

IN THE ADMINISTRATIVE COURT (SITTING AT BRISTOL)

Case No: CO/3105/2021
Neutral Citation Number: [2022] EWHC 1770 (Admin)

Courtroom No. 13

2 Redcliff Street
Bristol
BS1 6GR

Monday, 14th March 2022

Before:
THE HONOURABLE MRS JUSTICE STEYN

B E T W E E N:

THE QUEEN
on the application of
THE CHIEF CONSTABLE OF AVON AND SOMERSET

Claimant

and

BRISTOL CROWN COURT

Defendant

and

(1) GARY RANDALL

(2) CROWN PROSECUTION SERVICE

Interested Parties

MR JOHN GOSS appeared on behalf of the Claimant
NO APPEARANCE by or on behalf of the Defendant
NO APPEARANCE by or on behalf First Interested Party
NO APPEARANCE by or on behalf Second Interested Party

JUDGMENT
(Approved)

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.

Introduction

1. On 26 March 2021, the Crown Court at Bristol (“the Crown Court”) made a contingent destruction order (“the Order”) in respect of Jago, a dog belonging to the First Interested Party, Mr Gary Randall. That order was made on Mr Randall’s appeal against sentence from the Magistrates’ Court. This application for judicial review is brought by the Chief Constable of Avon and Somerset Constabulary (“the Chief Constable”) who contends that the Crown Court erred in law and acted irrationally, in making the order.
2. Permission to bring this claim was granted by Eyre J on 24 November 2021.
3. The Defendant has acknowledged service but, as the Court, has indicated it does not intend to make a submission. Mr Randall indicated when contacted by the Claimant that he did not want to be involved in these proceedings and he has not engaged in them at any stage. The Second Interested Party, the Crown Prosecution Service, filed Detailed Grounds supporting the Chief Constable’s grounds 1 to 4 and 6. The only ground the Crown Prosecution Service contested was ground 5, which the Chief Constable no longer pursues. In light of the withdrawal of ground 5, the Crown Prosecution Service indicated that it no longer intended to play an active part in these proceedings.
4. Accordingly, the only party appearing or represented at the hearing before me today has been the Claimant. I am grateful to Mr Goss, counsel for the Claimant, for his assistance.

The facts

5. On 17 June 2020, Mr Randall’s dog, Jago, was off the lead and unmuzzled in Netham Recreation Grounds. Jago mauled another dog, causing injuries that resulted in that dog having to be put down, and Jago also bit the other dog’s owner, causing a laceration requiring six stitches. The statement of Inspector Kathryn Tillitson states:

“Following this incident, Randall attended the home address of the victim demanding £600 because his dog had been seized by the police. He made threats to return to their address, which greatly alarmed the victim and his wife”.
6. I note that although Jago is described as a large ‘Pitbull or Staffordshire Terrier dog’, he has not at any stage been formally assessed as being a dog to which section 1 of the Dangerous Dogs Act 1991 (“the 1991 Act”) applies and he has never been dealt with by the Courts as a dog to which that provision applies.
7. On 15 September 2020, Mr Randall entered guilty pleas at Bristol Magistrates’ Court to both an aggravated offence contrary to section 3(1) of the 1991 Act and a public order offence. The hearing was adjourned for sentencing. On 20 January 2021, Bristol Magistrates’ Court sentenced Mr Randall to a community order with an unpaid work requirement. He was ordered to pay compensation of £783.21 and he was disqualified from owning a dog for a period of a year. In addition, the Magistrates’ Court ordered Jago’s destruction under section 4(1) of the 1991 Act (“the destruction order”).
8. The Magistrates’ Court gave the following reasons for the destruction order:

“Dr d’Sa has produced a very helpful report, which states that the temperament and past behaviors could be dealt with by conditions and training. However, she clearly states that to deal with this would require ‘extremely responsible and competent ownership and management...’. Given your list we cannot be satisfied, given you have not abided by Court orders in the past, that you will comply with a contingent destruction order and the public will be at risk. We therefore will have no option but to order the destruction of Jago.”

9. Mr Randall appealed the destruction order to the Crown Court. He sought to have the order disqualifying him from owning a dog for 12 months overturned, and to have Jago returned to him. In the alternative, he sought an order transferring the dog into the ownership of his then 15-year-old nephew, Leyland Randall.

