Neutral Citation Number: [2008] EWHC 2623 (Admin)

Case No: CO/1607/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2008

Before:
LORD JUSTICE SCOTT BAKER
-and-
MR JUSTICE AIKENS

- -

Between:

ASHLEY LANGLEY	**Claimant**
- and -	
PRESTON CROWN COURT	**Defendant**
-and-	
WEST LANCASHIRE DISTRICT COUNCIL	**First Interested party**
-and-	
THE SECRETARY OF STATE FOR JUSTICE	**Second Interested Party**

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James Hawks (instructed by **Canter Levin & Berg**) for the **Claimant**
Paul Burns (instructed by **West Lancashire District Council**) for the **First Interested Party**
Tim Ward (instructed by the **Treasury Solicitor)** for the **Second Interested Party**

Hearing date: 13 October 2008

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Judgment

Lord Justice Scott Baker :

This is the judgment of the court.

1. The claimant, Ashley Langley, is the subject of a 'stand alone' anti-social behaviour order (an "ASBO") i.e. it was not made following a criminal conviction. He seeks judicial review of the Preston Crown Court's refusal to entertain an appeal from the Chorley justices' variation of that order on 17 August 2007. The case raises a fundamental and important point of law, which, we were told, will have widespread application, namely whether a right of appeal against a variation of a "stand alone" ASBO by a magistrates' court lies to the Crown Court.

The facts

2. The material facts are uncontroversial and are as follows. On 20 February 2004 the West Lancashire District Council ("the Council") obtained a 3½ year 'stand alone' ASBO against the claimant in the Chorley magistrates' court under s.1(1) of the Crime and Disorder Act 1998 ("the Act"). It was due to expire on 19 August 2007. In July 2007 the Council laid a complaint under s.1(8) of the Act to vary the ASBO by extending it for two years. On 17 August 2007 the Chorley justices granted that application. The order provided under the heading "**date**" that the order was made 20 February 2004 and varied on 19 April 2004, 26 October 2006 and 17 August 2007." It recorded under the heading "**decision**":

"The court found that:

i) The defendant has acted in an anti-social manner, which caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the defendant;

AND

ii) This order is necessary to protect persons from further anti-social acts by the defendant;

AND

iii) See schedule of facts/reasons attached."

The schedule describes how the claimant had been convicted of breaking the terms of the ASBO on four occasions between June 2005 and January 2007 and been sentenced to a total of 24 months in custody during this period and to a further 4 months imprisonment after January 2007 for an offence of battery and breach of the ASBO. It concluded that an extended ASBO was necessary in order to provide ongoing protection for the community.

3. The appellant appealed to the Crown Court against this variation and the matter came before Judge Nield sitting with two justices. They decided they had no jurisdiction for reasons set out in a reserved judgment.

The statute

4. S.4 of the Act, as amended, provides:

> "(1) An appeal shall lie to the Crown Court against the making by a magistrates' court of an anti-social behaviour order, an individual support order, an order under section 1D above.
>
> (2) On such an appeal the Crown Court -
>
> > (a) may make such orders as may be necessary to give effect to its determination of the appeal; and
> >
> > (b) may also make such incidental or consequential orders as appear to it to be just.
>
> (3) Any order of the Crown Court made on appeal under this section (other than one directing that an application be reheard by a magistrates' court) shall, for the purposes of s.1(8) 1AB(6) above, be treated as if it were an order of the magistrates' court from which the appeal was brought and not an order of the Crown Court."

An order under s.1D is an interim ASBO. S.1AB(6) relates to individual support orders that are irrelevant to the present case.

S.1(8) provides that:

> "Subject to subsection (9) below, the applicant or the defendant may apply by complaint to the court which made an anti-social behaviour order for it to be varied or discharged by a further order."

Subsection 1(9) provides that:

> "Except with the consent of both parties, no anti-social behaviour order shall be discharged before the end of the period of two years beginning with the date of the service of the order."

Subsections 2(6) and (7) (now repealed) contained identical provisions with regard to sex offender orders except that the period during which they could not be discharged was five years rather than two.

5. The right of appeal under s.4(1) lies against "the making by a magistrates' court of an anti-social behaviour order." S.1(8) refers to variation or discharge *by a further order*. On the face of it, a further order granting a variation is an anti-social behaviour order within the meaning of s.4(1). As Mr Hawks, for the applicant puts it, the variation order is itself an ASBO. After 17 August 2007 the appellant could only break the later order; the earlier order was discharged by implication. By subsection 4(1) an appeal lies against *the making* of an order. So, submits Mr Hawks, the question is whether the order was *made* on 17 August 2007, because if it was then an appeal lies against it under the subsection. The alternative construction is that the variation is not a fresh order within the meaning of s.4(1) but an extension of the original order.

