Neutral Citation Number: [2019] EWHC 84 (Admin)

Case No: CO/3250/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/19

Before :

LORD JUSTICE HICKINBOTTOM
and
MRS JUSTICE WHIPPLE

- -

Between :

KIERON STANNARD

Appellant

- and -

THE CROWN PROSECUTION SERVICE

Respondent

- -
- -

Rupert Wheeler (instructed by **Hennessy and Hammudi Solicitors**) for the **Appellant**
Paul Jarvis (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 12 December 2018

- -

Approved Judgment
(As Corrected)

Lord Justice Hickinbottom :

Introduction

1. This is the judgment of the Court to which we have both contributed.

2. This is an appeal by way of case stated from the Magistrates' Court (District Judge (Magistrates' Court) Sophie Toms) in which the Appellant seeks to challenge his conviction for breach of a Community Protection Notice ("CPN") issued to him pursuant to section 43 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act").

3. The Appellant submitted at trial that there was no case for him to answer on the alleged breach because the CPN included requirements that were unreasonably wide – in the sense that they were neither necessary nor proportionate to address the risk posed by the Appellant – and it was consequently unlawfully imposed. As a result, the CPN was invalid and could not be enforced against him.

4. The District Judge rejected that submission on the basis that it was not for her to consider the validity or otherwise of the CPN, and any argument relating to its invalidity could and should have been raised by way of an appeal against the CPN. The trial continued. The judge found the breaches established on the evidence, and the Appellant was convicted.

5. The central issue raised on this appeal is whether, in the case of a prosecution for breach of a CPN, it is open to a defendant to argue by way of defence that the CPN was and is invalid.

The Legislation

6. Part 4 of the 2014 Act is headed "Community protection". Section 43 contains the power to issue a CPN:

> "(1) An authorised person may issue a [CPN] to an individual aged 16 or over, or a body, if satisfied on reasonable grounds that—
>
> (a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and
> (b) the conduct is unreasonable.
>
> …
>
> (3) A [CPN] is a notice that imposes any of the following requirements on the individual or body issued with it—
>
> (a) a requirement to stop doing specified things;
> (b) a requirement to do specified things;
> (c) a requirement to take reasonable steps to achieve specified results.

(4) The only requirements that may be imposed are ones that are reasonable to impose in order—

(a) to prevent the detrimental effect referred to in subsection (1) from continuing or recurring, or
(b) to reduce that detrimental effect or to reduce the risk of its continuance or recurrence.

(5) A person (A) may issue a [CPN] to an individual or body (B) only if—

(a) B has been given a written warning that the notice will be issued unless B's conduct ceases to have the detrimental effect referred to in subsection (1), and
(b) A is satisfied that, despite B having had enough time to deal with the matter, B's conduct is still having that effect.

(6) A person issuing a [CPN] must before doing so inform any body or individual the person thinks appropriate.

(7) A [CPN] must—

(a) identify the conduct referred to in subsection (1);
(b) explain the effect of sections 46 to 51.

(8) A [CPN] may specify periods within which, or times by which, requirements within subsection (3)(b) or (c) are to be complied with."

7. Section 46 provides a right of appeal:

"(1) A person issued with a [CPN] may appeal to a magistrates' court against the notice on any of the following grounds.

1. That the conduct specified in the [CPN]—

(a) did not take place,
(b) has not had a detrimental effect on the quality of life of those in the locality,
(c) has not been of a persistent or continuing nature,
(d) is not unreasonable, or
(e) is conduct that the person cannot reasonably be expected to control or affect.

2. That any of the requirements in the notice, or any of the periods within which or times by which they are to be complied with, are unreasonable.

3. That there is a material defect or error in, or in connection with, the notice.

> 4. That the notice was issued to the wrong person.
>
> (2) An appeal must be made within the period of 21 days beginning with the day on which the person is issued with the notice.
>
> (3) While an appeal against a [CPN] is in progress—
>
> (a) a requirement imposed by the notice to stop doing specified things remains in effect, unless the court orders otherwise, but
> (b) any other requirement imposed by the notice is of no effect.
>
> For this purpose an appeal is "in progress" until it is finally determined or is withdrawn.
>
> (4) A magistrates' court hearing an appeal against a [CPN] must—
>
> (a) quash the notice,
> (b) modify the notice (for example by extending a period specified in it), or
> (c) dismiss the appeal."

