

NCN: [2019] EWHC 2794 (Admin).

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
SITTING AT THE COUNTY COURT AT CARDIFF

Case No: CO/1221/2019

Courtroom No. 2

2 Park Street  
Cardiff  
CF10 1ET

Wednesday, 8<sup>th</sup> May 2019

Before:  
THE HONOURABLE MR JUSTICE STUART-SMITH

B E T W E E N:

TOBY HUMPHREYS

and

CPS

MS WANG appeared on behalf of the Applicant  
MR JONES appeared on behalf of the Respondent

JUDGMENT  
(Approved)

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MR JUSTICE STUART-SMITH:

1. Mr Humphreys appeals by way of case stated against the decision of the Caernarfon Magistrates' Court on 30 November 2018 to impose a criminal behaviour order ('CBO') under Section 22 of the Anti-social Behaviour Crime and Policing Act 2014. The order was imposed after the appellant had been convicted of a number of offences, which I shall mention in slightly greater detail later, as a result of which he had been sentenced to immediate custodial sentences.
2. The CBO was to last for five years and included the following provision:
  - 'The defendant must not:
    - (1) use or encourage others to use foul, abusive, insulting, offensive, threatening, disorderly, or intimidating language or behaviour in any public place in England and Wales or towards any person including such conduct carried out via social media applications or other means of communication.
    - (2) be intoxicated through drink or drugs in any public place in England and Wales.
    - (3) enter any licensed premises in the County of Gwynedd at any time.
    - (4) congregate in a public place in the county of Gwynedd in a group of three or more persons in a manner causing, or likely to cause any person to fear for their safety.
    - (5) drive any mechanically propelled vehicle on a public road in England and Wales without being a holder of a valid driving licence and certificate of insurance'.
3. In briefest outline, the basis of the challenge is that the Magistrate should have concluded that the appellant was incapable of understanding or complying with the terms of the CBO, and that therefore it should not have been made. The appeal is based upon the unchallenged evidence of a consultant psychiatrist, Dr Moosa whose evidence lies at the heart of this appeal.

### **Factual Background**

4. The background to this appeal emerges from the terms of the case stated. The case stated was full and thorough. To do it full justice and so that the issues on this appeal may be fully understood I cite the majority of it below:
  - '(1) On 30 November 2018 an application was made by the respondent for the appellant to be made the subject of a criminal behaviour order in accordance with Section 22 of the Antisocial Behaviour Crime and Policing Act 2014. The application having been made during criminal proceedings that were concluded on 6 August 2018 with the appellant being sentenced to a term of imprisonment in respect of four offences of violence.
  - (2) we heard the said application on 30 November 2018 and found the following facts:
    - a. On 6 August 2018 the appellant was sentenced to a total of 23 weeks' imprisonment in respect of four offences of violence, comprising assault occasioning actual bodily harm, assaulting a police officer in the execution of their duty, and two offences of assault by beating.

- b. The appellant had entered guilty pleas to all of those offences on the day of trial.
- c. On 18 September 2018 the appellant pleaded guilty to a further offence of assault by beating.
- d. On 18 September 2018 the appellant had also pleaded guilty to offences of theft, assaulting a police officer in the execution of their duty and two public order offences contrary to Sections 4A and Section 5 of the Public Order Act 1986.
- e. The appellant had initially pleaded not guilty to these offences on the basis that he lacked the mens rea to commit those offences. The Court had been informed by the appellant's solicitor prior to the trial date that this argument was not being pursued and the appellant wished to change his plea to guilty to these offences.
- f. On 18 September 2018 the appellant was sentenced to 24 weeks' imprisonment in total to be served consecutively to the sentence imposed on 6 August 2018.
- g. The appellant had a substantial antecedent record for numerous offences including a number of offences of violence and public disorder. In addition, the record shows offences involving possession of drugs and we noted that one episode of psychosis was drug induced.
- h. The appellant has engaged in behaviour that caused and was likely to cause harassment, alarm or distress to many individuals over a long period of time both in regard to the offences before the Court and his previous record of offending.
- i. The appellant understands, has insight into, and is responsible for his actions.
- j. The appellant is capable of complying with the terms of the criminal behaviour order notwithstanding his ADHD diagnosis.

(3) It was contended by the appellant:

- a. The appellant accepts that his behaviour has caused or was likely to cause harassment, alarm or distress to other persons and did not challenge PC3054 Llinos Lake's evidence in this regard.
- b. The appellant would not be able to comply with the terms of a criminal behaviour order because of his mental health, particularly during episodes of psychosis when he loses insight and fails to differentiate between right and wrong and difficulty controlling his behaviour.

