Neutral Citation Number: [2024] EWCA Civ 230

Case No: CA-2023-001038

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SWINDON LAW COURTS (CIVIL, FAMILY AND MAGISTRATES)
DISTRICT JUDGE HATVANY
J00SN129

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08 March 2024

Before:

LORD JUSTICE SINGH
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE EDIS

- -

Between:

SWINDON BOROUGH COUNCIL	**Appellant**
- and -	
MR DANIEL ABROOK	**Respondent**

- -
- -

Iain Wightwick (instructed by **Swindon Borough Council**) for the **Appellant**
The Respondent did not appear and was not represented
Cecilia Ivimy (instructed by **The Treasury Solicitor**) as Advocate to the Court

Hearing date: 23 January 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on 8 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This appeal concerns 'anti-social behaviour' for the purposes of Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 ('the Act'). The short question of principle raised by the judgment below is whether 'passive' begging is such behaviour, or whether begging is not anti-social behaviour unless it is also 'aggressive'. As will become clear, the right question, rather, is whether the behaviour of a respondent has caused, or is likely to cause, harassment, alarm or distress. The answer to that question depends on the proper construction of the relevant provisions of the Act, read in their statutory context, and on their application to the facts of this case.

2. The Appellant is Swindon Borough Council ('the Council'). The Council obtained an anti-social behaviour injunction dated 11 April 2022 ('order 5') against the Respondent, Mr Abrook. Order 5 was discharged by District Judge Hatvany ('the District Judge') on 8 May 2023 ('the Order'). He gave his reasons in an ex tempore judgment ('the Judgment'). In essence, the District Judge decided that Mr Abrook had engaged in 'passive' begging rather than 'aggressive' begging, and so he should discharge order 5.

3. He gave the Council permission to appeal, because, as he noted in his reasons for giving permission, there is doubt about the general question raised by this appeal. In view of the general importance of that point, he also made an order transferring the appeal from the county court to this court. He also gave permission to appeal on four further essentially procedural grounds (see paragraph 77, below). By an order dated 4 July 2023, Andrews LJ accepted that transfer. As Mr Abrook was a litigant in person, she also ordered the papers to be served on the Attorney General with a view to the appointment of an advocate to the court (formerly known as an amicus curiae). The Attorney General duly instructed Ms Ivimy as advocate to the court. We have been much helped by her lucid and careful written and oral submissions.

4. Mr Abrook has taken no part in the appeal. I am satisfied by information from the Civil Appeals Office that this court notified him of the hearing date of this appeal, by post, on four separate occasions. I infer that he chose not to attend the hearing. The Council was represented by Mr Wightwick, who was instructed by the Council's solicitor, Mr Bigwood. Mr Bigwood represented the Council at the hearing before the District Judge. He also drafted the Council's skeleton argument for this appeal.

5. For the reasons given in this judgment, I would allow the Council's appeal on all five grounds of appeal.

The facts

6. There are few relevant findings of fact in the Judgment, and few relevant documents in the bundles of documents for this appeal. What emerges from such evidence as we have read, in short, is that Mr Abrook is a persistent beggar in Swindon. He is not homeless but gives the impression to the public that he is, and he is also addicted to Class A drugs.

7. Mr Abrook has been the subject of several orders over the years. I now summarise the effect of the orders which were in the supplementary bundle for this appeal.

8. On 7 November 2016 there was a hearing which he did not attend. He had been personally served with the papers. At that hearing, a District Judge made, on the application of the Council, an order pursuant to Part 1 of the Act ('Order 1'). Order 1 prohibited Mr Abrook, for a year, from begging, or sleeping rough, sitting on the ground or on the pavement, or shouting or swearing at police officers, or officers of the Council, or verbally abusing them, in an area of Swindon shown on a plan which was attached to that order. A penal notice was endorsed on Order 1 and a power of arrest was attached to it. The Council relied on witness statements from PC Thompson, G Hesketh, J Kirby, W Whyte, Mrs Turner and I Napier. We have not seen those witness statements.

9. District Judge Cronin made a further order varying Order 1 on 19 December 2016 ('Order 2'). Mr Abrook did not attend the hearing. District Judge Cronin extended the area within which the order applied to the whole of the Borough of Swindon. A penal notice was endorsed on Order 2 and a power of arrest was attached to it. Again, Mr Abrook did not attend the hearing, but he had been personally served with the papers, as recorded in a recital to Order 2. District Judge Cronin relied on a further witness statement, dated 15 December 2016, from Mr Napier.

10. On 30 October 2017, the District Judge considered a third application to vary Order 1. Order 1 was then varied by the deletion of the prohibition on sitting on the ground or on the pavement ('Order 3'). A penal notice was endorsed on Order 3 and a power of arrest was attached to it. A recital to Order 3 recorded that the order had been varied a second time on 15 August 2017. Order 3 recorded that the District Judge read a bundle of documents, but does not describe those in any detail.

11. On the same date, Mr Abrook, who was suspected of a breach of Order 2, and had been arrested, was brought before the District Judge. The District Judge made an order ('Order 4') committing Mr Abrook to prison for 8 weeks for contempt of court. The order was suspended until 7 November 2018, on the four conditions stated in order 4. The court read a paginated bundle and various affidavits. Neither their deponents nor their dates are specified in order 4. The contempt was described as 'allegations 1 and 2 as set out in the attached schedule'. Those are allegations that, on Monday 16 October 2017, Mr Abrook begged close to a specific payment machine and in a particular thoroughfare in Swindon. An elderly woman and a married couple had complained to the police about the second episode of begging. Order 4 recorded in a recital that Mr Abrook had been committed for contempt on 20 September 2017 for a period of six weeks.

12. On 11 April 2022, on the application of the Council, a District Judge made a further order against Mr Abrook ('Order 5'). Mr Abrook attended the hearing. He indicated that he was aware of the application and willing to comply with the order which was the subject of the application. A recital to Order 5 recorded that Mr Abrook had changed his address. A further recital recorded that District Judge was satisfied that Mr Abrook had 'engaged in' or had 'threatened to engage in' anti-social behaviour.

13. Paragraphs 3)-9) of Order 5 restrained Mr Abrook, until further order, from doing seven types of act in the borough of Swindon:
    i. Begging (paragraph 3)),
    ii. sitting on the ground or pavement in any public space (paragraph 4)),

iii. sitting within 20 metres of any pay and display parking machine (paragraph 5)),
iv. acting in a way which was likely to cause alarm harassment or distress to any person (paragraph 6)),
v. having any needle or sharp or pointed object in any public place (other than objects which might be required for the purpose of administering any medication which had been lawfully prescribed for Mr Abrook (paragraph 7)),
vi. discarding any needle or sharp or pointed object in any public place (paragraph 8)) and
vii. defecating or urinating in any public place (other than in a public convenience) (paragraph 9)).

14. The District Judge read three witness statements: by Mr Archer (signed on 18 March 2022), by Police Community Support Officer ('PCSO') 6255 Sims (signed on the same date), and by Mr Napier (signed on 29 March 2022).

15. Mr Archer's statement described several occasions when Mr Abrook had been seen begging. It asserted (in paragraph 14) that his activities 'caused the businesses in the town centre a great deal of alarm, distress and harassment. This behaviour needs to be stopped as soon as possible in order to prevent any further damage to the businesses'.

16. The statement of PCSO Sims, who had issued Mr Abrook with a community protection notice ('CPN'), said that Mr Abrook's behaviour included 'constant begging' which was causing 'harassment alarm and/or distress to local residents and local business owners'. On the last two pages of her witness statement, she gave a list, from police records, of eight occasions between 19 November 2021 and 4 February 2022 when he had been seen begging, a further occasion when he had been begging 'aggressively'. She also said that on 11 March 2022 he had been seen defecating in public outside a Tesco Superstore.