The requirement of section 46(2) that any appeal is made within 21 days is not capable of being extended.

8. Section 48 provides that a person issued with a CPN who fails to comply with it commits an offence and is liable on summary conviction to a fine. By section 48(3), a person does not commit an offence if he took all reasonable steps to comply with the notice or there is some other reasonable excuse for the failure to comply with it.

9. Section 52 provides that an authorised person may issue a fixed penalty notice to anyone who that person has reason to believe has committed an offence under section 48. A fixed penalty notice is a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty to the local authority.

10. The Home Office has issued statutory guidance on anti-social behaviour powers contained in the 2014 Act. The current version was updated in December 2017. Paragraph 2.4 deals with CPNs. For the purposes of this appeal, it is unnecessary to refer to the particular terms of the guidance, although it should be noted that it is said that CPNs are "intended to deal with short or medium-term issues".

The Facts

11. On 28 February 2018, Reading Borough Council acting together with Thames Valley Police issued the Appellant with a standard form warning letter which stated that they had reason to believe that his behaviour – specifically anti-social behaviour in the vicinity of McDonald's restaurant on Friar Street in the centre of Reading – was having a detrimental effect on those living in the area, and was causing harassment, alarm and distress. The letter required the Appellant to cease this conduct immediately, failing which it made clear that he would be served with a CPN.

12. On 1 March 2018, the day after the Appellant received the warning letter, the police were called to McDonald's, Friar Street. The police identified the Appellant as one of a group of youths alleged to be causing trouble at that venue. PC Rawlings issued the Appellant with a CPN, there and then. The Appellant countersigned it in acknowledgement.

13. The prohibitions imposed by the CPN were as follows:

> "The notice now requires that you:
>
> > 1 – are not to enter the area of Reading Town Centre as defined by the map overleaf unless there is a prearranged appointment with a court or probation worker.
> >
> > 2 – are to give notice of a prearranged appointment to Thames Valley Police by calling '101' at least 24 hours prior to the relevant time.
> >
> > 3 – are not to attend within 100m of any McDonald's restaurant in Reading.
> >
> > 4 – are not to be in a group of more than 3 individuals including yourself."

The CPN was of indefinite duration. A plan of Reading with the proscribed centre area clearly marked was attached. The CPN warned the Appellant that, if he failed to comply with the requirements of the notice without reasonable excuse, he would be committing a criminal offence and could be prosecuted, in which case he could be liable to a fine and made subject to court-imposed requirements; or, if not prosecuted, he could alternatively be issued with a fixed penalty notice. It notified the Appellant of his right of appeal against the CPN within 21 days of the date of service, and set out the grounds on which an appeal could be brought including that "any of the requirements in the notice, or any of the periods within which or times by which they are to be complied with, are unreasonable". The CPN made clear that, whilst any appeal was pending, prohibitory requirements of the notice would remain effective.

14. The Appellant did not appeal the CPN. Before us, Mr Wheeler accepted that an appeal had been open to the Appellant; but, he said, the Appellant had not exercised that right as a result of his somewhat chaotic lifestyle, lack of funds and mental health problems. Of course, the Appellant is now long out of time to appeal.

15. On 6 March 2018, the Appellant was seen in the proscribed area in Reading town centre. He was arrested by PC Henderson and charged with failing to comply with the CPN.

16. On 22 March 2018, at Reading Magistrates' Court, he pleaded not guilty to breaching the CPN. The preparation for effective trial form which was completed by the Appellant's legal representatives indicated that the issues to be disputed at trial were (i) whether in the circumstances of this case the police had power to issue the CPN under section 43 of the 2014 Act, and (ii) whether the Appellant had made out the statutory defence under section 48(3) of the 2014 Act by taking reasonable steps to comply or having a reasonable excuse for breaching the CPN. In respect of (i), no further

particulars as to why the CPN was allegedly defective were given. In respect of (ii), the excuses given were that he needed to take a friend to hospital and his own mental health condition.

