

IN THE MAGISTRATES' COURT AT [REDACTED]

B E T W E E N:

[REDACTED]

Appellant

-and-

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondent

SUPPLEMENTARY SKELETON ARGUMENT OF THE APPELLANT
For adjourned hearing of the appeal on 21 March 2022

References in the format [--] are to page numbers in the hearing bundle.

Introduction

1. This an appeal brought under s.46 of the Anti-social Behaviour, Crime and Policing Act 2014 (“**the 2014 Act**”) against a community protection notice issued by the Respondent’s officers on 11 October 2021 (“**the CPN**”) against the Appellant in response to her begging on [REDACTED]. The CPN imposed some 14 conditions on the Appellant, covering a wide range of activity and including a requirement “*not to be anywhere on [REDACTED]*” without a medical or pre-arranged appointment. Grounds of appeal were filed on 27 October 2021, challenging each of the conditions imposed/the underlying conduct said to justify the imposition of the condition. The Court already has the Appellant’s Skeleton Argument of 24 February 2022 setting out her submissions on the appeal.
2. Following directions made by the Court at the previous hearing of 3 March 2022, the issues have been narrowed significantly. This Supplementary Skeleton Argument summarises the Appellant’s position on the CPN, including in relation to the narrower compass of issues that are now before the Court.

The CPN and the original grounds of challenge

3. It is clear from s.43 of the 2014 Act [149] that:
 - (1) An authorised person may only issue a CPN if satisfied that the conduct of the person in question satisfies the criteria in s.43(1)(a) and (b), being that the conduct of the individual concerned is having a detrimental effect of a persistent or continuing nature on the quality of life of those in the locality, and is unreasonable;
 - (2) The requirements imposed by a CPN can only be those that are reasonable to impose in order to (i) prevent the detrimental effect identified pursuant to s.43(1) from continuing or recurring, to reduce that detrimental effect or to reduce the risk of its continuance or recurrence.

4. The CPN [1-3] lists fourteen conditions covering a significant range of activity. The Appellant's position in relation to the CPN is addressed in detail in the Grounds [13-20] and in the Skeleton Argument of 24 February 2022. In summary:
 - (1) Condition 1: The Appellant denies engaging in the alleged conduct. There is in fact no evidence before the Court alleging that she did engage in that conduct.
 - (2) Condition 2, 3, 4, 6, 8 and 9: The Appellant denies engaging in the alleged conduct.
 - (3) Conditions 5, 7, 10: the conduct alleged has not had a detrimental effect on the quality of life of those in the locality and/or is not unreasonable.
 - (4) Conditions 11 and 12: The Appellant denies engaging in the alleged conduct and/or the conduct alleged has not had a detrimental effect on the quality of life of those in the locality.
 - (5) Conditions 13 and 14 are unreasonable due to their extreme width, which leaves the Appellant in a position where she cannot reasonably be expected to understand their scope and regulate her behaviour, and also their effect on the Appellant.
 - (6) In relation to conditions 2, 7, 8, 10 the description of the conduct is impermissibly vague in its factual description of the conduct and/or in its use of legal terms as part of the definition, and this should weigh in favour of a conclusion that an appeal on any or all or any combination of the alleged grounds in s.46(1) is made out.
 - (7) Conditions 2, 5, 6, 7 and 8 appear, in the Appellant's submission, to be conditions targeting those who live on the streets and who are poor, and contravene the Appellant's rights under Article 8 of the ECHR.

- (8) Conditions 5 and 7 amount to a unlawful blanket ban on begging that is contrary to Articles 8 and 10 of the ECHR (particularly the former).
- (9) The Appellant also alleges that there was a material defect or error in or in connection with the CPN due to the failure to comply with s.43(5).