17. The local police, she said, had 'reasonable grounds to suspect that [Mr Abrook] was having a detrimental effect on the quality of life' of others in the local area. 'This is due to his persistent begging while loitering and undertaking nuisance behaviour …This is causing harassment alarm and distress to members of public, residents and business owners'. She described begging by people who are housed, and who beg to feed their drug habits. They were leading people who gave money to them to believe they were homeless when they were not. Members of the public had given Mr Abrook food many times. He did not want it and 'has been seen to chuck this food away.'

18. He has been 'aggressive' to the police when they have tried to move him on. He returned to the same spot within a few hours. He is normally seen with 'his bedsheets, alluding to being homeless', yet he was housed in Booth House. He was at risk of losing that accommodation, which would exacerbate his 'ASB'. He had been known in the past to leave discarded needles, other drugs paraphernalia and human waste in public. 'This can be extremely intimidating to businesses, and people arriving into Swindon'. Proceeding against Mr Abrook for a summary offence would only lead to a fine and could take two to three months. This would be 'counterproductive as financial penalties would have no impact on his circumstances'.

19. He had not 'engaged with Turning Point, despite their best efforts. They [were] continuing to reach out to him'. She added that an order with 'a positive engagement' provision would give him 'the best opportunity to get help for his class A drug addiction and help reduce/stop ASB'. It was clear that 'feeding this addiction is the driver for this ASB'. He had such an order before without the engagement provision and 'this was positive and drove a reduction in his offending, we believe that a new injunction with the positive engagement element will likely achieve sustainable results'. It was clear that an injunction was a greater deterrent than a CPN. A copy of a CPN was annexed to her statement. It was signed by her and by Mr Abrook and dated 5 February 2022. Despite this evidence, Order 5 did not contain any provision requiring Mr Abrook to engage with a provider such as Turning Point.

20. Mr Napier had read the statements of Mr Archer and of PCSO Sims. He explained that the Council had applied for an injunction against Mr Abrook on 7 November 2016, for a period of a year. It was extended after breaches and applications to vary, until 7 November 2019. He said that it was clear that Mr Abrook's behaviour was likely to cause alarm, harassment or distress 'and that his behaviour has now escalated to include threats of violence. There is also evidence to suggest that [Mr Abrook] has offered actual violence towards police personnel'.

21. There was a further hearing on 1 July 2022. A District Judge 'heard an application on the papers'. The recitals to Order 6, made at that hearing, recorded 19 allegations that Mr Abrook had broken the terms of Order 5, with the dates, time and places of the alleged breaches. The dates were between 20 April 2022 and 18 June 2022. There were nine allegations of begging, and nine of sitting on the ground (including one of sitting within 20 metres of a pay and display machine). There was also an allegation that he had said 'Fuck off back to Scotland, you Scottish prick' to a PCSO in the presence of members of the public and 'therefore acted in a manner likely to cause alarm harassment or distress' contrary to the relevant provision of Order 5. The District Judge ordered the issue of a warrant for Mr Abrook's arrest and that on arrest, Mr Abrook be brought before a judge within 24 hours.

22. On 12 July 2022, a Deputy District Judge considered Order 5 and allegations that Mr Abrook had disobeyed it. The District Judge explained to Mr Abrook that he had rights to be silent, and not to incriminate himself. He indicated to Mr Abrook that he was willing to adjourn the hearing so that Mr Abrook could get legal advice before he responded to the allegations. Mr Abrook declined to have legal advice and admitted the allegations of breach. The District Judge found the allegations proved, but adjourned sentence, advising Mr Abrook to get legal advice before the sentencing hearing. In Order 7, the Deputy District Judge remanded Mr Abrook on bail on listed conditions, gave the Council permission to rely on the affidavit of Mr Milne sworn on 7 July 2022, and ordered Mr Abrook to attend the sentencing hearing. A Schedule to Order 7 listed the allegations against Mr Abrook. Those were the same as the allegations listed in the recitals to Order 6.

23. The sentencing hearing was on 21 July 2022. Order 8 recorded that Mr Recorder Main Thompson ('the Recorder') committed Mr Abrook for contempt of court to HMP Bullingdon for ten months. Order 8 also recorded that the application had been supported by seven affidavits (sworn by Mr Messrs Archer, Wall, Winter, Bezzant, and Milne and by Mesdames Grindrod and Edginton, on dates in June and July 2022). The

Recorder was satisfied that Mr Abrook had been guilty of contempt of court in the 19 respects referred to in Orders 6 and 7.

24. On 31 January 2023 District Judge Moore heard the Council's application on the papers, supported by an affidavit, that Mr Abrook had again disobeyed Order 5, in two respects: by begging on the afternoon of 22 January 2023, and by sitting on the ground on 23 January 2023, 'in a position to beg money', contrary to provisions 3 and 3 and 4 of Order 5, respectively. District Judge Moore issued a warrant for Mr Abrook's arrest ('Order 9'), so that he could be brought before a judge.

25. There was another hearing on 23 February 2023. In Order 10, HHJ Wright ordered that Mr Abrook be remanded on bail on conditions and that he attend a hearing on 16 March 2023. On 16 March 2023, Mr Abrook, having been arrested, was brought before HHJ Wright. He admitted the two breaches which were put to him. He indicated that he wanted to get help for his addictions from Turning Point. In Order 11 HHJ Wright adjourned the consideration of any penalty for the contempt so that Mr Abrook could get that support. Order 11 also provided that the matter might be restored if Mr Abrook did not comply with Order 5, and that Mr Abrook should file and serve evidence of his engagement with Turning Point, and of any medical support, by 4.30pm on 26 April 2023. HHJ Wright read an affidavit and a witness statement of PC 1899 Bezzant sworn, or as the case may be, signed, on 30 January and 23 February 2023 respectively. Order 11 recorded that HHJ Wright was satisfied that the allegations of contempt were proved. Sentence was adjourned until 27 April 2023.

26. District Judge Humphreys dealt with an application on the papers on 17 April 2023, which made two further allegations of breaches of Order 5. The allegations were that Mr Abrook had been seen begging on 17 and 23 March 2023. District Judge Humphreys made Order 12, a further warrant for Mr Abrook's arrest, on that date. Mr Abrook was duly arrested and brought before District Judge Bloom-Davis on 21 April 2023. He admitted the two further breaches and again said that he would like to get help from Turning Point, adding that he had an appointment for an assessment on 24 April 2023. Order 13 provided that Mr Abrook must comply with Order 5 and that the sentencing hearing for the admitted contempts was adjourned until 27 April 2023. Mr Abrook was again ordered to serve relevant evidence, by 4.30pm on 26 April 2023. District Judge Bloom-Davis read an affidavit by Mr Rowbotham on 28 March 2023. He was satisfied that the two further breaches of Order 5 had been proved. Sentence was adjourned until 27 April 2023. In a further order made on 21 April 2023 ('Order 14'), District Judge Bloom-Davis remanded Mr Abrook on bail on the conditions that he attended the hearing on 27 April 2023 and obeyed Order 5.

27. On 24 April 2023, the sentencing hearing listed for 27 April 2023 was adjourned to the next day, 28 April 2023. Mr Abrook's bail was continued on conditions. Mr Abrook did not attend the re-listed hearing on 28 April 2023. District Judge Humphreys issued a warrant for his arrest.

The Judgment

28. There was a further hearing on Monday 8 May 2023, a bank holiday. The District Judge referred to the four breaches of Order 5 which Mr Abrook had admitted. He said that Mr Abrook was not homeless. He had appeared in court before. He had somewhere to

go, but the evidence suggested that he pretended to be homeless in order to get sympathy. He carried a duvet on the street with him. The District Judge referred to Order 5. He expressed a view that 'passive begging' without more does not amount to anti-social behaviour. It might be anti-social behaviour if it was 'aggressive'. Order 5 seemed to include both types of begging. He said (paragraph 3) that begging 'per se, as long as it is not aggressive, is not conduct likely to cause harassment alarm or distress, and is not anti-social behaviour, and that actually this form of begging is a feature of urban life'.

