Neutral Citation Number: [2024] EWHC 869 (Admin)

Case No: AC-2023-LON-003047

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT
(On appeal from Harrow Crown Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2024

Before:

LORD JUSTICE COULSON
MR JUSTICE JEREMY BAKER

- -

Between:

Robert Fitzgerald	**Appellant**
- and -	
CPS	**Respondent**

- -
- -

Samuel March (instructed by **Cohen Cramer**) for the **Appellant**
The Respondent did not appear and was not represented.

Hearing date: 16 April 2024

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Approved Judgment

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LORD JUSTICE COULSON

LORD JUSTICE COULSON:

Introduction

1. This is an appeal by way of case stated under s.28 of the Senior Courts Act 1981 from a decision of the Crown Court at Harrow, made on 15 June 2023, in which the court dismissed the applicant's appeal against an order made by a District Judge on 15 December 2022 for the immediate destruction of a dog under s.4(1) of the Dangerous Dogs Act 1991 ("the 1991 Act"). The appeal raises issues in relation to the 1991 Act and, more importantly, a standalone issue as to the status of an uncontested expert's report in a case of this kind.

Background

2. The dog in question is a male bull breed dog known as Yosser. At all material times he has been owned by, and been in the control of, the appellant. The appellant has both physical and mental health issues and has subsequently been sectioned. The appellant's brother, Terry Fitzgerald, who offers now to have care and control of Yosser, believes that the incident which led to the destruction order arose out of Yosser's concern for the appellant's deteriorating health.

3. There are a total of three incidents involving Yosser, although the information as to the first is so scanty that I place no real weight on it. It appears that, on 24 April 2021, Yosser put his mouth on a surveyor who was attending the appellant's home. The surveyor's skin was not broken and he did not make a formal complaint.

4. The second incident occurred on 27 July 2021, when Yossser attacked a dog belonging to a member of the public, grabbing the dog by the hind legs. The owner of the dog then picked up their dog to protect it, and Yosser jumped up and dragged the other dog to the ground. In consequence, on 20 January 2022, the appellant was convicted by the North West London Magistrates of being the owner of a dog dangerously out of control (causing no injury). The Magistrates made a Contingent Destruction Order ("CDO"). They imposed conditions to the effect that Yosser was to be kept on a lead no longer than 1.5m at all times in a public place, and was also to be kept in a muzzle at all times in a public place.

5. The third incident was the most serious. On 22 February 2022, at about 4 o clock in the afternoon, the appellant was walking Yosser down the street. The victim, Ms Abdullakutty, was walking towards them. As their paths crossed, Yosser jumped up at Ms Abdullakutty and nipped or mouthed her arm. This caused bruising and left two distinct teeth marks. Happily, her skin was not broken. The victim called the police who arrived a few minutes later.

6. On 31 May 2022, police executed a search warrant and seized Yosser. On 3 December 2022, the appellant entered a guilty plea at the first opportunity to a single charge under the s.3 of the 1991 Act. On 15 December 2022, amongst other things, the District Judge made a Dog Destruction Order ("DDO") in respect of Yosser. He did this on the basis that there was already a CDO, and that the appellant was not a fit and proper person to own a dog. It is unclear whether any offer had been made at that stage for care and ownership of Yosser to be transferred to Terry Fitzgerald. In any event, the appellant appealed.

The Decision of the Crown Court

7. The appeal hearing took place on 15 June 2023 at Harrow Crown Court before Mr Recorder Michael Caplan KC and two lay magistrates. Before them was evidence which had not been before the District Judge, including an expert's report and an unequivocal statement from Terry Fitzgerald that he was willing to take control of and look after Yosser. I deal with those two strands of new evidence in greater detail below.