The adjourned appeal hearing of 3-4 March 2022 and the matters addressed in this Supplementary Skeleton Argument

5. The appeal was listed for directions on 16 December 2021. The substantive appeal was subsequently listed to be heard before this Court on 3-4 March 2022, on the basis that the CPN had 14 conditions, all of which were being pursued by the Respondent. On 3 March 2022 at 9:28 am, 30 minutes before the start of the intended first day of the appeal hearing, the Respondent filed and served its Skeleton Argument for the appeal hearing indicating, as dealt with below, a significant change of position on the part of the Respondent. Also on 3 March 2022, the Respondent applied for an adjournment on the basis that counsel for the Respondent had contracted COVID-19 and was too unwell to properly represent her client at the hearing. District Judge Law (“the Judge”) granted the adjournment sought.
6. The parties were directed to address the following issues as identified by the Judge at the adjourned hearing of 3 March 2022:
 - (1) Who bears the burden on the legal issues;
 - (2) The real issues in the case/the legal test the court is being invited to apply;
 - (3) Order of proceedings;
7. Pursuant to directions made by the judge on 3 March 2022, the parties have produced the Agreed Summary of Issues. The agreed position on point (3) is set out in the Agreed Summary of Issues. This Supplementary Skeleton accordingly addresses issue (1) and (2) below. The Appellant has also filed a supplementary bundle containing documents that were not able to be included in the main hearing bundle.

Who bears the burden on the legal issues

8. The following general propositions are relevant:

- (1) The question of the burden of proof is one of statutory construction: *R. v Hunt* [1987] A.C. 352 per Lord Griffiths at 380: “*Where Parliament has made no express provision as to the burden of proof, the court must construe the enactment under which the charge is laid. But the court is not confined to the language of the statute. It must look at the substance and the effect of the enactment.*”
 - (2) Per Lord Hope in *Sanderson v McManus* 1997 S.C. (HL) 55 at 63: “*It is of course true... that questions of onus usually cease to be important once the evidence is before the court. The matter then becomes one of overall impression, balancing one consideration against another...*”.
 - (3) “*One of the most basic rules of litigation is that he who asserts must prove*”: *Sadovska v SSHD* [2017] 1 WLR 2926 (SC) per Lady Hale at [28].
9. As to the Court’s jurisdiction and the statutory context here, a relevant feature of s.46 of the 2014 Act is that it grants the Court wide powers to review a CPN:
- (1) By s.46(1), the Court is empowered to adjudicate on challenges to every aspect of the conduct justifying the issue of a CPN;
 - (2) By s.46(2), the Court is empowered to adjudicate on the ‘reasonableness’ of any requirements imposed or any temporal limits imposed on the CPN;
 - (3) By s.46(3) the Court is empowered to address whether there has been a material error or defect in “*or in connection with*” the CPN; the latter wording would extend to procedural errors in the way the CPN was made as well as its substance.
 - (4) The Court is empowered to quash the CPN by s.46(4).
10. The Court’s jurisdiction as granted under s.46 is, thus, a broad one. There are significant parallels to the jurisdiction of the Administrative Court on a judicial review.
11. Taking those points together, the Appellant’s submission on the standard of proof are as follows:
- (1) It follows from the statutory procedure that the Appellant must initiate the appeal and set out the grounds on which the CPN is said to be unlawful. It follows that, in technical terms, the legal burden of proof falls on the Appellant, at least initially.
 - (2) Once the Appellant has initiated their appeal, the Court must turn to determine the questions that arise under s.46 of the 2014 Act. In order to do this, however, the Court must understand the basis on which the CPN has been issued and is said to

be in accordance with the statutory criteria. By way of example, in order to determine whether conduct did not take place (s.46(1)(a)), the Court must be in a position to understand what conduct is alleged to have taken place; or in order to determine whether the conduct has not had a detrimental effect on the quality of life of those in the locality (s.46(1)(b), it must be in a position to understand what the alleged detrimental effect is (and also what the conduct is).