29. In paragraph 4, the District Judge said that Mr Abrook begged because he was a drug addict, 'which he freely admits'. He had told the court 'on the last occasion' that he was engaging with Change Grow Live ('CGL'), but had admitted at the hearing on 8 May 2023 that he was not engaging with CGL at all and that he had lied to the court about that. He had told the District Judge on 8 May that 'he really' did have an appointment with CGL on 17 May. He had evidence on his phone. He was 'terrified' of going to prison again.

30. The District Judge referred to the Vagrancy Act 1824 ('the VA') in paragraph 5 and to a suggestion by the Civil Justice Council in a report of July 2020 ('the Report') that a custodial sentence was not possible although begging is a criminal offence under the VA 'which is somewhat dated'. He referred to the ten-month sentence Mr Abrook had been given for 19 incidents of begging. Mr Abrook had served five months of that sentence. He had been released on 21 December 2022.

31. Shortly after that, there had been four further breaches of Order 5. The begging was 'fuelled by his underlying drug addiction, and it appears that this has become a cycle of appearances to this court, taking up court time'.

32. On 8 May 2023, Mr Abrook gave an undertaking to the court that he would attend a meeting with 'Change Grow Live (formerly Turning Point)' on 17 May 2023 and that he would engage with CGL to 'address his addictions'. The District Judge was 'not convinced that being sent to prison addressed the underlying cause…and that perhaps prison is too blunt an instrument, and what needs to be addressed is the drug addiction' (paragraph 6).

33. In paragraph 6, the District Judge referred to the two hearings in front of HHJ Wright. Mr Abrook had admitted two further breaches and had said he was engaging with CGL. That was not true, as Mr Abrook had admitted on 8 May 2023. The District Judge also referred to the breaches on 17 and 23 March 2023, which Mr Abrook had also admitted. The hearing had not been listed on 27 April but Mr Abrook had not, in any event, attended that day. He had been served personally with notice of the hearing on 28 April, albeit at short notice, and had not attended. A further warrant had been issued. Mr Abrook had been arrested on 6 May, and brought to court on 8 May 2023.

34. The District Judge recorded his thanks to the Council's solicitor, Mr Bigwood, who had appeared at very short notice, had prepared a paginated bundle, and had referred to *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631; [2023] 1 WLR 1443, which, in turn, referred to the Report. Mr Bigwood had done 'an exemplary job in bringing to the court's attention, in his capacity as an officer of the court, all the information needed to make a decision about this case in difficult circumstances'.

35. The District Judge then referred to paragraphs 81 and 82 of the Report. It was a criminal offence under section 4 of the VA to beg in a public place, but the police rarely took action. A custodial sentence could not be imposed and the view was often taken that a fine was pointless. Some thought that as begging is a crime, it must also cause harassment alarm or distress, and was therefore, without more, anti-social behaviour. Others thought that only 'aggressive' begging could satisfy the criteria. 'The lack of consistency is undesirable and guidance is necessary'.

36. *Lovett v Wigan Borough Council* reminded the District Judge that he was sitting in a civil, not a criminal court, and that 'the primary objective is not punishment. The first objective is rehabilitation and that it is where matters differ between the Civil and the Criminal Courts. On that basis, I am not satisfied (a) that the injunction should remain in place, because I am not satisfied that begging per se, which includes both passive and aggressive begging - can constitute anti-social behaviour, merely sitting down certainly cannot constitute anti-social behaviour and (b) whether this is the appropriate forum to deal with the matter because if there is a breach because Mr Abrook goes out and begs, as he will do, to fund his drug addiction, I cannot see that that breach would reach the custody threshold' (paragraph 11).

37. Even if the District Judge were to suspend any sentence, he would have to be satisfied that a breach 'where begging that has not caused any alarm or distress to anybody reaches the custody threshold. I am not sure that this is an appropriate forum' (paragraph 12).

38. For those reasons, the District Judge discharged Order 5. As 'guidance is needed, I will be granting permission to appeal so that we get some definitive guidance on this' (paragraph 13). In paragraph 14, the District Judge made some further remarks about Mr Abrook's engagement with CGL. As his addiction was 'the root of the problem', that was what needed to be addressed. If Mr Abrook were to engage with CGL, there could be grounds for discharging him from his undertaking at a further hearing. The District Judge intended to list the case for a directions hearing in three months' time, to see what progress Mr Abrook was making.

39. As he had indicated that he would, the District Judge gave the Council permission to appeal.

The statutory framework

The legislative background and history relevant to this case

40. I am grateful to Ms Ivimy for drawing our attention to the detail of the relevant legislative background.

The Vagrancy Act 1824

41. As this case concerns begging, it is useful to start with the Vagrancy Act 1824 ('the VA'). The VA's short title describes it as an 'Act for the Punishment of idle and disorderly Persons, Rogues and Vagabonds in England'. As originally enacted, the VA had 22 sections. Only six are still in force. The piecemeal repeal of its provisions, combined with the interaction of its unrepealed provisions with section 70 of the Criminal Justice Act 1982 ['the CJA'] make some parts of the remaining provisions difficult to understand.

42. As amended, section 3 of the VA provides that 'Every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage to beg or gather alms…shall be deemed an idle and disorderly person …and subject to section 70 of the Criminal Justice Act 1982, it shall be lawful for any justice of the peace to commit any such offender (being convicted…) to the house of correction, for any time not exceeding one calendar month.'

43. As amended, section 4 of the VA provides that anyone who commits any of the offences referred to in section 3 and is convicted, and various other people described in section 4, including people who try to get charitable donations of any kind 'under any false or fraudulent pretence', and every person apprehended as an idle and disorderly person, and violently resisting any constable, and subsequently convicted, 'shall be deemed a rogue and vagabond', and subject to section 70 of the CJA, a magistrate may commit any such offender to the house of correction, for not more than three calendar months.

44. Section 5 is headed 'Who shall be deemed to be incorrigible rogues'. Any person who commits an offence under the VA which means that he shall be dealt with as a 'rogue and a vagabond', who has been 'adjudged so to be' and duly convicted, shall, subject to section 70 of the CJA, be deemed to be an incorrigible rogue, and subject to section 70 of the CJA, a magistrate can commit such a person who has been duly convicted before him either in custody or on bail.

45. Section 10 provides that when any incorrigible rogue is committed to the Crown Court, it may 'examine into the circumstances of the case' and 'order, if they think fit, that such offender be imprisoned' for up to a year. If a person is aggrieved by a decision of a magistrates' court, he may appeal to the Crown Court (section 14).

46. Section 70 of the CJA is headed 'Vagrancy Offences'. If a person is convicted under section 3 or 4 of the VA, of 'wandering abroad, or placing himself in any public place, street, highway, court or passage to gather alms', or under section 4, of 'wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms', the court 'shall not have power to sentence him to imprisonment but shall have the same power to fine him as if this section had not been enacted' (section 70(1)). If a person deemed a rogue and vagabond by virtue of section 4 of the VA is then guilty of an offence referred to in section 70(1) of the CJA, he 'shall be convicted of an offence under section 4 of the VA and shall not be 'deemed an incorrigible rogue' or committed to the Crown Court 'by reason only of that conviction' (section 70(2)).