8. The court considered the submissions, and referred to the expert's report and the statement from Terry Fitzgerald. However, the court concluded:

> "As I said, that we have got to look at all the circumstances indulgent temperament of the dog and its past behaviour. That is a factor which we have got to consider here. And we have looked at and re-visited when we considered this case, the past behaviour of the dog. Here was a situation where one month earlier in January 2022, there was a contingent order in place for the very reasons of the concerns which have been expressed by the Court then. So, this is not a case of a dog, an owner and a dog coming before a Court for the first occasion. It was before the Court on 20 January 2022, and we do think we should give great regard to the previous history and the behaviour of the dog in this case. Added to the [inaudible] there is the matter which I did refer to. We have considered, bearing all that in mind, whether there would be arrangements, which we can say, should be put in place which will allow us to come to the conclusion, on the balance of probabilities, that we do not have to make a destruction order in this case, because we can be satisfied the dog would not constitute a danger to public safety; and unhappily, and after careful consideration, we have come to the view, in the light, most certainly because the past behaviour, against obviously what we have read in the expert's report and what we have heard from Terri Fitzgerald, and all the submissions made to us, we have come to the conclusion that we feel in this case, that we have to make a destruction order because we cannot be satisfied the dog would not constitute a danger to public safety. In those circumstances we refuse this appeal."

9. The appeal by way of case stated is made in respect of that conclusion.

The Relevant Law

10. Section 3(1) of the 1991 Act provides:

> "**3 Keeping dogs under proper control.**
>
> (1) If a dog is dangerously out of control in any place in England or Wales (whether or not a public place)—
>
> (a)the owner; and
>
> (b)if different, the person for the time being in charge of the dog, is guilty of an offence, or, if the dog while so out of control injures any person or assistance dog, an aggravated offence, under this subsection…"

11. The relevant parts of ss.4 and 4A of the 1991 Act provide:

"**4 Destruction and disqualification orders**

(1)Where a person is convicted of an offence under section 1 or 3(1) above or of an offence under an order made under section 2 above the court—

(a) may order the destruction of any dog in respect of which the offence was committed and subject to subsection (1A) below, shall do so in the case of an offence under section 1 or an aggravated offence under section 3(1) above…

(1A) Nothing in subsection (1)(a) above shall require the court to order the destruction of a dog if the court is satisfied—

(a) that the dog would not constitute a danger to public safety; and

(b) where the dog was born before 30th November 1991 and is subject to the prohibition in section 1(3) above, that there is a good reason why the dog has not been exempted from that prohibition.

(1B) For the purposes of subsection (1A)(a), when deciding whether a dog would constitute a danger to public safety, the court—

(a) must consider—

(i) the temperament of the dog and its past behaviour, and

(ii) whether the owner of the dog, or the person for the time being in charge of it, is a fit and proper person to be in charge of the dog, and

(b) may consider any other relevant circumstances…

4A Contingent destruction orders

(1)Where—

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

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

(c) in the case of an offence under section 1 above, the dog is subject to the prohibition in section 1(3) above,

the court shall order that, unless the dog is exempted from that prohibition within the requisite period, the dog shall be destroyed.

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

> (3) Subject to subsection (2) above, the requisite period for the purposes of such an order is the period of two months beginning with the date of the order.
>
> (4) Where a person is convicted of an offence under section 3(1) above, the court may order that, unless the owner of the dog keeps it under proper control, the dog shall be destroyed.
>
> (5) An order under subsection (4) above—
>
> (a) may specify the measures to be taken for keeping the dog under proper control, whether by muzzling, keeping on a lead, excluding it from specified places or otherwise; and
>
> (b) if it appears to the court that the dog is a male and would be less dangerous if neutered, may require it to be neutered.
>
> (6) Subsections (2) to (4) of section 4 above shall apply in relation to an order under subsection (1) or (4) above as they apply in relation to an order under subsection (1)(a) of that section.