10. On 26 March 2021, the Crown Court refused Mr Randall’s appeal against the disqualification order. The Court stated:

“In relation to whether or not the Court should disqualify a person from having custody of a dog, the test is whether the offender is a fit and proper person to have custody of a dog. We have concerns about Mr Randall’s appropriateness to own any dog at present, but particularly Jago, on two bases. Firstly, that his history of compliance with Court orders is not good and so to place Jago in his custody would run the risk that he would not comply with the order that we are going to make in relation to the dog, and the effect of that would be that members of the public and other animals would be put at risk. Secondly, we also have concerns over whether he is a fit and proper person to have custody of Jago, in particular because the expert report makes clear that Jago needs careful management to ensure that there aren’t further risks. On that basis, therefore, the appeal against the imposition of the Disqualification order on Mr Randall is refused.”

11. However, the destruction order was revoked, and the Order made instead. The Order reads:

“The Court orders ...
that

the defendant’s dog be destroyed, this act being contingent upon: The dog is

1. to be castrated
2. to be muzzled in public
3. to be on a lead in public.

...

The Court further orders that to be placed in the custody of the police and to be housed with a suitable owner (if appropriate, the police can decide to rehouse the dog with Mr Leyland Randall after a full and proper assessment is deemed appropriate)”

12. The drafting is imperfect but making allowance for that, it is apparent that the intention was to make a contingent destruction order, such that the dog is to be destroyed only if conditions

of castration, muzzling and being on a lead in public are not met. The rider to the order places the dog in the Chief Constable's custody until a 'suitable owner', who may or may not be Mr Randall's nephew, can be identified. On a natural reading of the Order, the rider does not appear to be part of the contingent conditions.

13. I note that the order does not say that the dog must be kept under control, and it also does not address what is to happen if the dog cannot be placed with a suitable owner.
14. The transcript of the appeal hearing before the Crown Court shows that the possibility of a contingent destruction order with provision for rehousing was discussed. It is fair to say, as the Chief Constable (who was not a party to those proceedings) submits, and as the prosecution who were a party have acknowledged, that the Crown Court did not receive the assistance that it needed at that hearing on what are complex statutory provisions which are not easy to apply.
15. The Crown Court stated:

“... in relation to the Destruction Order the appeal succeeds insofar as we do not impose a destruction order regarding Jago but instead replace it with a Contingent Destruction Order. Although the behavioural expert indicates that Jago is a very well socialised dog so far as people are concerned, there are issues about his responses to other animals and as the fact of the original sentence made abundantly clear, in those circumstances the risks are not only to other animals but also to people. And so it is right that there be an order ensuring that Jago is properly managed.

We take into account Jago's temperament and his past behaviour, and we take into account the fact that Mr Randall is not currently a fit and proper person to be in charge of him and we, therefore, make a contingent destruction order requiring the dog to be left in the custody of the police and requiring the dog to be castrated, muzzled whenever out in public and kept on a lead whenever in public.

And we don't order that Jago is safe in the custody of Leyland Randall because we have very limited information about Leyland Randall and without wishing to, in any way, suggest that this *isn't necessarily* (inaudible), we are concerned that there may be pressure brought to bear upon family members if the dog is left with family for Mr Randall then to take the dog back into his custody. However, the police will be in a position to assess the circumstances more fully, and if it is appropriate that the dog is rehoused with Leyland Randall, then that course remains open, but for now the dog will remain in the care and custody of the police”.

16. The Chief Constable does not consider that Mr Randall's young nephew is an appropriate person with whom to re-home Jago. I should emphasise that this conclusion does not in any way reflect on the young man's character. The Chief Constable submits that it was not rationally open to the Crown Court, on the facts before them, to conclude that the dog would not constitute a danger to public safety and more fundamentally, the Crown Court erred in imposing the responsibility for identifying a suitable owner for the dog on the police.
17. Following receipt of the order, the Chief Constable approached the Crown Prosecution Service with a view to obtaining clarification from the Court, if necessary. On 27 April 2021,

the CPS indicated that they proposed to take it back to the Crown Court under the slip rule. In the event, unfortunately, the matter was not then brought back to the Court until 22 June 2021, which was outside the 56 days available for a correction or amendment under the slip rule. On that occasion, the learned Recorder observed that the order as it stands does not prevent the police from placing the dog with any suitable person or legal person, including a dog charity, but it does not give the police the power to destroy the dog.

18. At present, Jago remains in the Chief Constable’s custody, kept in kennels at public expense. This has now been the situation since June 2020. The Chief Constable submits the order is unworkable, unlawful and irrational.

The legal framework

19. Section 3 of the 1991 Act provides so far material:

“(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”.

20. Section 4 provides so far as material:

“(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...

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”.