The Public Order Act 1986

47. Part 1 of the Public Order Act 1986 ('the 1986 Act') is headed 'New offences'. The 'new offences', before the insertion of section 4A, were riot, violent disorder, affray, 'fear or provocation of violence' (section 4), and 'harassment alarm or distress' (section 5). The section 4 offence is committed if a person (a) uses, towards another person, 'threatening, abusive or insulting words or behaviour, or (b) distributes or displays to another any writing, sign or other visible representation which is threatening abusive or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another, or to provoke that person or another person to use such violence, or to make that person believe that such violence will be used or that it is likely to that such violence will be provoked'. The section 5 offence is committed if

a person uses 'threatening, abusive or insulting words or behaviour, or disorderly behaviour' or 'displays any writing, sign or other visible representation which is threatening abusive or insulting' and thereby 'causes that or another person harassment, alarm or distress'. It is not necessary to prove any intention to procure that effect. A person convicted of the section 5 offence is liable on conviction to a fine only.

48. Section 154 of the Criminal Justice and Public Order Act 1994 inserted section 4A in Part 1 of the 1986 Act. Section 4A is headed 'Intentional harassment, alarm or distress'. A person is guilty of an offence if 'with intent to cause harassment alarm or distress' he uses 'threatening, abusive or insulting words or behaviour, or disorderly behaviour' or 'displays any writing, sign or other visible representation which is threatening abusive or insulting' and thereby 'causes that or another person harassment alarm or distress' (section 4A(1)). The causing of 'harassment alarm or distress' features in two aspects of this offence; as part of the intent necessary to commit it, and as part of acts necessary to show that the offence has been committed. The maximum sentence for this offence is 6 months' imprisonment.

The Protection from Harassment Act 1997

49. Section 1(1) of the Protection from Harassment Act 1997 ('the 1997 Act') prohibits a person from pursuing a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of another. Section 1(1) does not apply to a course of conduct if its pursuer shows that 'it was pursued for the purpose of preventing or detecting crime' (section 1(3)(a)). Section 2(1) makes the pursuit of such a course of conduct an offence, which is punishable on summary conviction with a maximum sentence of six months' imprisonment. Section 3(1) provides that 'An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings…'. Section 3A enables a person to apply for an injunction to restrain such conduct. Section 7(2) of the 1997 Act provides that 'References to harassing a person include alarming the person or causing the person distress'.

50. These provisions were considered by the House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] UKHL 34; [2007] 1 AC 224. The respondent claimed that the appellant's employer was vicariously liable for his harassment by a fellow employee. His claim was struck out as disclosing no reasonable cause of action. The House of Lords held that an employer could be vicariously liable for such conduct.

51. In paragraph 30 of his opinion, Lord Nicholls observed that courts dealing with claims founded on allegations of harassment by fellow employees 'are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases…the courts will have in mind that irritations, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity must be of an order which would sustain criminal liability under section 2'. In paragraph 6 of her opinion, Baroness Hale commented on the meaning of harassment. She said, among other things, that 'A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour'.

52. In *Hayes v Willoughby* [2013] UKSC 17; [2013] 1 WLR 935 the respondent had applied for an injunction to stop the appellant from pursuing a course of conduct during which, between 2003 and 2009, he had made, to various official bodies, repeated allegations that the appellant had been guilty of fraud and embezzlement. By the time the appeal reached the Supreme Court, there was no issue but that the appellant's conduct amounted to harassment. The main issue, as described by Lord Sumption in paragraph 2 of a judgment with which Lords Neuberger and Wilson agreed, concerned the circumstances in which the appellant could rely on section 1(3)(a) (see paragraph 49, above). In paragraph 1, Lord Sumption said that harassment is 'an ordinary English word with well understood meaning.' He also relied on paragraph 30 of the judgment of Lord Phillips MR in *Thomas v News Group Newspapers Limited* [2001] EWCA Civ 1233; [2002] EMLR 78 for the proposition that 'Harassment is a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to, and does cause that person alarm, fear and distress.' In paragraph 12, he endorsed paragraph 30 of the opinion of Lord Nicholls in *Majrowski*.

The Crime and Disorder Act 1998

53. The Crime and Disorder Act 1998 ('the 1998 Act') was repealed and replaced by the Act. Section 1 of the 1998 Act is headed 'Anti-social behaviour orders'. A relevant authority could apply for an anti-social behaviour order ('an ASBO') if it appeared that two conditions were met. They were that a person had acted '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 that such an order was necessary to protect 'relevant persons' from further anti-social acts by him (section 1(1)). Any application was made to the magistrates' court (section 1(3)). If it was proved that the two conditions were met, the court could make an ASBO, which prohibited the defendant from doing anything described in the order (section 1(5)). The prohibitions which might be imposed by an ASBO were 'those necessary for the purpose of protecting persons…from further anti-social acts by' the defendant (section 1(6)).

54. An ASBO had effect for the period specified in the order, which had to be at least two years, or until further order (section 1(7)). An applicant or defendant could apply to the court for the discharge or variation of an ASBO. Unless both parties consented, an ASBO could not be discharged before the end of the period of two years ending with the service of the ASBO (section 1(8)). A person committed an offence if, without reasonable excuse, he did an act prohibited by the ASBO. On conviction on indictment, he was liable to a maximum sentence of 5 years' imprisonment (section 1(10)).

55. *R (McCann) v Crown Court at Manchester* [2002] UKSC 39; [2003] 1 AC 39 concerned an ASBO. The House of Lords considered two appeals. The issue in the McCanns' appeal was whether proceedings for an ASBO were civil or criminal. The allegations against the three McCann brothers, who were 16, 15 and 13, were that they had behaved in a threatening and abusive way, and had committed criminal damage, theft and burglary. The magistrate held that they had behaved in a way which had caused, or was likely to cause, harassment alarm or distress to people who were not in their household, by offensive and abusive insulting and intimidating words and behaviour, and had behaved violently towards local people.

56. Lord Hope described the evidence against them in paragraphs 47 and 49 of his opinion. They had been accused by various members of the public of threatening and abusive behaviour, causing criminal damage, theft and burglary (paragraph 47). Lord Hope described the evidence in more detail in paragraph 49. The evidence included evidence of more than one physical assault, an incident of reckless driving, and the hurling of objects from scaffolding. Lord Hope summarised the evidence as showing 'a prolonged course of behaviour which caused or was likely to cause harassment alarm or distress to many people ...during this six-month period' (paragraph 50).

57. The House of Lords held that the proceedings were civil in domestic law, and could not be classified as criminal under article 6 of the European Convention on Human Rights ('the ECHR'). The House of Lords dealt with this issue even though the Human Rights Act 1998 was not yet in force (see paragraph 3 of the opinion of Lord Steyn). The Appellate Committee therefore decided that hearsay evidence was admissible in such proceedings. Nevertheless, given the seriousness of the proceedings, the court should be satisfied to the criminal standard that the respondent had engaged in anti-social behaviour. That last finding has been substantially qualified by the Supreme Court in *Birmingham City Council v Jones* [2023] UKSC 27; [2023] 3 WLR 343 (see paragraph 52 of the judgment of Lord Lloyd-Jones, with which the other members of the court agreed).

58. We were also referred to paragraphs 16 and 25 of Lord Steyn's opinion, and similar remarks in paragraphs 42 and 85 of the opinions of Lords Hope and Hutton, respectively. I will quote two examples only. In paragraph 16 Lord Steyn described the mischief at which the 1998 Act was aimed. He said that it was 'well known' that in some areas, youths and groups of youths 'cause fear distress and misery to law-abiding and innocent people by outrageous anti-social behaviour. It takes many forms. It includes behaviour which is criminal, such as assaults and threats, particularly against old people and children, criminal damage to individual property and amenities of the community, burglary, theft and so forth. Sometimes the conduct falls short of cognisable criminal offences'. In paragraph 25 he referred to an argument based on the consequences of an ASBO. He said that section 1 was not meant to be used 'in cases of minor unacceptable behaviour but in cases which satisfy the threshold of persistent and serious misbehaviour'. Lord Hope put it slightly differently in paragraph 42: 'Taken one by one, their criminal or sub-criminal acts may seem to be, and often are, relatively trivial. But, taken together, the frequency and scale of their destructive and offensive behaviour presents a quite different picture'.