6. On any view there is no right of appeal against the *discharge* under s.1(8) of an ASBO, nor, it should be noted, does s.4(1) give any right of appeal against the refusal by a magistrates' court to make an ASBO. Mr Hawks submits that the fact that the order of 17 August 2007 arose from a variation application does not preclude that order from constituting "the making" of an ASBO by a magistrates' court, thus falling within s.4(1).

Discussion

7. We think the starting point is s.1 of the Act and to see what must be established before an ASBO can be obtained. It provides as amended:

> "An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely –
>
> (a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
>
> (b) that such an order is necessary to protect relevant persons from further anti-social acts by him."

8. There are therefore two distinct features that must be established (1) past behaviour and (2) a need to protect relevant persons from future possible anti –social acts by the subject of the ASBO. As Buxton L.J. pointed out in *R (on the application of Manchester City Council) v Manchester Crown Court* (unreported 13 October 2000) at para 11, the provisions of variation or discharge are in the Act to deal with change of circumstances or potentially with the passage of time, where the offender is able to come back to the court and say he has mended his ways, left the area, got a proper job or any other considerations which may lead the court to think that the prohibition on him can be lifted. S.1(8) makes it clear that either side can come back to get a variation.

9. Variations by extension of time will focus not on the first criterion, whether the defendant's past behaviour warrants the making of an order, but on the second, whether the order continues to be necessary. The type of factual disputes that are likely to arise in relation to a defendant's past behaviour are unlikely to trouble the court on a variation application. On a variation application, by either side, the magistrates' court will be concentrating on whether, as a matter of judgment, the current state of affairs concerning the subject of the ASBO warrants a change in the conditions in the ASBO. The need for a full right of appeal to the Crown Court, on both the facts and the exercise of judgment by the court, is less apparent.

10. There is no authority directly on point on the true construction of s.4(1), although Latham L.J., giving the judgment of the court in *Leeds City Council v RG* [2007] 1 WLR 3025, had no doubt there was no right of appeal against the decision to vary an ASBO. He said at para 11:

> "The fact that there is no appeal from any variation is a matter which has caused us concern. But it seems to us this is insufficient in itself to justify a departure from the clear meaning of the subsection. The protection for a defendant is, in our view, provided by the fact that an application to vary, if it imposes more stringent obligations (such as greater length) on a defendant, can only succeed if the applying authority can put before the justices material which justifies the extension as necessary in order to achieve the statutory objective. The usual burden and standard of proof will apply to the determination of that question. Further, in an application to vary length the applying authority will have to persuade the justices that it is appropriate to vary the length of the existing ASBO rather than make application for a new one. There would be a clear rationale for example, for asking for an extension of an ASBO for less than two years, on the basis that the authority did not consider that it was necessary to have a further period as long as the minimum period of two years which would be necessary were a fresh ASBO to be ordered."

11. Mr Hawks submits that the point was not argued in *RG* and that certainly appears to be so. Nevertheless, the decision was the decision of the court and the observations of Latham L.J. were made in a reserved judgment.

12. Mr Hawks relies on the words of Lord Bingham C.J. in *B v Chief Constable of Avon and Somerset Constabulary* [2000] 1WLR 340 para 34:

> "Had he regarded the terms of the order as obscure or unduly restrictive it was open to him to apply for a variation, and, if that application was unsuccessful, to appeal."

Now that was a case that concerned a sex offender order and s.2 of the Act (now repealed) but, for present purposes, there is no material difference in the provisions from those in the present case. In our view, however, it is reading too much into the words of Lord Bingham to conclude he was saying there was a right of appeal against a refusal of a variation order. Buxton L.J. at para 17 in the *Manchester City Council* case thought that what Lord Bingham had in mind was an application for a variation by asking the court to elucidate what the order meant. We think it unlikely that the issue of an appeal from the magistrates' court to the Crown Court had been fully argued before Lord Bingham.

13. Mr Hawks submits that virtually all decisions of magistrates are appealable on the facts and that it would be unfair if the original order is appealable but a variation of it is not. Mr Burns, for the local authority, does not agree. He points out that these proceedings are civil in nature rather than criminal. See *R (McCann and others) v Crown Court at Manchester and another* [2003] 1 AC 787 and that there is, for example, no right of appeal against the refusal by magistrates to vary or discharge a restraining order under s.5(4) of the protection from Harassment Act 1997.