- c. If the appellant's ADHD is not treated properly the making of a criminal behaviour order will inevitably lead to the order being breached by the appellant.
- d. Emphasis should be placed on making the appellant engage with an appropriate ADHD service and complying with his medications rather than making him the subject of a criminal behaviour order.

(4) It was contended by the respondent:

- a. That the appellant has engaged in behaviour that has caused harassment, alarm or distress to members of the public and the police.
- b. Making a criminal behaviour order in the terms sought will help in preventing the appellant from engaging in such behaviour.

...

- d. The psychiatric report when read as a whole did not support the conclusion that the appellant lacked capacity to understand or comply with a criminal behaviour order.
- e. The appellant had previously been offered the opportunity to engage with mental health and substance misuse services and not taken those opportunities.
- f. That the dissatisfaction expressed by the appellant with regard to the proposed terms of the criminal behaviour order was indicative that the appellant possessed insight and understanding of the proposed terms and effect of a criminal behaviour order.

...

(6) We were of the opinion that:

- a. Having considered the demeanour of the appellant while present in court, the evidence produced by the respondent and, in particular, the report of Dr Moosa, we were of the opinion that:
  - i. The appellant is capable of both understanding and complying with a criminal behaviour order.
  - ii. The psychiatric report confirmed the appellant has ADHD and has had two brief episodes of psychosis. One is recorded as being drug induced psychosis in 2010. The second undated psychotic episode is described as being caused by sleep deprivation.
  - iii. The appellant's psychotic episodes are rare and when he is not psychotic, which is most of the time, he is fully able to

comprehend boundaries and what he should and should not be doing (reference, paragraph 12.8 of Dr Moosa's report).

- iv. The fact that the appellant is diagnosed as having ADHD is not a reason in itself for not making a criminal behaviour order. Dr Moosa states (paragraph 12.9) that in the absence of treatment for his ADHD it is 'highly likely' that the appellant would breach the terms of the order. This is attributed to impulsivity and being easily provoked, not through lack of understanding of the terms of the order.
- v. Dr Moosa also reports (paragraph 12.12) that should the appellant engage in ADHD services having structure and boundaries in place would be beneficial to him.
- vi. The opinion of the psychiatrist, taking his report as a whole, is not that the appellant is incapable of understanding or complying with the terms of a criminal behaviour order.
- vii. A criminal behaviour order for a period of five years in the terms sought by the respondent would help to prevent further antisocial behaviour by the appellant.

(7) Question for the opinion of the High Court:

- a. Were we wrong in law on the information before us to find that the appellant was capable of understanding both what criminal behaviour order meant and what behaviour would breach such order made in the terms sought?

**Dr Moosa's Evidence**

5. Dr Moosa provided a review of the appellant's past psychiatric history and medical records, which included reference to childhood ADHD, which has never been successfully treated in adulthood, and two brief psychotic episodes, of which Dr Moosa has said, at paragraph 3.1:

'The defendant told me he has had three admissions to a psychiatric hospital. He told me that in 2010 he had a brief drug-induced psychotic episode which resolved fairly quickly. He had a further admission some time later, but he was unable to remember the exact date. He recalls being psychotic, and he believed that this was induced by sleep deprivation rather than any illicit drug use.

His third admission to hospital was more recently in 2018 when he was taken on a Section 136 to the local A&E department, as he had attempted to stab himself. He was subsequently discharged from the Section 136 and not admitted to a psychiatric unit'.

6. According to the history recorded by Dr Moosa, the appellant accepted having used drugs when he was younger but denied being a regular user or drinker now. Between 2009 and 2018 when the report was produced the appellant had accumulated 28 convictions and 54

offences, these were summarised as being:

‘... four offences against a person; two offences against property; 10 theft and kindred offences; four public disorder offences; 11 offences related to the police/courts/prisons; two drug offences; two firearms/shotguns/offences weapons offences; 17 miscellaneous offences; and two non-recordable offences’.

7. I have read and take into account the whole of Dr Moosa’s report, even though I do not recite all of it as part of this judgment. For present purposes, the critical section of the report is section 12, which contained his opinion and recommendations. In that section Dr Moosa confirmed that the appellant had been suffering from ADHD for most of his childhood: see paragraph 12.1. In describing the consequences of his ADHD Dr Moosa said at 12.3 to 12.5:

‘[ADHD] is a disorder characterised by “hyperactivity, impulsivity and inattention”. It starts from an early age and there is lack of persistence in activities that require cognitive involvement, and a tendency to move from one activity to another without completing any one, together with this disorganised, ill-regulated and excessive activity.