21. Section 4(A) provides so far as material:

“(1) Where—

(a) a person is convicted of an offence under section 1 above or an aggravated offence under section 3(1) above;

(b) the court does not order the destruction of the dog under section 4(1)(a) above; and

(c) in the case of an offence under section 1 above, the dog is subject to the prohibition in section 1(3) above, the court shall order that, unless the dog is exempted from that prohibition within the requisite period, the dog shall be destroyed.

(2) Where an order is made under subsection (1) above in respect of a dog, and the dog is not exempted from the prohibition in section 1(3) above within the requisite period, the court may extend that period.

(3) Subject to subsection (2) above, the requisite period for the purposes of such an order is the period of two months beginning with the date of the order.

(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...”

22. A contingent destruction order under section 4A(4) 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.

23. The drafting of section 4A(1) insofar as it relates to aggravated offences under section 3(1) in relation to dogs which are not subject to the prohibition in section 1(3), was considered by Collins J in *Kelleher v Director of Public Prosecutions* [2012] EWHC 2978 (Admin). He observed a paragraph 8:

“That subsection makes no sense. It is singularly ill drafted. It makes no sense because it has no application on its face to an aggravated offence under section 3. It is concerned, and concerned only, with section 1, and accordingly the only sensible way of reading it is to omit the words ‘or an aggravated offence under

section 3(1) or (3) above’.”

24. Unfortunately, when Parliament amended this subsection in 2014 it merely removed the words “or (3)” rather than dealing with its inherent unworkability. The position remains that it can have no meaningful application to an aggravated offence under section 3.
25. In *Webb v Chief Constable of Avon and Somerset Constabulary* [2017] EWHC 3311 (Admin), [2018] 1 WLR 5001, the Divisional Court considered the phrase “owner of the dog or the person for the time being in charge of it” as it appears in the section 4B(2A). That subsection is in materially identical terms to section 4(1B). The same phrase appearing in the same Act should be interpreted consistently.
26. The Divisional Court held in *Webb* that section 4B(2A) does not permit a Court to make a finding that someone who is not “the owner” or a “person for the time being in charge of [a dog]” is a fit and proper person to be in charge of it. It “only enables the Court to consider whether someone from a limited class, namely the owner or a person for the time being in charge of the dog, is fit and proper person to be in charge of it”.
27. At paragraphs 88 to 89 the Divisional Court held:

“In our judgment, the words ‘in charge for the time being’ should not be understood in a particularly narrow (or indeed particularly expansive) sense. These are ordinary words which are capable of applying to a range of situations. The judgment in any case is very fact-sensitive, and it is one for the justice or the sheriff to make. For the reasons we have given, we have concluded that the concept of being in charge relates to whether the person in question has responsibility for the dog. It follows from what we have said that we would consider that it is at least possible for a person who walks a dog on a regular basis, and who has responsibility for the dog during that time, to be ‘in charge for the time being’ for the purpose of section 4B. There are likely to be exceptions to that general proposition, for example, where the person is walking the dog purely as the agent of another, in which case that person may not be ‘in charge’ for the purpose of that provision. The language of the statute is broad enough to encompass anyone who, for whatever reason and in whatever way, is in charge of the dog for the time being. It also follows that we reject Mr Ley-Morgan’s submission that a volunteer cannot be a person in charge – such a person can be.

So far as timing is concerned, we reject the Secretary of State’s submission that ‘for the time being’ must mean at the time of the seizure. Although that would, as a matter of timing, potentially include Mrs McCann who had contact with Sky while she was kennelled before she was seized, there are other situations in which it would not be appropriate to consider the person in charge at the moment of seizure. For example, it could be that the owner of the kennels where the dog has been housed since being seized wishes to apply (as in ‘Stella’s case’). Again, it may be that the erstwhile partner of the owner who had been the joint keeper with the owner seeks keepership where that person was not ‘in charge’ at the moment of seizure, perhaps because the relationship had recently broken down. Such a person may be able to demonstrate a track record of being in charge of the dog. There is no good reason, consistent with the statutory purpose, why such persons should be excluded from section 4B(2A)(a). There are, however, some temporal limits on what ‘for the time

being’ means. We note that Ms McGahey did not submit that the phrase could be interpreted to include proposed future contact. She was right not to do so, because the concept involves contact in the past or present. It cannot extend to the future”.