- (3) It follows, therefore, that once the Appellant has put forward an arguable case on appeal, the burden swings to the Respondent to ensure those counter-points are established. This ‘swinging burden’ has been described as a feature of all civil litigation: see, in the context of business rates disputes, *Ratford and Another v Northavon District Council* [1987] Q.B. 357 (CA) per Slade LJ at 370 – “*like all cases of the burden of proof in litigation, it is a swinging burden.*’ *As the evidence of varying weight develops before the magistrates, the eventual burden of proof will, in accordance with ordinary principles of evidence, remain with or shift to the person who will fail without further evidence.*”
- (4) The more detailed the arguments made in support of the appeal, and the greater the difficulty in identifying the basis on which the CPN satisfies the relevant statutory criteria for its issuance, the more definite the ‘swing’ of the burden to the Respondent.

The real issues in this appeal/the test the Court is being asked to apply

12. By its Skeleton Argument filed and served on 3 March 2022, the Respondent:
 - (1) made no submissions on the lawfulness of the specified conduct as described in the CPN;
 - (2) made no submissions on the lawfulness of the conditions imposed in the CPN;
 - (3) instead submitted that the Court should exercise its jurisdiction under s.46(4)(b), which only arises on an appeal, to modify the CPN, so as to:
 - (a) modify the nature of the conduct alleged to constitute the justification for the imposition of the CPN “*to that which is set out in the statements of [REDACTED] and [REDACTED]*”;
 - (b) impose new, different prohibitions:

- (i) that the Appellant not “*sit directly outside the entrance of*” [REDACTED] and [REDACTED] on [REDACTED]; (“**new condition i**”);
- (ii) that the Appellant not be “*in possession of signage indicating the request for monies which constitutes begging*” outside of either establishment (“**new condition ii**”);
- (iii) that the Appellant be prohibited from entering either establishment “*without a valid reason i.e. to purchase goods*” (“**new condition iii**”);
- (c) impose a new requirement to take reasonable steps to achieve specified results, being to continue to engage with staff and support workers at [REDACTED] and [REDACTED].

13. The Respondent’s Skeleton Argument did not seek to justify the lawfulness of the CPN in its current form. Nor did it put forward any submissions justifying the conditions or description of conduct in the CPN or responding to the criticisms made by the Appellant. Further, and problematically in the Appellant’s submission, the conduct relied upon for the new conditions was not specified, but indicated by a general reference to the statements of the third parties on which the Respondent relies.

14. The parties have narrowed the compass of the dispute further in the Agreed Summary of Issues. The alleged conduct is now specified as “*Begging outside* [REDACTED] *and* [REDACTED] *on* [REDACTED] *including sitting on the street with signage requesting money*”; the Appellant **admits** this conduct. As a result, the position now is that there is no factual dispute as to the conduct that is alleged to form the basis for the CPN.

15. The position of the Respondent in relation to modification of the CPN remains as per the Skeleton Argument of 3 March 2022, in that the Respondent is seeking the imposition of the three new conditions but, it is now clear, only on the basis of the admitted conduct.

16. Section C of the Agreed Summary of Issues sets out the list of issues for determination. The way in which those issues have been formulated also indicates the parties’ agreed position on the relevant legal test for the Court. The list of issues is repeated here for convenience:

- (1) Whether the alleged conduct is having a detrimental impact on the quality of life of those in the locality.
 - (2) Whether the alleged conduct is unreasonable.
 - (3) Whether the alleged conduct is conduct that the Appellant can reasonably be expected to control.
 - (4) Whether the Respondent's proposed requirements are reasonable.
 - (5) Whether there is a material defect or error in, or in connection with, the notice.
 - (6) Whether the proposed requirements would result in a breach of the Appellant's ECHR rights under Article 8 and/or 10.
 - (7) What remedy should be granted (i.e. whether the CPN should be quashed or modified).
17. As to disposal of the appeal, the Appellant makes the following points.
18. The appeal against the CPN remains before the Court and must be disposed of. In the Appellant's submission, there is no basis on which that appeal could be dismissed in circumstances where the Respondent does not seek to justify the CPN in its current form or evidence a factual basis for the conditions it imposes. The Appellant's arguments, as set out in the Grounds and developed in the Skeleton Argument of 24 February 2022, are cogent and should be accepted.
19. The next question is whether the Court should modify the CPN as requested by the Respondent. The Appellant's position is that the Court should not do so, but should instead quash the CPN, for the following reasons:
- (1) The Court's power under s.46(4)(b) to modify the notice must, as a matter of statutory construction, have a limit:
 - (a) It would not be open to the Court to substitute an entirely new notice. The 'notice' that is referred to in s.46(4) must be the same 'notice' that is referred to in s.46(1). The example given in s.46(4)(b) "*for example by extending a period specified in it*" is, it is submitted, indicative of the type or extent of modification envisaged by Parliament.
 - (b) A CPN that is issued without providing the recipient with a written warning pursuant to s.43(5) would be unlawful. If the Court were to seek to 'modify' the CPN so that the conduct that forms the basis for it would be changed or

would need to be changed, that would have the effect of denying the recipient of the notice the right granted by statute under s.43(5). It cannot have been Parliament's intention for the s.46(4)(b) power to be exercised so as to circumvent the protection afforded to recipients of a CPN by s.43(5). If the statute were to be read so as to provide for such a broad power to modify, it would correspondingly create problems in interpreting the right of appeal under s.46(3). A failure to provide a written warning under s.43(5) would allow a recipient to succeed on an appeal under s.46(3) or possibly 46(1)(d), on the basis that a statutory prerequisite for issuance of a CPN has not been met. If the Court could modify a CPN to include different conduct to that originally alleged, that would either mean that the modified CPN would by definition fall to be quashed under s.46(3) or 46(1)(d), or that that right of appeal would also be taken to be denied. Both scenarios highlight the problematic nature of such an interpretation of s.46(4)(b). In contrast, extending the period within which a requirement is to be complied with (the example given in s.46(4)(b)) would not undermine the protection granted to the recipient by s.43(5), because the conduct which formed the basis for the written warning would not have changed.

- (c) The conduct that forms the basis for the proposed new conditions is different to that that formed the basis for the CPN. The Appellant has not been given the opportunity to modify her behaviour in response to a warning that she should not continue *that* conduct (i.e. the admitted conduct). As the Respondent is seeking to 'modify' the conduct that forms the basis for the CPN, that has the effect of circumventing the protection provided by s.43(5). The fact that acceding to the Respondent's request would have this effect is a strong indication that the course of action that the Respondent invites the Court to take is one that is outwith the Court's powers under s.46(4).
- (2) In any event, even if there were no jurisdictional issue, the proposed new conditions would be unlawful:
- (a) new conditions i and ii are unlawful for the same reasons that conditions 5 and 7 of the CPN are unlawful, and the Appellant repeats her submissions in relation to those grounds, as set out in her Grounds and Skeleton argument of 24 February 2022;

- (b) new condition 3 is unlawful because it is (i) vague as to the conduct prohibited in similar terms to condition 10, (ii) the underlying conduct justifying the prohibition is not specified and in any event not made out, (iii) the conduct, even it were specified and made out, has not had a detrimental effect on the quality of life of those in the locality and/or (iv) the condition is unreasonable because of all or any combination of those reasons.
- (c) On either or both of those bases, the justification for imposing the requirement to engage with [REDACTED] and [REDACTED] would also fall away.

CONCLUSION

- 20. For all those reasons and the reasons set out in the Appellant's Grounds and Skeleton Argument of 24 February 2022, the Appellant respectfully invites the Court to allow the appeal and quash the CPN.

17 March 2022

ADMAS HABTESLASIE

Landmark Chambers

ANGHARAD MONK

Garden Court Chambers

LIBERTY