Several other abnormalities may be associated. ADHD patients are often reckless and impulsive, prone to accidents and find themselves in disciplinary trouble, because of unthinking breaches of rules, rather than deliberate defiance. Their relationships with adults are often socially disinhibited with a lack of normal caution and reserve. They can be unpopular with others, and they are isolated resulting in self-esteem problems.

Impairment of cognitive functions are common and specific delays in motor and language development are disproportionately frequent. Secondary complications include antisocial behaviour and low self-esteem.

12.4. The [appellant] has had this condition since childhood. Unfortunately, he has not had successful treatment with the couple of medications he has tried ...

The [appellant] has not had the benefit of input from a specialist adult ADHD specialist. I would strongly recommend that the defendant has the opportunity to have an assessment followed by treatment in an ADHD clinic. If he was able to do this appropriate treatment such as Elvanse and other ADHD medication may be tried. ...

12.5. There is a lot of research showing that untreated ADHD symptoms can cause all sorts of complications, including coming into conflict with the criminal justice system. I note that the defendant has had numerous convictions in the past and has breached various bail conditions and court requirements.

I am in no doubt that his untreated ADHD has contributed significantly to this. Over the years, secondary difficulties, such as antisocial behaviour,

low self-esteem, loss of confidence and anxiety symptoms can become co-morbid issues. In addition, some patients can start self-medicating with substances, such as psycho stimulants (cocaine and amphetamines), to make them feel calmer and sometimes cannabis can also help with insomnia. I note that the [appellant] has used all of this in the past’.

8. Turning to the episodes of psychosis and their effects, Dr Moosa said at paragraphs 12.6 to 12.9:

‘12.6. The [appellant] has previously suffered from brief episodes of psychosis. From the medical records I did note that in 2010 he induced a drug-induced psychosis. However, I was not able to get further information in relation to the other psychotic episode that he described, which was caused by sleep deprivation. However, I do note that he is somewhat vulnerable to developing these psychotic episodes.

12.7 During these episodes of psychosis it is most likely that the defendant would lose insight and would fail to differentiate between what is right and wrong, as he was clearly suffering from delusional ideas at the time of his previous episode. It would be very difficult for him to have insight and to control his behaviour as a result of the psychosis. In these circumstances, it would be unreasonable for him to adhere to the rules set out by the CBO.

12.8 On other occasions when he is not psychotic, i.e., most of the time, the defendant is able to differentiate between what is right and wrong, has insight into his actions, and should be held responsible for his actions. Also, in my opinion, having boundaries can be therapeutic in both antisocial personality traits and in ADHD. In the absence of any treatment for the defendant’s ADHD it is highly likely that the defendant, if he is placed on the CBO, would be likely to breach his conditions on a regular and frequent basis. This is due to the fact that he can be very impulsive and easily provoked in situations where others would normally be able to retain calmness and a good degree of control. However, with appropriate treatment and support in place for his ADHD, having such boundaries would be therapeutic in my opinion in the future’.

9. Later in the report, at paragraphs 12.10 to 12.11, Dr Moosa said:

‘12.10 As I mentioned earlier, having the CBO in place without properly treating his ADHD symptoms is just setting the defendant up for failure again in the future. It is highly likely that he will breach the order on numerous occasions, which may result in lengthy custodial sentences. This will, clearly, in my opinion, not address the underlying mental health condition that needs treatment and support.

12.11. Having reviewed the medical reports and assessed the defendant, it is not my opinion that he suffers from a personality disorder. The defendant’s antisocial behaviours are, in my opinion, attributed to his untreated ADHD’.

10. In addition, later at 12.12:

‘As I mentioned earlier, once the defendant engages with an ADHD service and benefits from the treatment having structure and boundaries in place in the future would be beneficial to him. However, without the above treatment and control of his symptoms it is my opinion that it is unlikely to work in a patient suffering from moderate to severe ADHD, as in the case of the defendant’.