17. On 15 May 2018, the matter came on for trial before District Judge Toms. The evidence of PC Rawlings relating to the issue of the CPN was agreed, and in consequence he was not called to give evidence. PC Henderson was called to give evidence about the Appellant's previous anti-social behaviour, but in the event the judge ruled that evidence irrelevant.

18. An application of no case to answer was made at the end of the prosecution case, on the basis that the prosecution had the burden of establishing that the CPN was valid but could not do so having called no evidence of the circumstances in which the CPN had been made. The Appellant had therefore had no opportunity to challenge any such evidence, or the basis on which the CPN had been made. In fact, it was submitted, the CPN was clearly invalid, because its terms (notably its indefinite duration, and the term preventing the Appellant from being in a group of three or more individuals wherever he might be) were unreasonable and disproportionate.

19. The prosecution resisted that submission on the basis that the court did not have to satisfy itself of the validity of the CPN: it only needed to be satisfied that the CPN had been breached. Any challenge to the CPN itself, it was submitted, should have been by way of appeal against the CPN and could not be raised as a defence to prosecution for breach.

20. The District Judge rejected the application: applying the principles of R v Galbraith [1981] 1 WLR 1038, she found that there was a case to answer. She noted that section 43 of the 2014 Act authorised a police constable to issue a CPN; and, further, that section 46 provides for an appeal within 21 days but that this CPN had not been appealed. Relying upon "established principles of Crown Prosecution Service v Michael T [2006] EWHC 728 (Admin) and other settled case law" (see paragraph 10 of the Case Stated), she found that, if the Appellant had wished to challenge the evidence of PC Rawlings or the validity of the CPN, then he had to appeal under section 46; and he could not raise those issues by way of defence to a criminal prosecution for breach.

21. The case proceeded. No evidence was called by or on behalf of the Appellant; and the reasonable excuse defence, suggested in the case management form, was not developed.

22. At the end of the case, the District Judge found to the criminal standard that the CPN was in force at the relevant date, and the Appellant was bound to comply with it. He had breached the CPN; and was thus guilty of the offence as charged.

23. By an Appellant's Notice dated 16 August 2018, the Appellant appealed against his conviction by way of Case Stated. The Appellant had asked the District Judge to state a case for appeal, and she had done so on 1 August 2018. The Case Stated set out the facts, before posing the following three questions for this court:

> "Q1. Did I have to satisfy myself as to reasonableness and/or legality of the [CPN], when dealing with the alleged breach?

> Q2. Does a [CPN] issued by the Police, have the same status in law, until appealed or varied, as an order of court?
>
> Q3. When a defendant is alleged to have breached the terms of a [CPN], are the Crown Prosecution Service under a duty to call the original evidence complained of to satisfy the Court as to whether the CPN should have been issued?"

The Grounds of Appeal

24. On behalf of the Appellant, it was submitted before the District Judge that it is implicit in the 2014 Act that only reasonable and proportionate prohibitions or requirements can be imposed by way of CPN. That is reinforced by the Home Office guidance, which suggests that CPNs were intended to be used to address relatively low-level anti-social behaviour in the short to medium term only. In this case, the prohibitions exceeded what was reasonable and proportionate, notably because (i) the term of the requirements was indefinite, and (ii) the prohibition prohibiting him from being with more than two people at any time was not spatially specific: he could not associate with more than two people anywhere. Consequently, the CPN was invalid, and could not lawfully be enforced against the Appellant.

25. Mr Wheeler relied upon similar contentions before us. He submits that the prosecution bears the burden of proving that the relevant person was issued with a valid CPN pursuant to section 48(1) of the 2014 Act. The failure to issue a valid CPN in this case is a triable issue on a criminal charge on an alleged breach; and, he submits, the District Judge was wrong to hold otherwise. She was wrong to conclude that any issue relating to validity had to be raised by way of appeal against the CPN, the appeal route being obviously inadequate because the appeal window is limited to 21 days which would mean that a person who fails to appeal within that time – for whatever reason – has no means of challenging a CPN. Consequently, a person who (as in this case) is subject to a CPN of indefinite duration would be bound by it for life. In this case, the terms imposed are disproportionate and unreasonable in their ambit, but, on the District Judge's interpretation of the statutory provisions, the Appellant has no redress. That, he submits, cannot have been intended by the statute.