12. Following the conviction of an owner under s.3(1) of the 1991 Act, the proper approach under ss.4 and 4A was set out by Silber J at [11] of the judgment of the Court of Appeal (Criminal Division) in *Flack* [2008] EWCA Crim 204. He said:

> "…(1) The court is empowered under section 4(1) of the 1991 Act to order the destruction of the dog.
>
> (2) Nothing in that provision shall require the court to order destruction if the court is satisfied that the dog would not constitute a danger to public safety: section 4(1)(a) of the 1991 Act.
>
> (3) The court should ordinarily consider, before ordering immediate destruction, whether to exercise the power under section 4A(4) of the 1991 Act to order that, unless the owner of the dog keeps it under proper control, the dog shall be destroyed ("a suspended order of destruction").
>
> (4) A suspended order of destruction under that provision may specify the measures to be taken by the owner for keeping the dog under control whether by muzzling, keeping it on a lead, or excluding it from a specified place or otherwise: see section 4A(5) of the 1991 Act.
>
> (5) A court should not order destruction if satisfied that the imposition of such a condition would mean the dog would not constitute a danger to public safety.
>
> (6) In deciding what order to make, the court must consider all the relevant circumstances which include the dog's history of aggressive behaviour and the owner's history of controlling the dog concerned in order to determine what order should be made."

13. The relevant sentencing guidelines provide, amongst other things:

> "The court **shall** make a destruction order unless the court is satisfied that the dog would not constitute a danger to public safety. In reaching a decision, the court should consider the relevant circumstances which **must** include:
>
> - the temperament of the dog and its past behaviour;
> - whether the owner of the dog, or the person for the time being in charge of it is a fit and proper person to be in charge of the dog;
>
> and **may** include:
>
> - other relevant circumstances.
>
> If the court is satisfied that the dog would not constitute a danger to public safety and the dog is not prohibited, it **may** make a contingent destruction order requiring the dog be kept under proper control. A contingent destruction order may specify the measures to be taken by the owner for keeping the dog under proper control, which include:
>
> - muzzling;
> - keeping on a lead;
> - neutering in appropriate cases; and
> - excluding it from a specified place."

14. The burden of satisfying the court under s.4 that a dog would not constitute a danger to the public (either at all, or if released under a CDO with conditions) is on the defendant. The applicable standard is the balance of probabilities: see *Davies* [2010] EWCA Crim 1923. As the Court of Appeal noted in *Singh* [2013] EWCA Crim 2416, when they quashed a DDO and replaced it with a CDO, "it is not possible to be absolutely confident that no risk of recurrence exists".

15. The sentencing court enjoys greater flexibility in cases like Yosser's, compared to those which involve banned breeds. One relatively common condition in a CDO is the transfer or rehousing of the dog with suitable owners: see *Devon* [2011] EWCA Crim 1073 and *Housego* [2012] EWHC 255 (Admin). This is, of course, a way of addressing the concern that the current owner is not a fit and proper person to own a dog.

16. Where a CDO is proposed, and particular conditions are put forward, a court which rejects those conditions must explain why they would not address the danger posed by the dog: see *Singh*. This must be a properly reasoned exercise, setting out why the proposal is inadequate or insufficient. In my view, there is no reason why that same approach should not be followed in circumstances where there has been non-compliance with an earlier CDO, but where the terms of the proposed CDO are different to those of the earlier order.

17. That conclusion is confirmed by:

    (a) the judgment of the Divisional Court in *Chief Constable of Merseyside Police v Doyle* [2019] EWHC 2180 (Admin), which in the practical summary at [25], strongly suggests that a breach of an earlier CDO will not automatically require to be dealt with by way of a DDO. All the circumstances must be considered. The court noted, amongst

other things, that a sentencing court must consider the circumstances at the time of the sentencing hearing, which may be very different to those which existed at the time of the original CDO;

(b) the recent decision of the Court of Appeal in *R v Smith* (8 September 2023)[1] where breaches of two earlier Community Protection Warning Notices were not found to justify a DDO (despite behaviour that was significantly worse than in the present case), and where rehoming the dog to a suitable owner was held to justify a CDO.