11. It is immediately to be noted that Dr Moosa does not say, or imply, that the appellant is incapable of understanding the meaning of the CBO. Nor, subject to one possible exception, does he say or imply that the appellant is incapable of complying with the terms of the CBO as opposed to being someone who is likely to breach the CBO with his mental conditions being a contributory concurrent factor in his doing so. The possible exception is during the periods of psychosis, but as Dr Moosa makes plain those periods have been rare and brief in the past, and he does not opine that they will be more frequent or last longer in the future.
12. Miss Wong, whose submissions both orally and in writing were clear and focused, drew attention to the fact that the appellant’s medical condition remains complex in the absence of proper treatment of his ADHD, and she cites the fact that he was detained pursuant to Section 136 as recently as August 2018. That incident did not involve behaviour that would have put the appellant in breach of the terms of the CBO. In addition, more generally, the fact that his medical condition remains complex does not of itself answer the question whether he is incapable of complying.

### **The Legal Framework**

13. The power to impose a CBO is provided by Section 22 of the Antisocial Behaviour Crime and Policing Act 2014, which states:
  - ‘1. This section applies where a person (“the offender”) is convicted of an offence.
  2. The Court may make a criminal behaviour order against the offender if two conditions are met.
  3. The first condition is that the Court is satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.
  4. The second condition is that the Court considers that making the order will help in preventing the offender from engaging in such behaviour’.
14. In the present case it is common ground that the first condition is satisfied. The appeal focuses on the second condition. The statutory question to be answered is whether the Court below was entitled to consider that making the order would help in preventing the offender from engaging in behaviour prohibited by the CBO, or otherwise engaging in antisocial behaviour.
15. The issue in this appeal is not whether the appellant is capable of *understanding* the terms of the CBO, it is accepted that he can. The issue is whether on the basis of Dr Moosa’s evidence the Magistrates were wrong to find that he was not incapable of *complying*.
16. Breach of a CBO is dealt with at Section 30 of the 2014 Act, which states:
  - ‘1. A person who without reasonable excuse -



- a) does anything he or she is prohibited from doing by a criminal behaviour order, or
- b) fails to do anything he or she is required to do by a criminal behaviour order commits an offence’.

17. As is well known, the introduction of the CBO regime replaced the ASBO regime that had previously been in force pursuant to the terms of the Crime and Disorder Act 1998. The power to make an ASBO was established by Section 1C(2) of the 1998 Act, which was similar in terms to Section 22 of the 2014 Act save for one highly material difference: where the second condition for the making of a CBO is that the Court considers that making the CBO ‘will help in preventing the offender from engaging in such behaviour’, the second condition for making an ASBO was that such an order was, ‘*necessary* to protect persons in any place in England and Wales from further antisocial acts by the [defendant]’ (emphasis added). The change in wording is clearly intentional and there is no basis for reading a test of necessity back into the second statutory condition for imposing a CBO.
18. There is a measure of agreement between the parties about the principles that apply. In particular, it is accepted that there are analogies between the principles to be applied when deciding whether to impose an injunction or (subject to the statutory differences between the conditions to be applied) an ASBO on the one hand, and when deciding whether to impose a CBO on the other.
19. The issue in *Wookey v Wookey* [1991] (Fam) 121 was whether to impose a non-molestation injunction upon a husband in order to protect his wife. At 130H, Butler-Sloss J said:  
‘The grant of an injunction is a discretionary remedy derived from the equitable jurisdiction which acts in personam and only against those who are amenable to its jurisdiction. Nor will it act in vain by granting an injunction which is idle and ineffectual. An injunction should not, therefore, be granted to impose an obligation to do something which is impossible or cannot be enforced. The injunction must serve a useful purpose for the person seeking the relief and there must be a real possibility that the order, if made, will be enforceable by the process in personam’.
20. Later, applying the relevant principles to the facts of that case, she said at 132 E-F:  
‘In the case of the husband the view of the consultant psychiatrist in charge of his case was that he was incapable within the McNaughton rules of understanding what he was doing or that it was wrong.  
  
In my judgment an injunction ought not to be granted against a person found to be in that condition, since he would not be capable of complying with it. Such an order cannot have the desired deterrent effect, nor operate on his mind so as to regulate his conduct. If the order can have no effect on the husband any breach by him cannot be the subject of effective enforcement proceedings since he would have a clear defence to an application for committal to prison for contempt’.
21. Similar issues were considered in the *R(Cooke) v DPP* [2008] EWHC 2703 (Admin), a decision of the Divisional Court on an appeal by way of case stated against the imposition of an ASBO pursuant to Section 1C of the 1998 Act. There was medical evidence to the effect that the appellant’s complex mental health problems:

‘makes [the appellant] very difficult to engage with, understand and the manner in which he interacts with others, especially those in authority, can be construed as deliberately antagonistic, that his behaviour is consequential to his mental health problems’: see [4].