26. Mr Wheeler submitted that Michael T, upon which the District Judge relied, is distinguishable and of no assistance in this case because of fundamental differences between the statutory regime for criminal behaviour orders ("CBOs") in Part 2 of the 2014 Act (formerly anti-social behaviour orders ("ASBOs") under the Crime and Disorder Act 1998), with which Michael T was concerned, and that of Part 4 of the 2014 Act governing CPNs. First, under section 27 (formerly section 1CA of the 1998 Act as applying to ASBOs), it is possible to seek a variation or discharge of a CBO; but there is no equivalent right under the 2014 Act in relation to CPNs. In the absence of express provision, he submitted, no such right could be implied. Second, as were ASBOs, CBOs are issued by courts of competent jurisdiction and subject to judicial scrutiny from the outset. CPNs, by contrast, are issued by authorised persons (in this case, a police constable) in circumstances where there has been no opportunity to test the evidence on which the decision to issue the CPN has been based. Therefore, this was a case which was factually analogous to Boddington v British Transport Police [1999] 2 AC 143 – a case to which we shall return – and it was open to a person in alleged breach of a CPN to argue that the CPN was invalid.

Discussion

27. Where a criminal charge is based on the breach of some underlying provision, the invalidity of that provision is not necessarily a defence to a charge based upon its breach. As Lord Irvine of Lairg LC said in the leading case of Boddington (at pages 152, 160 and 161):

> "The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.
>
> Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions. That approach is supported by authority of this House.
>
> ….
>
> However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based on arguments of invalidity of subordinate legislation or an administrative act under it. These are situations in which Parliament may legislate to preclude challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely….
>
> However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive pubic bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so….
>
> In my judgment only the clear language of a statute could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a byelaw or administrative decision where his prosecution is premised on its validity."

28. Therefore, the question is whether, on the true construction of the relevant legislation, Parliament intended the invalidity of the provision not to be a defence to such a criminal charge.

29. Boddington is an example of the application of that approach. Mr Boddington was prosecuted for breach of a byelaw preventing smoking on a train. He contended that the smoking ban was *ultra vires* the rail company as it went beyond the company's statutory powers under the Transport Act 1967 to regulate the railway. The House of Lords held that the stipendiary magistrate had been wrong to rule that Mr Boddington could not raise that as a defence to the criminal charge, because, on the true construction of the statutory provisions, Parliament did not intend to exclude that defence to such a criminal charge. It was emphasised that the first time Mr Boddington had a sensible opportunity to challenge the *vires* of the ban was when he was charged with breach. However, Mr Boddington's appeal ultimately failed because the House held that, under the relevant statutory provisions, the rail company did have power to impose a total smoking ban.

30. However, whether such a defence is available is of course dependent upon the relevant statutory provisions seen in their proper context.

31. Michael T concerned an ASBO made under the 1998 Act, which prohibited the defendant from "[acting] in an anti-social manner in the City of Manchester". He was prosecuted for breach. The magistrates held that the term of the ASBO was too vague and lacked clarity such that it was invalid and unenforceable. The charge was dismissed.

32. The prosecution appealed to this court (Richards LJ and David Clarke J) which allowed the appeal, concluding that, in the context of the 1998 Act which provided clearly defined avenues of appeal against ASBOs as well as a statutory right to apply for a variation or discharge, there were compelling arguments for treating an ASBO as binding unless and until it was set aside or varied; and that any issue as to the validity of the original order should be raised by way of appeal (or possibly by way of judicial review, if that were an appropriate remedy notwithstanding the right of appeal) rather than as a defence to breach proceedings. Giving the judgment of the court, Richards LJ said:

> "26. The validity or invalidity of a byelaw or an administrative decision falls to be determined in accordance with conventional public law principles by reference to the powers conferred by the enabling legislation. Their Lordships in Boddington's case affirmed the *ultra vires* doctrine as the essential basis of judicial review of such measures: see in particular per Lord Irvine of Lairg LC at pages 154–157, per Lord Browne-Wilkinson at page 164, and per Lord Steyn at pages 171–172. The central point of dispute in Boddington's case was whether the issue of validity could be determined only by the Administrative Court in proceedings for judicial review or whether it was also within the jurisdiction of the magistrates' court to determine it when raised as a defence in criminal proceedings. In holding that the magistrates' court had such jurisdiction, their Lordships were strongly influenced by the fact that, if precluded from raising the issue as a defence in the magistrates' court, an individual might not otherwise have a fair opportunity to challenge the measure breach of which was alleged to constitute a criminal offence by him: see per Lord Irvine LC, at pages 161–162, and per Lord Steyn at page 173.