18. So, whilst any breach of the CDO is plainly a relevant factor for the court to consider and, absent any change of circumstances, the ordinary position may well be the making of a DDO (as per [25(5)] of *Doyle*), the various checks and balances identified in the authorities to which I have referred remain both relevant and applicable in such cases. In particular, any change of circumstances (whether actual or proposed) must be very carefully considered.

Summary of My Conclusion

19. For the reasons explained in greater detail below, I have come to the conclusion that the Crown Court failed properly to apply the law to the facts of this case. Had they done so, I consider that they would have concluded that a new or amended CDO was appropriate, with extra conditions that the care and control of Yosser was transferred to Terry Fitzgerald, and that the appellant was never to have control of Yosser in public again. The other elements of the original CDO (as to the muzzle and lead) would have been maintained. There are three separate reasons for that conclusion.

The Expert's Report

20. First, I consider that the Crown Court failed to have any or any proper regard to the expert's report of Helen Howell, dated 6 April 2023. This report contained a lengthy section dealing with Ms Howell's examination of Yosser and his behaviour throughout. It is necessary only to set out certain paragraphs of Ms Howell's conclusions:

> "8.01 It should be made clear that no test will ever be able to 100% predict the future behaviour of a dog and provide absolute certainty that a dog will behave in a certain way, nor should any test be able to do so. The multifactorial nature of aggressive behaviour in any dog means that no professional is able to say with absolute certainty how an animal will behave in the future. My opinion regarding Yosser's behaviour is based upon my professional judgment, experience and scientific knowledge and is an assessment of the risk I feel he poses to public safety.
>
> 8.02 On assessment Yosser presented as a nervous but gentle dog. He showed no sign of aggression during an invasive examination by a complete stranger. There are no reports of Yosser behaving aggressively toward people during his time in kennels. There was a period of some four months between the incident occurring and the Metropolitan police seizing Yosser, I find this surprising considering the opinion of the officer in the case that the dog involved

[1] Although the transcript of the judgment, prepared by Opus 2, proudly claims that it is "an accurate and complete record of the Judgment", it omits to provide any title at all. My thanks are due to Mr March, and the indispensable *Crimeline*, for researching and rectifying that omission.

> presented such a risk to public safety that it required seizing. During this period of time there were no reports of Yosser behaving aggressively…
>
> 8.06 Mr Fitzgerald's home is suitable to house Yosser. I have recommended that the broken panel in the private rear garden be repaired, and I would advise that Yosser be separated from unfamiliar visitors to the house with the use of a child's safety gate across an internal doorway, I would suggest the kitchen door. Mr Terry Fitzgerald is an experienced dog owner and is clearly very fond of Yosser. He understands the importance of managing him safely as ordered by the court.
>
> 8.07 **In summary, with the following measures in place I am of the opinion that Yossser would not pose a danger to public safety:**
>
> - **Ownership and care of Yosser be transferred to Mr Terry Fitzgerald**
> - **Yosser should be walked on a lead and muzzled when in public."**

21. When the CPS received the report from Ms Howell, they responded to say, amongst other things:

> "No issue is taken with the expert's report/the expert's report is not disputed.
>
> There is no need, therefore for the expert to attend the appeal hearing".

22. Accordingly, at the hearing before the Crown Court, there was unchallenged expert evidence that, if ownership and care of Yosser was transferred to Terry Fitzgerald, and if Yosser was walked on a lead and muzzled when in public, he would not pose a danger to public safety. Save in one respect, the Crown Court made no attempt to grapple with the report or those conclusions, or to explain why it had reached an entirely different result.

23. The exception lies in this passage of the judgment, where the learned Recorder said of the expert:

> "We note what she says in her report. She has carried out an assessment, she describes the dog as nervous, but a gentle dog. She has visited the home of Terry Fitzgerald, she says what the amendments can be made to his home, of course what she has not done is seen Yosser out in the public areas, she saw him and observed him, obviously, when he was detained; but of course, we have given due weight to her expert report. We have also given due weight to the statement from Mr Terry Fitzgerald."