14. In *Lee v Leeds Crown Court* [2006] EWHC 2550 Admin the appellant appealed against the refusal of the Leeds magistrates to vary or discharge a restraining order

under the Protection from Harassment Act 1997. The recorder at the crown court ruled the court did not have jurisdiction to hear the appeal. Because s.5(4) was silent as to any right of appeal it was accepted that the only possible avenue was the general right of appeal under s.108 of the Magistrates Court Act 1980. This, however, did not avail the appellant because the decision sought to be appealed did not fall within the meaning of the word "sentence" in that section. Bean J. pointed out that, absent any right of appeal under the Protection from Harassment Act 1997, there would, in appropriate circumstances, be a remedy by judicial review or case stated on a point of law. Neither the fact that these are civil proceedings nor the decision in *Lee* or the observations of Latham L.J. in *RG* assist Mr Hawks' construction; if anything the reverse.

15. It is important to look at one consequence if Mr Hawks' construction is correct. On his argument a right of appeal arises under s.4 because the variation under s.1(8) creates a fresh ASBO. Mr Hawks, however, accepts that the consequence of this is that s.1(9) then bites, so that the fresh order cannot, absent the agreement of both parties, be discharged for two years after it has been served. That would in our view be a most surprising result. Furthermore, if the parties did not agree, s.1(9) would be applicable in every case where there was a variation, whatever its nature, and the order could not be discharged for two years. A variation of an ASBO will not necessarily be by extension of its period; it will often be as to the ambit of the order e.g. by geographical area. It would be odd if a decision to extend its area of operation by say 100 yards had the effect that it had to continue for another two years. In our view this strongly militates against the correctness of Mr Hawks construction.

16. As well as the jurisdiction to make freestanding ASBOs of the kind in the present case, ASBOs can also be made under the Act in county court proceedings (s.1B) and on conviction in criminal proceedings (S.1C). A look at how those provisions operate illustrates, in our view, that it is unsurprising to find no right of appeal against a variation in the present case.

17. The criteria for making an ASBO are identical in county court proceedings (see S.1B(4)) and almost identical for making an ASBO following a conviction (see S.IC(2)).

18. The appeal route is, however, different in the case of ASBOs made by the county court. The right of appeal under s.4 applies to orders made in the magistrates court and that section applies, on its face, both to free standing ASBOs and ASBOs made following conviction. County court appeals generally are governed by CPR 52. S.1B of the Act makes no specific provision for appeals in relation to ASBOs from the county court and they therefore must fall within the standard procedure for civil appeals. The following features of civil appeals are important: (i) an appeal requires permission and (ii) an appeal is ordinarily by way of review rather than by way of rehearing. In county court proceedings there is no distinction between the rights of appeal against the making of an original ASBO and its subsequent variation.

19. S.1B(5) gives a right to apply to vary a county court ASBO in substantially the same terms as s.1(8). S.1B(6) is in substantially the same terms as s.1(9) as to the two year prohibition against discharge.

20. Power to vary an ASBO made on a criminal conviction was introduced by s.140 of the Serious Organised Crime and Police Act 2005 and is to be found in s.1CA of the Crime and Disorder Act 1998. S.1CA(7) contains the familiar restriction against discharge of an ASBO for the first two years. S.1CA gives no right of appeal against the variation or discharge of an order.

21. Where an ASBO is made following a conviction in the Crown Court, an appeal lies to the Court of Appeal (Criminal Division) as it would be "an order made by a court when dealing with an offender" and thus be appealable under s.50 of the Criminal Appeal Act 1968 (see also s.9 of that Act). Leave to appeal, under s.31 of the Criminal Appeal Act 1968 would have to be obtained. Although we heard no argument on the point, a variation of an ASBO which was made by the Crown Court would, at least arguably, also fall within the description of an "order made by a court when dealing with an offender" and thus also be appealable to the Court of Appeal (Criminal Division). The provisions of the Criminal Appeal Act 1968 do not of course apply to a magistrates' court order. It would seem that the only right of appeal on the facts is by s.4 of the Act. It was also accepted by all appearing before us that there would also be a right to appeal on the law by way of a case stated and judicial review of any decision of the magistrates relating to an ASBO.

