be implemented and the dog destroyed

(6) As accepted by the Appellant, correctly in my view, there is a right of appeal provided for by section 4(2) of the 1991 Act in relation to an order actually implementing the destruction of the dog, just as there was in relation to the original imposition of the contingent destruction order.

26. In light of the above, it is not necessary for this court to answer further the questions posed by the Magistrates' Court.
27. As to the instant case, this court has not been invited to reconstitute itself as a magistrates' court to consider what, if any, order should be made in relation to the non-compliance with the contingent destruction order and this court expresses no view as to what orders should be made. Those are matters which will need to be considered by the magistrates' court in light of this court's holding as to the nature of its powers.

LORD JUSTICE IRWIN:

28. I agree.

Post Script

Following delivery of these judgments, a consent order was placed before the Court by which remittal was avoided. The age and condition of the dog in this case, as at the time of this appeal meant that the Appellant no longer sought immediate destruction of the dog. The contingent destruction order remains in place.