> 27. Very different considerations apply in the present context. First, the normal rule in relation to an order of the court is that it must be treated as valid and be obeyed unless and until it is set aside. Even if the order should not have been made in the first place, a person may be liable for any breach of it committed before it is set aside. Secondly, the person against whom an ASBO is made has a full opportunity to challenge that order on appeal or to apply to vary it: indeed, the defendant did appeal the order made against him in this case, though the matter was not pursued to a conclusion. Accordingly, in so far as any question does arise as to the validity of such an order, there is no obvious reason why the person against whom the order was made should be allowed to raise that issue as a defence in subsequent breach proceedings rather than by way of appeal against the original order. The policy consideration that influenced the finding in Boddington's case that the magistrates' court had jurisdiction to determine issues of validity of a byelaw or administrative decision is wholly absent when the issue is the validity of an order of the court."

33. The court observed that the trial judge may be able to deal with concerns about the scope of an ASBO in other ways. Richards LJ said (at [37]):

> "It does not follow that the district judge lacked any means of giving effect to the concerns he had about the width and uncertainty of the order. It was open to him to consider whether the relevant provision lacked sufficient clarity to warrant a finding that the defendant's conduct amounted to a breach of the order; whether the lack of clarity provided a reasonable excuse for non-compliance with the order; and whether, if a breach was established, it was appropriate in the circumstances to impose any penalty for the breach…".

34. Therefore, as I have indicated and these authorities illustrate, when faced with a submission that there is a public law defence to a criminal charge, the court must determine whether, on the true construction of the legislative provisions in context, they deny the criminal court jurisdiction to adjudicate the validity of legislation or any administrative act pursuant to it.

35. With our compass thus set, we turn to the legislation in this case.

36. In our view, it is clearly the intention of the legislation that a challenge to the validity of a CPN should not be a defence to a charge of breach. In coming to that conclusion, we have taken into account in particular the following.

37. Unlike the circumstances of Boddington, where the relevant byelaw was aimed at the world-at-large, a CPN is specific to an individual and his behaviour. As we have described, section 43 of the 2014 Act sets out various requirements for a CPN. The notice must identify the conduct of the individual which is having a detrimental effect, and must explain the effect of the statute including the right of appeal (section 43(7)(a)). It can only be issued if a warning has been given to the individual, and expressly confirm that the authorised person is satisfied that the person's conduct is still having a detrimental effect (section 43(5)). The individual to whom a CPN is issued must be

told at the time of its issue that he or she can appeal against it (sections 43(7)(b) and 46).

38. Again unlike the circumstances in Boddington, there is a prior opportunity to challenge the scope of the provision underlying the charge in the form of a statutory right of appeal against a CPN, with detailed provisions about the grounds on which an appeal can be pursued set out in section 46. On its face, the legislation envisages that a challenge can and should be by way of appeal.

39. In these respects, the circumstances of this case are much closer to Michael T. It is true that section 43 of the 2014 Act refers in terms only to *issue* (see section 43(1)) and, unlike the provisions that govern CBOs which give an express right to seek variation and discharge of such an order (see section 27, formerly section 1CA of the Crime and Disorder Act 1998 which applied to ASBOs), there is no express provision permitting a CPN to be varied or discharged outside the appeal process. Particularly in this respect, the CPN regime is different from the CBO/ASBO regime.