28. In *Webb*, the Divisional Court also addressed the purpose of the legislation observing at a paragraph 50:
- “The legislative aim is to protect the public by destroying dangerous dogs, while sparing those dogs which, subject to the specific requirements of the legislation, can be shown not to be dangerous. The qualification results from the fact that, as we have seen, one of the requirements in deciding whether a dog is dangerous concerns the owner of the dog or the person for the time being in charge of it. It is therefore not only the dog’s temperament which is relevant but who qualifies under the Act as the ‘person for the time being in charge’ of the dog”.
29. Decisions of the Crown Court, other than in connection with matters relating to trial and indictment, are subject to the High Court’s supervision by way of judicial review, including for error of law and on rationality grounds: *R (BBC) v Newcastle Crown Court* [2019] EWHC 2756 (Admin) and *R (Crown Prosecution Service) v Crown Court at Bolton* [2013] 1 WLR 1880.

Grounds for review

30. The Chief Constable relies on five grounds (omitting the withdrawn ground 5):
- a. **Ground 1:** No reasonable Crown Court could have concluded that a dog which had attacked another dog and a person, where the owner was not a fit and proper person to be in charge of him and where no other fit and proper person could be identified to be his keeper, would not constitute a danger to public safety.
 - b. **Ground 2:** The Crown Court failed properly to apply the statutory scheme for orders arising from aggravated offenses under section 3(1).
 - c. **Ground 3:** The Crown Court failed to take into account whether the owner or the person for the time being in charge of Jago was a fit and proper person.
 - d. **Ground 4:** The Crown Court erroneously adopted an approach that contradicted the decision in *Webb* as to who can be the owner or person for the time being in charge of Jago.
 - e. **Ground 6:** No reasonable Crown Court could have made an order which required another public body to engage in conduct which was unlawful. Alternatively, the Crown Court had no jurisdiction to do so.
31. The Crown Prosecution Service supports each of these grounds. Although no party has engaged in these proceedings opposing the claim, it remains necessary for the Court to consider carefully whether each of the grounds is made out. I am grateful to Mr Goss for his assistance in considering what matters could potentially have been put forward by the defendant or by the first interested party if they had attended or engaged in these proceedings.
32. The underlying offence was an aggravated one under section 3(1) of the 1991 Act. It follows

that the Crown Court had to make a destruction order unless satisfied that the dog would not constitute a danger to the public: see section 4(1)(a) and section 4(1A) of the 1991 Act. In deciding this question, first, the Crown Court had to consider the dog's temperament and past behaviour: see section 4(1B)(a)(i) of the 1991 Act. In this case the dog had savaged another dog so badly that it had to be put down and bitten that dog's owner. The animal behavioural consultant had advised that he was a very well socialised dog so far as people were concerned, but he was reactive towards other animals. Such behaviour entailed a risk to any person who might seek to protect their animal from attack as the facts of the offence made clear. The consultant reported that appropriate control measures, such as castration, muzzling, a harness and being on a lead at all times in public could prevent Jago from causing injury, but she emphasised that he required extremely responsible and competent ownership and control.

33. The second factor the Crown Court was required to consider in deciding whether the dog constituted a danger to the public was 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: see section 4(1B)(a)(ii) of the 1991 Act. The owner was Mr Randall and the Court concluded he was not a fit and proper person to be in charge of the dog, finding that he should remain disqualified from owning a dog for 12 months. The only other person put forward by Mr Randall as being fit and proper to be in charge of the dog was his nephew. The Court did not consider whether Leyland Randall was "a person for the time being in charge" of the dog within the meaning of that phrase as addressed in *Webb*, and there does not appear to have been any evidence to suggest that he was. However, even assuming he was capable of being found to be such a person on the limited information that Mr Randall adduced about his nephew, the Court was not satisfied that Leyland Randall was a fit and proper person to be in charge of Jago. On the Crown Court's findings, it necessarily followed that the answer to the question, 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, was 'no'.
34. It was also open to the Court in deciding whether the dog constituted a danger to the public to consider any other relevant circumstances: see section 4(1B)(b) of the 1991 Act. In this case the only other circumstances that the Court considered in deciding to make a contingent destruction of order were that:
 - a. "The police will be in a position to assess the circumstances more fully and if it is appropriate that the dog is rehoused with Leyland Randall then that course remains open"; and
 - b. "for now the dog will remain in the care and custody of the police".
35. In my judgment, the Crown Court's conclusion was not one that was open to the Court, properly applying the statutory provisions.
36. First, it is clear from the transcript that the Court failed to decide whether Jago was a danger to public safety. The discretion in section 4(1A) or in section 4A(4) to make a contingent order only arose if the Court was first satisfied that the dog did not constitute a danger to public safety. Yet, the approach of the Crown Court was in effect to delegate to the police the decision as to who should be put in charge of the dog and, therefore, whether the dog was a danger to the public. That was an error of law. It was not open to the Court to foist onto the Chief Constable the responsibility for identifying someone with the skills to be an extremely responsible and competent owner of the dog.