59. Section 1C of the 1998 Act applied when an offender was convicted of an offence. It was first inserted in the 1998 Act by the Police Reform Act 2002, and amended several times before the repeal of the 1998 Act. As in force from 1 February 2009 until its repeal, it gave a court the power to make a criminal behaviour order against an offender if the two conditions described in section 1C(2)(a) and (b) were met. Those conditions were similar to the two conditions in section 22 of the Act (see paragraph 76, below), with two main differences. First, section 1C(2)(a) did not expressly state that the court had to satisfied to the criminal standard that the offender had behaved in an anti-social way. Second, the court had to be satisfied that 'an order was necessary to protect persons …from any further anti-social acts by him'.

The Act

60. The Act creates a range of powers for dealing with bad behaviour. As Ms Ivimy explained in her submissions, the White Paper 'Putting victims first: more effective responses to anti-social behaviour' (May 2012, Cm 8367) describes the mischief at which the Act is aimed. One of its purposes was to replace '19 complex existing powers with six simple new ones'. The six new powers were a civil injunction or 'ASBI', a criminal behaviour order, a dispersal power, a community protection notice, a public spaces protection order, and a closure power. I note that the criminal behaviour order is not entirely new, as, until its repeal, section 1C of the Crime and Disorder Act (see the previous paragraph) conferred a similar but not identical power.

61. Part 1 of the Act (sections 1-21) is headed 'Injunctions', and enables applications to be made for injunctions to restrain anti-social behaviour (see further, paragraphs 67-75 below). Part 2 (now repealed) provided for criminal behaviour orders (see further, paragraph 76, below).

62. Part 3 makes provision for dispersal powers. One of the conditions to be met for the making of dispersal 'direction' is that a constable has reasonable grounds to suspect that 'the behaviour of the person in the locality has contributed or is likely to contribute to members of the public in the locality being harassed, alarmed or distressed' (section 35(2)(a)). It is an offence, punishable with a fine, to fail, without reasonable excuse, to comply with such a direction (section 39(1)).

63. Part 4 is headed 'Community protection'. Chapter 2 provides for community protection notices and public spaces protection and expedited orders. The former are available when conduct of an individual or body 'is having a detrimental effect, of a persistent and continuing nature, on the quality of life of those in the locality, and the conduct is unreasonable' (section 43(1)). The latter are available, first, when activities carried on in a public space 'have had a detrimental effect on the quality of life of those in the locality' or it is likely that activities will be carried on and that they will have such an effect. A further condition is that the effect or likely effect of the activities is, or is likely to be persistent and continuing, and is or is likely to be such as to make the activities unreasonable (section 59(2) and (3)). It is an offence, punishable by a fine, to fail to comply with such an order (section 67).

64. Chapter 3 of Part 4 provides for closure notices and closure orders in respect of certain premises. A notice may be issued if a relevant police officer or a local authority is satisfied on reasonable grounds that the use of premises 'has resulted…or is likely soon to result in nuisance to members of the public' or that there has been, or there is likely soon to be, 'disorder' near them associated with their use (section 76(1)). Unless the notice is cancelled under section 78, the issue of a closure notice must be followed by an application to a magistrates' court for a closure order (section 80(1)). The court may make the order if it is satisfied that a person has engaged or is likely to engage in 'disorderly, offensive or criminal behaviour' on the premises, or that the use of the premises has resulted or is likely to result in 'serious nuisance to members of the public' or that there has been or is likely to be disorder near the premises (section 80(5)). Section 92 applies for the interpretation of Chapter 3 of Part 1. It defines 'offensive behaviour' as 'behaviour by a person that causes or is likely to cause harassment, alarm or distress to one or more people not of the same household *as* that person'.

65. Part 5 deals with the recovery of possession of dwelling houses. Section 94 inserts section 84A in the Housing Act 1985. This applies to secure tenancies. It creates an absolute ground for possession where any of five conditions is met. Condition 3 is that a court has found in relevant proceedings that the tenant, or a person living in or visiting the dwelling house, has breached a provision in an injunction granted under section 1 (see paragraphs 67-69, below), other than an activity requirement, and the breach was committed wholly or in part in or near the dwelling house, or the breach was committed elsewhere and the provision breached was intended to prevent nuisance or annoyance to a person living near the dwelling house, or to the landlord or to someone employed in connection with the landlord's housing management functions (section 84A(4)). Condition 4 is that the dwelling house has been subject to a closure order or a closure notice under section 76 of the Act (see the previous paragraph) (section 84AA(6)).

66. Section 97 inserts ground 7A in Part 1 of Schedule 2 to the Housing Act 1988, which makes similar provision in relation to assured tenancies. Section 98 inserts a provision in Part 1 of Schedule 2 to the 1985 Act, and in Part of Schedule 2 to the 1988 Act (which deal with discretionary grounds for the possession in relation to secure and assured tenancies respectively. This enables a court to order possession if the tenant has been guilty of conduct causing or likely to cause nuisance or annoyance to the landlord or to someone employed in connection with the exercise of the landlord's housing management functions).

Part 1 of the Act in more detail

67. Section 1 of the Act is headed 'Power to grant injunctions'. Section 1(1) gives a court power to grant an injunction against a person who is 10 or over, if two conditions are met. They are that the court is satisfied on the balance of probabilities that the person 'has engaged, or threatens to engage, in anti-social behaviour' (see further, paragraph 70, below) and that the court considers it 'just and convenient to grant the injunction for the purpose of preventing' the person from 'engaging in anti-social behaviour' (section 1(2) and (3)). For that purpose, the injunction may prohibit the person from 'doing anything described in the injunction and may require him to do anything described in the injunction' (section 1(4)).

68. Any such prohibitions and requirements must 'so far as is practicable be such as to avoid' any interference with the person's work or educational commitments and any conflict with the requirements in any injunction to which the person may be subject (section 1(5)). An injunction must specify how long it will last for, or state that it has effect until further order (section 1(6)). An injunction may also specify how long particular prohibitions and requirements are to last (section 1(7)). In the case of an adult, an application for an injunction must be made to the High Court or to the county court (section 1(8)). Section 3 makes further provision about requirements. In short, an injunction which includes a requirement must specify 'the person who is to be responsible for supervising compliance with the requirement'. The person may be an individual or an organisation.

69. A court may attach a power of arrest to a prohibition or requirement if the court thinks that the anti-social behaviour in which the person has engaged or threatens to engage consists of or includes 'the use or threatened use of violence against other persons or there is a significant risk of harm' to other people from the person (section 4(1)). If a

power of arrest is attached to a provision of an injunction, a constable may arrest the respondent without a warrant in the circumstances described in section 9(1). Section 9 then provides for what is to happen if the respondent is arrested in the exercise of that power. A formula similar to that in section 4(1) also appears in section 13(1)(b), as one of the conditions which must be met before an injunction excluding a respondent from his home can be granted. 'Harm' is defined in section 20 as including 'serious ill-treatment or abuse, whether physical or not'.

70. Section 2 is headed 'Meaning of "anti-social behaviour"'. As Ms Ivimy pointed out in her submissions, it is significant that section 2(1)(a), (b) and (c) give three meanings to this expression. The first is 'conduct that has caused, or is likely to cause, harassment, alarm or distress to any person'. The second is conduct which is 'capable of causing nuisance or annoyance' to a person 'in relation to that person's occupation of residential premises'. The third is 'conduct which is capable of causing housing-related nuisance or annoyance to any person'. Section 2(2)(b) only applies when one of three specific types of applicant applies for an injunction (section 2(2)) (in effect, housing providers). The effect of section 2 is that housing providers can now apply for an injunction under Part 1 of the Act under section 1, which replaces, in the context of housing, the anti-social behaviour injunction which was available under section 153A of the 1996 Act (until its repeal). The special definitions of 'anti-social behaviour' in section 2(2)(b) and (c) are similar to the cumulative effect of the definitions of 'housing related' and 'anti-social conduct' in section 153A(1).