40. However, as a matter of statutory construction, taking account of the words of the statute and its purpose and context, we conclude that section 43 must by implication confer a power not only to issue a CPN but also to do all acts consequential upon issue, including the power to vary or discharge a CPN. It would be totally impractical for the regime to operate without the authorised person possessing a power to vary or discharge, as the implied corollary of the power to issue, a CPN. Mr Wheeler is right that, absent such a power, a CPN would become immutable after 21 days if an appeal had not been instigated by that date, subject only to the possibility of challenging the lawfulness of a CPN by way of judicial review. Where the CPN was issued more than three months earlier, a judicial review challenge may well fail on grounds of delay. We accept his submission that that cannot be what the statute intends, because it would risk substantial injustice in an individual case where, e.g., there is a change of circumstance which renders the terms of CPN inappropriate. As stated in Bennion on Statutory Interpretation (7th Edition) at paragraph 12.1:

> "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief."

41. In our judgment, it is clear that a CPN must be capable of variation or discharge, outside of the appeal framework, not least to take account of changed circumstances beyond the 21 day period. The police may accept that a CPN is no longer necessary; or a CPN may be issued to the wrong person who only lately came to know about it. In these circumstances, the availability of judicial review of the decision to issue may not be sufficient to avoid injustice. We do not consider that it could have been the Parliamentary intention to allow a disproportionate or otherwise inappropriate CPN to continue in place, incapable of being revoked or varied, even if the issuer accepts that it is inappropriate.

42. We find no difficulty in according a wide meaning to section 43(1) to enable authorised persons not only to issue CPNs, but also to do other acts consequent on issue, including

variation or discharge. The courts have in similar circumstances been willing to read in wider powers than are expressed. For example, in R v Bristol City Council ex p Everett [1999] 1 WLR 92 (which concerned the Council's withdrawal of an abatement notice) it was said by Richards J (at page 106D-E):

> "In the absence of an implied power to withdraw an abatement notice, the enforcement provisions would in my view be unduly rigid. It seems senseless that an authority should be unable to withdraw an abatement notice which, for whatever reason, it no longer considers to be appropriate. It is particularly unsatisfactory that the recipient of the notice should remain subject to it and, by reason of a failure to comply with its requirements, should remain in breach of the criminal law in circumstances where the local authority does not consider the notice to be appropriate and has no intention of bringing a prosecution for breach of it. A power of withdrawal is therefore consistent with, and serves to promote rather than to undermine, the legislative scheme. I see no difficulty in implying such a power."

The judgment of Richards J was affirmed by the Court of Appeal ([1999] 1 WLR 1170), Mummery LJ (with whom Hirst and Beldam LJJ agreed) saying simply that "the council clearly had an implied power to withdraw the notice". We consider the implied power equally clear here.

43. In relation to an appeal against a CPN, the powers of the magistrates on appeal are wide: as well as dismissing the appeal, they can quash or modify the CPN (section 46(4)). These powers go beyond a determination of whether the defendant is simply guilty or not guilty of breach, which is the binary question answered at trial. Further, when read with section 52 of the Magistrates' Court Act 1980 and rule 34 of the Magistrates' Court Rules 1981, it is clear that an appeal under section 46 is to be determined within the civil jurisdiction. To permit the challenge to be raised at trial, where evidence is assessed on the criminal standard and by reference to criminal rules of procedure, would undermine section 43. It would also, as Mr Jarvis points out, lead to a perverse incentive not to appeal but to await prosecution for breach and raise the challenge at that point, to secure an easier route of challenge. Such outcomes run contrary to the clear purpose and intention of sections 43 and 46. This clearly points to the legislative intention being that challenge should be by way of appeal, in the ordinary case.

44. The mainstay of Mr Wheeler's case is that the appeal window is now closed and, absent the possibility of challenging the validity of the CPN at trial, there will be substantial injustice because there is no alternative route of challenge to the allegedly disproportionate CPN, and no other means by which the Appellant can air his grievances about the making of the CPN and its ambit.

45. However, we do not agree. Leaving aside the possibility of judicially reviewing the decision to issue a CPN, as we have indicated, there is a power for an authorised person to revoke or vary a CPN, as well as issue one. If an affected person sends written representations to such an authorised person with a reasoned case that the CPN is inappropriate, on ordinary public law principles, the authorised person will have to consider those representations when considering the exercise of his discretion as to whether to retain, or revoke or vary, the notice. If he fails to do so, then, again on

general public law principles, the individual will be able to seek a judicial review of that failure on usual public law grounds.