24. I am wholly unpersuaded by this attempt to minimise Ms Howell's findings, on the sole basis that she had not observed Yosser in public areas. First, of course, she was unable to see Yosser in public areas because he was detained by the police. Secondly, Ms Howell herself would have been only too aware of the fact that she had not seen Yosser in a public place but, on the face of her report, that did not affect her conclusions. Thirdly, if this was a real point of doubt or difficulty, and one which at least potentially

undermined Ms Howell's conclusions, then fairness dictated that she should have been asked about it, rather than her report and recommendations simply being set to one side.

25. This point brings into sharp focus the status of Ms Howell's uncontested evidence in this case. As noted above, her report (which concluded with the unequivocal view that, on those stated conditions, Yosser would not pose a danger to public safety) was not disputed. Indeed the CPS had confirmed that no issue was taken with her report. How then could the court fairly reach a conclusion which was the polar opposite of Ms Howell's unchallenged evidence? In my view, it could not.

26. The leading criminal case on unchallenged expert evidence is *R v Brennan* [2014] EWCA Crim 2387, where the defendant was convicted of murder. Nigel Davis LJ noted that, even if the ultimate conclusion was always for the jury, where there was no rational or proper basis for departing from uncontradicted and unchallenged expert evidence, the jury was not entitled to do so: see [44]. In that case, there was unchallenged psychiatric evidence in support of a defence of diminished responsibility. Davis LJ went on to say at [45] that, if such unchallenged expert evidence was to be rejected, "then it must be rejected for *reason*". There, in the absence of any such reason, the verdict of manslaughter was substituted for the original verdict of murder.

27. Here, there was a decision by a Recorder sitting with two lay magistrates, who were obliged to provide reasons for their decision. There was no jury. That makes this type of case closer to a civil dispute than *Brennan*. Indeed, I note that in *Doyle,* it was held that the making of DDOs and CDOs were part of the civil jurisdiction of the Magistrates' Court.

28. The leading civil case on uncontested expert evidence is now *TUI UK Ltd v Griffiths* [2023] UK SC48, where the Supreme Court found that a party who challenged the evidence of a witness on a material point was obliged to cross-examine that witness. An expert's report had been provided in support of the claimant's claim, and although the defendant had chosen not to cross-examine the expert, its counsel had then made submissions as to why the report should not be accepted. The trial judge had acceded to those submissions; the High Court judge had ruled that he should not have done so; and the Court of Appeal (by a majority) had reinstated the trial judge's conclusion.

29. The Supreme Court agreed with the High Court judge, and the dissenting judgment of Bean LJ in the Court of Appeal, that the trial judge should not, in the circumstances, have departed from the expert's unchallenged conclusions. The applicable principles were summarised by Lord Lloyd-Jones at [70] of his judgment in the following terms:

> "70… (i) The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.
>
> (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

> (iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.
>
> (iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.
>
> (v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.
>
> (vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.
>
> (vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of *Phipson* recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.
>
> (viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances."

30. The exceptions noted in paragraphs 61-68 of the judgment of Lord Lloyd-Jones include where any challenge to the expert was peripheral or insignificant; where the expert's opinion was incredible; where the opinion was simply stated without any supporting reasoning at all; where the expert had made an obvious mistake; where the evidence of fact was contrary to the facts which formed the basis of the expert's opinion; where the expert had been asked to clarify or explain further and had not done so; and where there was a procedural objection. None of those exceptions applied here, and the contrary has never been so much as hinted at.

31. Accordingly, following the principles in *TUI v Griffiths*, if the CPS had wished to challenge Ms Howell's conclusion about Yosser, they were obliged to require her to attend for cross-examination. Otherwise, there was a significant risk that the hearing and its outcome would be unfair. They did not do so, saying that they took no issue with her report. In those circumstances, it seems to me that the Crown Court was bound by her conclusion, unless there was a reason why that conclusion could be fairly ignored or discounted. For the reasons that I have already given, the only ground that was

advanced, namely the point about Yosser not having been examined in a public place, was not a valid point of distinction.