71. Section 5(1) lists the ten types of applicant which can apply for an injunction. An application for an injunction may be made without notice (section 6(1)). The current guidance issued by the Secretary of State under the power conferred by section 19(1) deals with without notice applications (see further, paragraph 75, below). If such an application is made, the court must adjourn the proceedings and grant an interim injunction, adjourn without making such an order, or dismiss the application (section 6(2)). Section 7 make further provision about interim injunctions. Section 8(1) gives the court power to vary or to discharge an injunction of the application of the person who applied for the injunction, or of the respondent. Section 8(3) makes further provision about the court's power to vary an injunction. Section 8(4) is significant. It provides that if an application under section 8 is dismissed, the party who made that application may not make a further application under section 8 without, either, the court's permission, or the agreement of the other party.

72. If the applicant for an injunction thinks that the respondent has broken any of its provisions, he may apply for a warrant for the respondent's arrest (section 10(1)). The relevant court can only issue such a warrant in the circumstances described in section 10(3).

73. Section 14(1(b) provides that, in the case of an adult, the applicant for an injunction must inform any person or body who or which the applicant thinks is appropriate that it has applied for an injunction. Section 14 also imposes other obligations to inform appropriate people or bodies before the first on-notice hearing of the application. A similar obligation is imposed on a person who applies for the variation or discharge of an injunction.

74. The effect of section 16(1) is that Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999, which provides for special measures directions to be given in the case of vulnerable and intimidated witnesses, applies, with modifications, to proceedings for anti-social behaviour injunctions.

75. Section 19(1) gives the Secretary of State power to issue guidance about the exercise of their functions to those who are entitled to apply for injunctions under Part 1 of the Act. Section 19 does not make express provision about the legal status of such guidance. It would therefore seem that the terms of that guidance are a relevant consideration when applicants exercise the functions conferred by Part 1 of the Act. In July 2014, the Home Office published, under section 19, 'Anti-social Behaviour, Crime and Policing Act 2014: Reform of anti-social behaviour powers: Statutory guidance for front-line professionals' ('the Guidance'). Next to the phrase '"Without notice" applications' on page 25, the Guidance says that injunctions can be applied for without notice 'to the perpetrator in exceptional cases to stop serious harm to victims. They should not be made routinely or in place of adequate preparation for normal 'with notice' applications. The notification and consultation requirements that apply to 'with notice' applications do not apply to 'without notice' applications. Paragraph 153 of the Report draws attention to this passage in the Guidance. Paragraph 158 draws attention to the judgment of Warby J (as he then was) in *Birmingham City Council v Afsar* [2019] EWHC 1560(QB); [2019] ELR 373, in which he emphasised the duties on a person who applies for an injunction without notice to the respondent.

Part 2

76. Until its repeal, section 22 gave a court power to make a criminal behaviour order when a person was convicted of an offence if the conditions in section 22(3) and (4) were met. The first was that the court was satisfied, to the criminal standard, that the offender had 'engaged in behaviour which caused or was likely to cause harassment alarm or distress'. The second was that the court considered that making the order would 'help in preventing the offender from engaging in such behaviour'. That power is now found in the Sentencing Act 2020.

The grounds of appeal

77. Paragraph 6 of the Order limited the grounds of appeal to the five grounds listed in that paragraph. That limit is reflected in the five grounds of appeal attached to the Appellant's Notice. The Council points out that if any of the grounds succeeds, that success will make the remaining grounds otiose, and that it will only be necessary to decide ground iii. if all the other grounds fail.

i. The District Judge erred in deciding that begging is not, 'in and of itself' anti-social behaviour.
ii. He erred in discharging the ASBI as Mr Abrook's begging included 'aggressive begging' and the provisions of the ASBI were designed 'for the purpose of preventing' Mr Abrook 'from engaging in anti-social behaviour' pursuant to section 1(3) of the Act.
iii. He erred in discharging the whole ASBI (paragraphs 6),7), 8) and 9)) as the ASBI also applied to anti-social behaviour which was not connected with begging.

iv. He erred in discharging the ASBI without considering whether it was more appropriate to vary it so as limit it to 'aggressive' begging or 'by including a recital clarifying the reason for the general restriction on begging or the court's interpretation of begging'.
v. He erred in discharging the ASBI at a sentencing hearing, after other judges had already decided that contempts had been proved, without giving the Council prior notice that that was his intention, and in the absence of any application from Mr Abrook.

The Council's submissions

78. Mr Wightwick told us that the District Judge, who had sat on a Bank Holiday Monday, did not have the case file. He 'painted a picture' of Mr Abrook for us. Some of the elements, but few of the details, of this picture were in the evidence which we have seen. Mr Wightwick also referred to Mr Archer's witness statement. He equivocated somewhat on the question whether an ASBI with a positive requirement might help Mr Abrook.

79. The appeal should be allowed on grounds ii.- v. The District Judge had made no attempt to consider the evidence on which order 5 was based. He had been wrong to say that Mr Abrook's begging was not aggressive. Mr Bigwood had told the District Judge that the evidence showed that Mr Abrook had been begging aggressively. Ground iii. was self-explanatory. Mr Bigwood had protested when the District Judge announced that he was going to discharge Order 5. The response of the District Judge had been to give the Council permission to appeal. Many of the provisions of Order 5, rightly, were designed to prevent the precursors of the anti-social behaviour which were not, in themselves, necessarily anti-social behaviour.

80. Mr Wightwick submitted that a person who was sitting begging at night by the ticket machine towards the top of a dark and deserted multi-storey car park might have a completely different effect on, say, a single woman, than a person who was sitting in broad daylight by the ticket machine in a busy car park at ground level. The woman in the multi-storey car park might be deterred from paying and therefore from collecting her car. The prohibitions were 'outcome-driven' and were intended to stop anti-social behaviour before it could happen.

81. He agreed with Singh LJ's summary of his submissions on this point, that the restrictions in an injunction are not required, in themselves, to restrain anti-social behaviour, because, once the applicant has shown that a defendant is engaging in such behaviour, the question was whether it was just and convenient to grant an injunction the purpose of which was to prevent such behaviour. In that situation, an order which restrained someone from sitting on the ground could properly be made. Mr Wightwick also agreed with him that any such order must be proportionate.

82. When pressed by the court to explain whether, and if so, how, begging might, of itself, amount to anti-social behaviour, he submitted that it would all depend on the context. He accepted that some types of begging would not amount to anti-social behaviour, because they would not cause, or be likely to cause, harassment, alarm or distress.

83. Whether begging was 'aggressive' and therefore amounted to anti-social behaviour was a judgment for the county court. It was also for the county court to decide, on the facts, whether it was 'just and convenient' to grant an injunction. Even if some apparent inconsistency was the result, individual District Judges were in the best position to decide whether or not a particular instance, or particular instances, of begging met the definition in section 2 of the Act. He added that a reminder to that effect would be 'timely'. Glosses or alternative phrases should not be substituted for the statutory test.

84. He relied heavily on the fact that Mr Abrook's begging was dishonest, in that Mr Abrook created a false impression that he was homeless when he was not. A person who gave him money would be distressed if he or she later discovered that Mr Abrook was not homeless, after all.

The submissions of the Advocate to the Court

85. Ms Ivimy made no submissions on the procedural grounds of appeal. She acknowledged, at the start of her oral submissions, that, in the light of those procedural grounds, this appeal might not be the best vehicle for her submissions of principle. She also acknowledged that whether behaviour falls within section 2 of the Act is 'not straightforward'. The two difficulties were that the Act defines anti-social behaviour by reference to its effects on other people, rather than by reference to specified conduct, and that those effects were themselves ambiguous. There was no express threshold of seriousness. In effect she agreed with Mr Wightwick that whether or not conduct would amount to anti-social behaviour would depend on the context. This meant that an ASBI could respond to a range of circumstances.