37. Secondly, the Crown Court failed to take into account whether the owner or the person for the time being in charge of Jago was a fit and proper person. That is a mandatory consideration. Although it follows from the Court's findings that the only conclusion open to it was that the owner or the person for the time being in charge was not a fit and proper person, the Court did not expressly acknowledge this or go on to consider what impact that answer had in deciding whether the dog was a danger to public safety.
38. I agree with the Chief Constable that this criterion carries the same meaning as the identical words in section 4B(2A) that were considered in *Webb*. The term "for the time being in charge" relates to whether the person in question has responsibility for the dog; it 'involves contact in the past or present. It cannot extend to the future'. It would not have been an answer to the question posed by section 4(1B)(a)(ii) for the Court to find that someone who is neither the owner nor a person for the time being in charge of a dog is a fit and proper person to be in charge of it. Although if Mr Randall had identified such a person to whom he was content to pass ownership, and who was willing to commit to taking responsibility for and caring for the dog, if the Court accepted they were fit and proper it seems to me that would be a matter the Court could take into account pursuant to section 4(1B)(b) (this not being a section 1 case).
39. However, that was far from the case. No fit and proper person who was willing and able to take responsibility for the dog was identified. No one to whom Mr Randall was content to pass ownership was identified. Moreover, there was not even a condition that ownership of the dog would pass to whoever the police identified as a fit and proper person to take charge of the dog, assuming such a condition could have been imposed. Although it was ordered that Jago 'be housed with a suitable owner', and it was presumably intended that this third party would have all the rights of ownership, no change of ownership was in fact mandated as part of keeping Jago under proper control. The police do not own Jago and so cannot pass on ownership to anyone else. As a matter of law, no one may give better title than he himself possesses.
40. Thirdly, it is impossible to see how the Court could have been satisfied that the dog was not a danger to public safety, given the uncontested evidence that it required extremely responsible and competent ownership and control to avoid an incident such as had occurred on 17 June 2020 reoccurring, and there was no identified fit and proper owner or person for the time being in charge of him. In determining whether a dog is a danger to the public, it is not only the dog's temperament and past behavior that must be taken into account, but also who is for the time being in charge of the dog: see *Webb* at paragraph 50. The consultant's report made especially clear how important the identity of the person in charge of the dog was on the facts of this case. By adopting an approach which relied on some as yet unidentified person, who was neither the owner nor the person for the time being in charge of Jago, being treated as his future keeper, the Crown court erred in law and reached an irrational decision.
41. The Chief Constable could not be treated as a fit and proper person to take charge of the dog in circumstances where the Chief Constable had not expressed willingness to take ownership in charge of the dog and that was not the effect of the order made. As I say, it was not open to the Crown Court simply to delegate the task of determining who would be a fit and proper owner. For these reasons, and in agreement with the submissions made on behalf of the Chief Constable, I agree that the five grounds relied on are well-founded. It follows that I should quash the order.

42. I am bound to consider whether I should nonetheless make a contingent destruction order or remit the matter for further consideration of whether a contingent destruction order should be made. Mr Goss has helpfully drawn my attention to the case of *R v Devon* [2011] EWCA Crim 1073] in which the Court of Appeal made a contingent destruction order transferring ownership of a dog to a kennels and rehousing centre. As the Court of Appeal observed at paragraph 13 of that judgment, “They are more than able and willing to rehouse the dog with a suitably qualified family within 21 days”. However, first, that judgment was given prior to the amendment of the 1991 Act.
43. Secondly, in this case, the Chief Constable is not able and willing to rehouse the dog. The reality is that there was no fit and proper person before the Crown Court, and it remains the position before me, there is no fit and proper person who is able and willing to take the dog and keep it under control.
44. As I have concluded that on the evidence and findings that the Crown Court made, given the strictures of the statutory scheme, there was only one decision which the Crown Court could have reached, namely that the dog constituted a danger to public safety and must be destroyed, it is appropriate to quash the order and for this Court to take the decision for itself under section 31(5)(b) of the Senior Courts Act 1981. That is not an order that the Chief Constable seeks lightly, or that the Court makes likely, but for the reasons that I have given, it is the inevitable result of the proper application of the statutory provisions.

End of Judgment

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291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

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