46. Once established that the authorised person has a power not only to issue, but also to vary or discharge the CPN, the scheme can be seen to work effectively by permitting the person subject to the CPN to seek its variation or discharge, even if an appeal is no longer open. That deals with the possibility of changed circumstances, touched on above, and with other anomalies or injustices which might arise during the term of the CPN beyond the appeal period.

47. We accept Mr Jarvis' submission that in principle any decision pursuant to section 43 is amenable to judicial review. Thus, there is a means of challenge, outside the appeal process, for any decision under section 43, whether it is a decision to issue a CPN, or a refusal to vary or discharge a CPN. The merits of any challenge would be for this court to determine. This court may, in the usual way, be unimpressed by applications for judicial review in circumstances where a right of appeal exists or has been allowed to lapse without being pursued, on the basis of that an alternative remedy is or has been available. However, refusals to vary or discharge a CPN after the appeal window has closed are in a different category of decision because there is no right of appeal against these decisions under the statute.

48. We conclude that the combination of the right of statutory appeal, coupled with the availability of judicial review, provides an effective means by which to challenge the CPN, throughout its term. That conclusion, which is based on our analysis of the statute, leads us to conclude further that such a challenge to the validity of a CPN is not open to a person at trial by way of defence: that is not what the statute intends, nor in our view is that an effective remedy because a person subject to a CPN should not be required to breach a CPN in order to exercise a right to challenge it.

Conclusion

49. In our judgment, the District Judge was therefore right to conclude that the CPN was binding on (and enforceable against) the Appellant unless and until it was varied or discharged: accordingly, she could not look behind it and did not have jurisdiction to hear the Appellant's arguments going to the validity of the CPN. In this case, the terms of the CPN were clear and the breaches of the CPN were clear cut – it has not been suggested otherwise. The Appellant had gone back to the McDonald's in Friar Street from which he was clearly banned by the CPN. The District Judge was therefore correct to conclude that the charge had been made out.

50. We answer the questions posed in the Case Stated as follows.

    Q1. No: when dealing with the alleged breach, the District Judge did not have to satisfy herself as to the reasonableness and/or legality of the CPN.

    Q2. Yes: a CPN issued by the police is like an order of the Court in this sense, it is valid until varied or discharged by an authorised person on review (subject to the courts' oversight by way of judicial review), or on appeal.

Q3. No: when a defendant is alleged to have breached the terms of a CPN, the prosecution is not under a duty to call the original evidence of which complaint was made to satisfy the Court that the CPN was lawfully issued.

51. For the reasons we have given, we dismiss the appeal.

Postscript

52. Of course, if the CPN remains as it is, and if the Appellant is again prosecuted for breach, he will not be able to raise the argument he has raised before District Judge Toms and us by way of defence at trial. However, we make clear that, the failure of this appeal does not mean that the Appellant is fixed with the CPN in its current form for evermore. If he has concerns about the scope of the CPN or its indeterminate nature, he should raise them with the Thames Valley Police and seek a variation of the CPN. If they wrongly refuse to vary, judicial review will be available.

53. More generally, we emphasise that those who are authorised under section 43(1) of the 2014 Act should recognise that they have power not only to issue, but also to vary and discharge a CPN in appropriate circumstances. It is not for this court to tell authorised persons how to go about their decision-making, but we would think it a minimum that such persons should operate a system for receiving and adjudicating requests for variation or discharge of CPNs; and that relevant information should briefly be given with any CPN about how to seek a variation or discharge (e.g. on a change of circumstance), in addition to information required by statute about a statutory appeal.

54. CPNs constitute a significant interference with an individual's freedom; they must be clear in their terms and proportionate in their effect. We make two final comments. First, we consider it would be best practice and consistent with legal certainty for any CPN to be limited in time, with that term clearly stated in the CPN. Secondly and more generally, we emphasise the need for authorised persons prior to issuing a CPN to consider with care the prohibitions and restrictions imposed to ensure that they go no further than is necessary and proportionate to address the behaviour which has led to the CPN being made.