86. Nevertheless the District Judge was right to decide that 'passive' begging could not amount to anti-social behaviour. The type of distress which susceptible donors might experience when seeing a beggar begging with an empty cup and a sign was not enough. 'Distress' must mean more than that when construed in this statutory context. The statutory context included the legislative history, the statutory purpose and the words of the statutory definition. She described the legislative history in her skeleton argument. One of the differences between an ASBO and an ASBI was that the test for making the former was that it was 'necessary' for the purpose of preventing anti-social behaviour whereas, for the latter, it was whether it 'just and convenient' for that purpose. She referred to the tests in the public order legislation.

87. Four points emerged from *McCann*. The aim of the legislation was prevention, not punishment; the purpose of prevention was to protect the victims of anti-social behaviour; it was not intended for minor conduct but for conduct which was persistent and serious; and the impact, also, should be serious 'fear, distress and misery'. Behaviour which is trivial or benign is not caught. The target is behaviour from which its victims need to be protected. That approach to interpretation is supported by the range of powers conferred by the Act, and the different tests which govern their exercise. The definition in section 2 fits into that context.

88. A restriction on sitting on the ground could be legitimate; a person could be prevented from 'doing anything' as long as that restriction was proportionate and conducive to the

statutory purpose. Whether there was the necessary link was an evaluation for the court which was considering making an ASBI.

89. Distress at the plight of a homeless person is not relevant: the behaviour must itself be the cause of any feeling of distress. Discomfort is not enough; nor is sympathy. There are two parts in the test. It was not therefore necessary to show that a particular person had been caused harassment, alarm or distress. The court could assess for itself whether the conduct in question was 'likely' to have the relevant effect. In *R (Mills) v Birmingham City Council* [2005] EWHC 2732 (Admin) (DC) the applicant applied for judicial review of an ASBO imposed after her conviction for theft. She had stolen three pairs of gloves from a shop. No-one apart from a police officer had seen the theft. The Crown Prosecution Service applied for the ASBO, but did not appear, on the application for judicial review of the ASBO, to defend its imposition. She was a drug addict and had many convictions for theft. It was a case in which there was no evidence that anyone had been caused harassment, alarm or distress and in which such an effect was not likely, either (see paragraph 11 of the judgment of Scott Baker LJ). It followed that the court had had no power to impose the ASBO.

90. A court was entitled to hold that begging, by itself, is not likely to cause harassment, alarm or distress. Something more was needed, such as evidence from a person who was caused harassment, alarm or distress, explaining why the behaviour had that effect. Begging late at night near a ticket machine in a darkened multi-storey car park might be an example of such behaviour.

91. A counter-example from the cases was a 12-year-old who was 4 foot 9 inches tall, and who, when his sister was arrested for criminal damage late at night, abused police officers, carried on after being asked to stop, made obscene gestures at them when they were in a police van, and shouted 'Wankers'. He was charged with an offence contrary to section 4A of the 1986 Act, and convicted by the magistrates. He appealed by way of case stated. Toulson J (as he then was) was not persuaded that the police officer who had said he was 'distressed' by this conduct was describing 'emotional disturbance' which met the statutory test. The policeman was over six feet tall and weighed over 17 stone (paragraph 11 of *R (R) v Director of Public Prosecutions* [2006] EWHC 1375 (Admin)).

92. In answer to a question from Singh LJ, Ms Ivimy agreed that the distinction between passive and aggressive begging made by the District Judge was not helpful. Whether a particular example of begging would meet the statutory test would all depend on the context. The words of the definition were ordinary English words and courts should simply apply them to the facts found in any particular case. She said, in defence of the District Judge, that he had been right to try to encapsulate something more than begging as the type of conduct which would meet the test. But she agreed that that 'gloss' was not the best way to do so.

Discussion

93. As is clear from my summary of counsel's submissions, there is a clear divide between the procedural grounds of appeal and the questions of principle which are raised on this appeal, principally by ground i. I will start with the procedural grounds of appeal.

The procedural grounds of appeal
Ground v.

94. It makes sense to start with ground v. Section 1(8) of the 1998 Act (see paragraph 54, above) made it clear that an applicant or defendant could apply for the discharge of an ASBO, but unless the parties agreed, it could not be discharged until two years had passed since its imposition. Section 8(1) of the Act (see paragraph 71, above) gives the court power to discharge an ASBI on the application of the person who applied for it or of the respondent. Both the 1998 Act and the Act create detailed statutory schemes. A power for the court to discharge an ASBO of its own motion is not necessary to make the statutory scheme work. It follows that there is no room for the implication of such a power (cf *Hazell v Hammersmith v Fulham London Borough Council* [1992] 2 AC 1). Neither the Council nor Mr Abrook had applied for the discharge of Order 5. The District Judge had no power, therefore, to discharge it. The other criticisms made in ground v. are not necessary to this conclusion. They are further procedural errors.

95. I will consider those other criticisms briefly, nevertheless. I will suppose, for a moment that the District Judge had power to discharge the ASBI of his own motion. Even if he had had such a power, the exercise of any such power would have been wrong in this case. First, he should have given the Council advance notice of his intention. Second, he could only have exercised any such power as respects the future. He could not lawfully have exercised it in such a way as to discharge the ASBI with retrospective effect: there had been no appeal against Order 5, let alone a successful appeal against it. Third, at two separate hearings, Mr Abrook had admitted four separate breaches of order 5. Mr Abrook's case had been listed for him to be sentenced for those admitted breaches. The District Judge should therefore have sentenced Mr Abrook for those admitted breaches, or, if he was persuaded that there was a good reason to do so, could have adjourned the sentencing hearing to a later date.

96. I would allow the appeal on ground v. That conclusion makes it unnecessary to deal with grounds ii. - iv, but I will do so, nevertheless.

Ground ii.

97. The second condition for the grant of an ASBI (see paragraph 67, above) is that it is 'just and convenient to grant the injunction for the purpose of preventing' the respondent from engaging in anti-social behaviour. The first condition is that the respondent 'has engaged, or threatens to engage, in anti-social behaviour'. It is necessary to distinguish between those two conditions. I consider that the District Judge did not make this distinction in his approach to the restraints in Order 5. Once a court is satisfied on the evidence that the first condition is met, it is not limited to making an order which simply restrains the particular anti-social behaviour in which, on the evidence, it is satisfied that the respondent has engaged, or threatens to engage. The terms of the second condition mean the court also has power to restrain conduct which is not intrinsically anti-social behaviour, if the court is satisfied that it is just and convenient to restrain such (other conduct) 'for the purpose of preventing' the respondent from engaging in anti-social behaviour.

98. Even if the District Judge was right that there is a legally useful distinction between 'aggressive' and 'passive' begging, it does not follow that paragraphs (3)-(5) of Order 5 were unlawful. They would only have been unlawful (if that assumption were correct)

if the second condition was not also met. Thus, if the court which made Order 5 was satisfied, on the evidence, that Mr Abrook's begging amounted to anti-social behaviour, as I must assume that it was, it could lawfully have made an order in terms of paragraphs (3)-(5) if it was also satisfied, as I must also assume that it was, that it was just and convenient to impose those restraints for the purpose of preventing anti-social behaviour by Mr Abrook. In the absence of a successful appeal against Order 5, the District Judge was also obliged to make the assumptions which I have described in the previous sentence. I would allow the appeal on ground ii.

Ground iii.