22. In summary, therefore, in the county court there is a right of appeal against an ASBO and its variation to the High Court or Court of Appeal as appropriate, but only with permission. Permission would only be given if an appeal had a real prospect of success or there was some other good reason. There would only exceptionally be a rehearing. An ASBO, and probably a variation of an ASBO, made on conviction in the Crown Court is appealable to the Court of Appeal (Criminal Division) but only with leave, and an appeal would ordinarily only be allowed if the decision was wrong in principle or in some way manifestly excessive. An ASBO made in the magistrates' court on conviction is, we think, appealable to the Crown Court under s.4 of the Act in the same way as a freestanding ASBO but in neither case is there a right of appeal against a variation of the original ASBO. Case stated and judicial review, are remedies available against the magistrates court but not the County Court.

23. When considering whether Parliament intended to give a defendant a right of appeal from a variation of an ASBO that was made in the magistrates' court, we think that it is important to remember that the procedure resulting in an ASBO (or its variation) is always civil in nature. We accept that an ASBO is a hybrid animal in the sense that an order can be made in the county court (under s.1B), as a free – standing order in the magistrates' court without conviction (as in the present case) and in the magistrates' court and the Crown Court after conviction (under s.1C). We think the Parliament would intend to give rights of appeal, at least in cases of variation of ASBOs, that were comparable. Thus, in the county court, there is, effectively, no right of appeal (to the High Court or the Court of Appeal as appropriate) on fact because there can only be an appeal with permission and the appeal will be in the nature of a review, not a rehearing. In the case of a variation in the Crown Court, there is only a right of appeal under the Criminal Appeal Act 1968 if leave to appeal is given. That will only be done if the variation was wrong in principle or manifestly excessive. Thus, it is logical that, in the case of variation of ASBOs by the magistrates' court, there should not be an appeal on fact, but there will be a right of review by way of case stated or judicial review. In all cases, the appellate court is able to consider the key issue that will arise

on a variation of an ASBO, i.e. whether the exercise of judgment that a variation was necessary, was reasonable, rational and proportional. There is also the point that court time is a finite resource and it is understandable that Parliament would wish to avoid creating avenues for appeal that are not really necessary .

24. We were told in the course of argument that there have been attempts to get round the absence of a right of appeal against the variation of an ASBO by seeking leave to appeal out of time against the original ASBO. This course was followed in *R v Bradfield* [2006] EWCA Crim 2917 which was a case under the Protection from Harassment Act 2007. For our part, where Parliament has decided not to grant a right of appeal against a variation, we would regard it, save in the most exceptional circumstances, as an abuse of process to allow an appeal to go forward out of time against the original order.

Article 6 of the ECHR

25. The second issue is whether if there is no right of appeal to the Crown Court, there has been a breach of Article 6 of the European Convention on Human Rights and Fundamental Freedom. Article 6.1 provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

26. It is common ground that the right to a fair hearing under Article 6 does not require a right of appeal, let alone a right of appeal by a way of rehearing see *Delcourt v Belgium* (1970) 1EHRR 355. Mr Hawks' argument is that where procedures are in place they must be Article 6 compliant. He submits that unfairness arises in the present case because of the discrepancy between the unfettered right of an appeal by a way of rehearing that a defendant has when he is first made the subject of an ASBO and the limited redress available to him on a variation. He argues that the Council could perfectly well have applied for a fresh ASBO instead of a variation in which case the appellant would have had a right of rehearing in the Crown Court.

27. Mr Burns for the Council and Mr Tim Ward, for the Secretary of State, make the following submissions:

- It is unusual to have a right of appeal by rehearing in proceedings of a civil nature.
- There was a full hearing in the present case before the magistrates that was Article 6 complaint.

- Any defendant who is the subject of an application to vary an ASBO is by definition already subject to one. The magistrates must, when making the ASBO, have concluded the statutory criteria were satisfied. That first hearing attracted a right of appeal.

- The remedies of case stated on a point of law and judicial review are both available. The case of *Samuda v DPP* [2008] EWHC 205 Admin shows that on a case stated (and we would have thought also on judicial review) the court will look closely at the proportionality of the restriction.

- The right to apply to the magistrates for a variation is in itself a valuable safeguard for a defendant.

28. We are completely satisfied that there is nothing remotely approaching a violation of Article 6 in this case.

Conclusion.

29. On the true construction of s.4 of the Crime and Disorder Act 1998, as amended, there is no right of appeal against a decision by the magistrates' court to vary or discharge an ASBO. The absence of such right of appeal does not amount to a violation of Article 6 of the ECHR. Accordingly we refuse the application for judicial review.