Apparently, in his oral evidence the medical expert had said that the appellant was not capable of complying with the terms of the ASBO and that he would repeatedly breach it.

22. At [10] Lord Justice Dyson said:

‘In my judgment if the Justices had concluded that the appellant’s mental state was such that he was truly incapable of complying with the conditions of any ASBO that they were minded to make, they would have been wrong in law to make the order. If by reason of mental incapacity an offender is incapable of complying with an order, then an order is incapable of protecting the public, and cannot therefore be said to be necessary to protect the public.

23. Later, at paragraphs [12]-[13] he continued:

‘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 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 two 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.

13. A defendant who suffers from a personality disorder may on that account be liable to disobey an ASBO. In my judgment, however, that is not a sufficient reason for holding that an order which is otherwise necessary to protect the public from a defendant’s antisocial behaviour is not necessary for that purpose, or that the Court should not exercise its discretion to make an order’.

This distinction was subsequently adopted and endorsed by the Divisional Court in *Fairweather v Commissioner of Police for the Metropolis* [2008] EWHC 3073 (Admin) at [29]-[31].

24. It is not, in my judgment, necessary to refer to other authority. Without derogating from the statements of principle, to which I have referred, I would summarise the position in the following way: the statutory conditions to be applied are those set out at Section 22 of the 2014 Act. However, when deciding whether making the proposed CBO will help in preventing the offender from engaging in such behaviour, a finding of fact that the offender is incapable of understanding or complying with the terms of the order, so that the only effect of the order will be to criminalise behaviour over which he has no control, will indicate that the order will not be helpful and will not satisfy the second condition.

25. The authorities have not expressly considered the question where a person’s condition may mean that an order would generally be helpful, but that there might be occasions when,

because of his condition, he is incapable of complying with the terms of the order. In my judgment the question in such a case remains: is the second statutory condition satisfied on the facts of the particular case? In other words, on the facts of the particular case, can it be said that making order will help in preventing the offender from engaging in such behaviour, even though it is anticipated that he might engage in it on one of more occasions, because he is at that time incapable of complying with it?

26. In principle, the answer to that question will depend upon the precise factual circumstances and prognosis of the case in hand, and no a priori answer can be given. If the conclusion is that making an order would be helpful, despite the complexities of the factual findings, protection for the offender may, in such circumstances, be provided by the opening words of Section 30, which provide that the breaching behaviour will be an offence if it is done 'without reasonable excuse'. In my judgment if a person does or fails to do something in breach of a CBO, because they are incapable of complying, the proper conclusion should be that their incapacity is a reasonable excuse within the meaning of Section 31.

### **Applying the Principles to the Facts of This Case**

27. In my judgment, the Magistrates were not merely entitled to make the detailed findings that they did but were right to do so. On a proper interpretation of Dr Moosa's evidence, the appellant's medical condition means that he is more likely to disobey the CBO, but that is not the criterion to be applied as the judgment in *Cooke* makes clear.
28. Returning to the terms of the case stated, the only qualification that may be required is to recognise that there is a low risk of one or more further psychotic episodes, which may cause him to disobey the terms of the CBO over the years to come. However, since one of the past episodes was probably drug induced and one was probably induced by sleep deprivation, the risk of such episodes in the future appears lower than the risk in the past, because the appellant is not currently taking drugs.
29. That said, in my judgment the low risk does not subvert the general findings by the Magistrates, that the appellant understands, has insight into and is responsible for his actions, and that he is capable of understanding and complying with the terms of the CBO notwithstanding his ADHD. On the basis of those unimpeachable conclusions the Magistrates were entitled to conclude that a CBO for a period of five years in the terms sought and ordered would help to prevent further antisocial behaviour by the appellant.
30. I will only add that in the unlikely event of the appellant breaching the terms of the order, because he is incapable of complying with it, whether because of a psychotic episode or some other good and substantial reason, he will be entitled to submit and prove that he had reasonable excuse for acting in a prohibitive manner. In which case, and assuming that his conduct is not otherwise criminal, his behaviour will not be criminalised by the terms of Section 30 of the 2014 Act.

### **Conclusion**

31. The case stated discloses no error of law or other ground for appeal. This appeal is accordingly dismissed.

**End of Judgment**

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This transcript has been approved by the judge.