99. I will make three assumptions in considering this ground of appeal. The first is that the District Judge's distinction between 'aggressive' and 'passive' begging was legally useful. The second is that he had power to discharge the ASBI. The third is that he had power to do so, in whole or in part, in reliance on that distinction. Paragraphs 6), 7), 8) and 9) of Order 5 (see paragraph 13, above) do not restrain begging of any kind, or sitting in public. They restrain other conduct which is self-evidently conduct within the definition in section 2 of the Act. I accept the Council's submission that, even making those three assumptions in favour of the District Judge, he erred in law in discharging those paragraphs of Order 5. I would allow the appeal on ground iii.

Ground iv.

100. I will make the same assumptions as I made in the previous paragraph. On those assumptions, I accept the Council's submission that the District Judge erred in law in not considering whether other steps, such as those suggested in this ground of appeal, would have justified an order with a narrower scope. I would also allow the appeal on ground iv.

The issues of principle

The approach demanded by the Act

101. The starting point is the definition of 'anti-social behaviour' in a non-housing context. This phrase has appeared in other legislation. It is likely, therefore, that when Parliament chose to use it in the Act, it intended the phrase to be interpreted consistently with its interpretation in other contexts. Those are contexts which include, in crime, decisions by District Judges and by juries which require them to consider whether the specific behaviour with which a defendant has been charged falls within the statutory language. The same phrase must be interpreted similarly in that context and in this. I therefore accept Ms Ivimy's submission that cases which shed light on its meaning in other contexts are, in principle, relevant in this context. She helpfully referred us to several authorities (not all of which I have summarised above), with the sensible caveat that whether particular behaviour is aptly described by this phrase will often very much depend on the facts.

102. As the effects are described by ordinary English words, however, it is difficult to see how, other than in a general way, the authorities can give much useful guidance. The statements in the three decisions of the House of Lords/the Supreme Court to which we were referred are all obiter, and are all prompted by the facts of the appeals, and/or by the nature of legal issues which were decided. They are of some persuasive value, but I do not consider that they are binding.

103. There are three main elements in the definition. They are not cumulative, so behaviour is anti-social behaviour if it has caused, or is likely to cause, any of the three listed effects to any person. A court can therefore be satisfied that a respondent has engaged in anti-social behaviour in two ways. The first is if there is evidence from a person, or from people, who describe the conduct and say that they felt one or other of the three effects, and why. Second, the test can be satisfied without such evidence, but if there is no such evidence, the applicant must adduce evidence which shows, with sufficient descriptive particularity, that the behaviour was such that it would be likely to cause one or other of those effects to any person, which could include, hypothetically, a vulnerable person. Moreover, if the evidence shows that one or other of the effects was in fact produced in a particularly vulnerable person, the test would be met.

104. I agree with the thrust of Ms Ivimy's submission, based on the dicta to which I have referred, that the definition does not capture trivial conduct. That agreement flows mainly, however, from the immediate statutory context. Other provisions of the Act cast light on the definition of 'anti-social behaviour' by showing that Parliament also had in mind different types of conduct, for which it created different remedies. Some of those are also evidently less serious than anti-social behaviour, as defined, and help to show, albeit in a general way, where Parliament intended the bar for anti-social behaviour to be set.

105. First, that bar can be contrasted with conduct which 'is capable of causing nuisance and annoyance' in relation to the occupation of residential premises (section 1(1)(b)). It is clear that Parliament viewed anti-social behaviour as it is defined in the non-housing context as both different from and more serious than conduct which is capable of causing 'nuisance or annoyance'. Second, section 43(1) refers to conduct 'which is having a detrimental effect, of a persistent and continuing nature, on the quality of life of those in the locality', and which is 'unreasonable'. This is a further illustration of conduct which is different from and less serious than anti-social behaviour as it is defined in the non-housing context. Third, section 76(1) refers to conduct which 'has resulted…or is likely soon to result, in nuisance to members of the public', and to the occurrence, or likely imminent occurrence of 'disorder'. Disorder might well cause, or be likely to cause two of the three effects, but it is not likely, without more, that 'nuisance' would do so. Fourth, section 80(5) refers to 'disorderly, offensive or criminal behaviour' on premises, and to use of premises which has resulted or is likely to result in 'serious nuisance to members of the public' and likely 'disorder' near premises. The first type of conduct might overlap with anti-social behaviour, and the second type may overlap with it, or may be more serious.

106. Finally, section 35(2)(a) refers to conduct which 'has contributed or is likely to contribute to members of the public in the locality being harassed, alarmed or distressed'. Such conduct is not the cause, but a contributory cause, to the three effects. Section 2, on the other hand, requires a direct causal relationship between the conduct and the effects. This contrast underlines the importance, in the definition in section 2, of a direct causal relationship between the impugned conduct and its actual or likely effects.

107. In the light of these statutory provisions, I have reached four general conclusions which are relevant in this case.

108. First, I do not consider that a distinction between 'aggressive' and 'passive' begging is useful. It should not be substituted for the statutory test, which is clear, and framed in ordinary language. A court considering an application for an ASBI must examine the evidence on which the applicant relies, and ask itself, on the balance of probabilities, whether the statutory test is met. A court should expect more by way of evidence than general assertions, such as the bald assertion, in the language of the statutory test, that the test is met (of which there are examples in this case). It should expect a description of the behaviour and of its actual effect, or likely effect, and ask whether it is satisfied on that evidence that the test is met. The court should not take a credulous approach to such evidence and there may be cases in which such an assertion is made but the court is not prepared to accept it (as in *R (R) v Director of Public Prosecutions*; see paragraph 91, above).

109. Second, the fact that the impugned conduct falls within the statutory definition is not enough. The court must also be satisfied that it is just and convenient to make an order for the purpose of preventing anti-social behaviour. If a court is so satisfied, that is, if it satisfied that that the restraint is likely to achieve the statutory purpose, it may make an order restraining behaviour which is not intrinsically anti-social. But a court can only restrain behaviour if it is also satisfied that it is just and convenient to do so. This test is framed in ordinary language, and it is not necessary to elaborate on it, except to make two obvious points. First, a court must consider whether, even if the behaviour meets the definition in section 2, it is serious enough to warrant the court's intervention by making a negative restraint. Second, the court should consider whether it might be better, having made appropriate inquiries, to make a positive requirement rather than an order restraining conduct.

110. Third, a power of arrest should not be attached to an order as a matter of course. A power of arrest can only be attached if the test in section 4(1) is met (see paragraph 69, above). From the limited information in the papers I have seen, it is far from clear that this test was met on the evidence on each of the many occasions when a power of arrest was attached to an order.

111. Fourth, applicants must observe, and the court must police carefully, the restrictions on without notice applications in section 6, and the provisions in section 7 about interim injunctions (see paragraph 71, above). Applicants should only depart from the statutory guidance on without notice applications (see paragraph 75, above) if they are able to articulate good reasons for doing so. The impression I have from the papers I have seen (and this may be an unfair criticism) is that there might not have been, on those occasions when applications were made without notice, evidence of an exceptional case in which such an application was necessary to prevent serious harm to any victim.

Conclusion

112. I would therefore allow the appeal on all five grounds. The District Judge was wrong to discharge Order 5. I would remit the case to county court for it to sentence Mr Abrook for the four breaches of Order 5 which he admitted at the earlier hearings. I would also draw the attention of the sentencing judge to *Lovett v Wigan Borough Council* (see paragraph 34, above). That case concerned breaches of ASBIs in the housing context, but its guidance about the general approach to sentencing for breach of ASBIs applies equally in the non-housing context. The main point is that when a court sentences for

breach of an ASBI it must ensure that the sentence is proportionate to the levels of sentences which are passed for criminal offences. If he or she is persuaded that that is the right course of action, the sentencing judge may, for good reason, adjourn the sentencing to a future date.

Lord Justice Edis

113. I agree.

Lord Justice Singh

114. I also agree.