32. Accordingly, I conder that, in view of Ms Howell's expert report, and the CPS decision not to challenge her evidence, the Crown Court was bound to accept her conclusion. They certainly identified no valid reason for departing from it. That therefore led to an unfair order.

The Evidence of Terry Fitzgerald

33. The second reason why I consider that the Crown Court erred in its approach was in its treatment of the evidence of Terry Fitzgerald. That was important for a number of reasons. Amongst other things, it provided an explanation for the incident which led to the CDO. At paragraph 13 of his statement, Terry Fitzgerald explained that the appellant was, at the time, self-medicating due to his various serious health conditions and had undiagnosed kidney failure. That affected his judgment and "greatly impacted his character". Terry Fitzgerald said that he believed that Yosser had sensed the change in the appellant's temperament "and as a result may have been more protective of him at the time of the incident." In my view, that evidence only served to emphasise that rehoming Yosser may well be the answer.

34. It was also unchallenged that Terry Fitzgerald knew and was fond of Yosser, had the space to accommodate Yosser comfortably, and was a fit and proper person to have the care and control of Yosser. If there were any doubt about that, that was confirmed in a number of places in Ms Howell's report.

35. The authorities set out above make plain that a CDO can be made, requiring the care and control of the dog in question to be transferred to a fit and proper person. Despite the fact that that was the proposal in the present case, the Crown Court did not address it. Although the judgment said that they had considered the statement of Terry Fitzgerald and given "due weight" to it, they gave no consideration to the detail of the proposal to transfer care and ownership to him, or how and why that change would not provide the necessary public safety. At best, the reasons for the Crown Court's rejection of this part of the proposal were implicit (which is contrary to *Singh*). At worst, they were not addressed at all. Either way, the decision was contrary to law.

The Application of the Relevant Principles

36. Thirdly, I consider that, more widely, the Crown Court failed to take into account the applicable principles of law that I have set out above. There was no consideration of the *Flack* approach. There was no consideration of the proposed terms of the CDO. There was ultimately no explanation, in the passage that I have cited in paragraph 8 above, as to why the Crown Court decided the appeal in the way they did.

37. To the extent that a reason is proffered, it appears to be that the Crown Court considered that the fact that there had been a breach of the CDO was, in some way, a trump card which outweighed everything else. If that was the approach of the Crown Court, I consider it to be wrong in principle. I have explained why the mere fact that there was a breach of a CDO does not mean that the Crown Court can avoid considering all the circumstances of the case, including, in the present case, the proposed change of ownership and care.

38. I accept, of course, that there will be cases where, on a consideration of all the facts, a breach of a CDO will outweigh everything else: see [25(5)] of *Doyle*. But such a conclusion can only be reached after a proper consideration of all the counter-balancing factors. Because that exercise was not carried out by the Crown Court in the present case, I consider that their conclusion cannot stand.

The Answers to the Questions Stated by the Crown Court

39. I set out below my answers to the questions posed by the Crown Court.

40. **Question 1: Did we unlawfully and/or unreasonably fail to identify a rational or proper basis and/or give cogent reasons for departing from uncontradicted and unchallenged expert evidence that the dog would constitute a danger to public safety if released subject to certain conditions?**

Yes, for the reasons set out above.

41. **Question 2: Was it unreasonable and/or irrelevant and/or unfair to take into consideration that the expert had not assessed the dog in a public place, given that the dog was at the time seized by police and could only be inspected in circumstances prescribed by the police?**

Yes, for the reasons set out above. Moreover, it was not only the fact that the dog could only be inspected in circumstances prescribed by the police that undermined this part of the reasoning, but also the fact that, if this was an arguable point of distinction, it had not been put to Ms Howell, and she had not therefore had the opportunity of answering it.

42. **Questions 3: Did we fall into error by failing to determine whether or not Terry Fitzgerald was a fit and proper person before deciding that we could not be satisfied that the dog would not be a danger to public safety if ownership and/or keepership were transferred to him?**

To the extent that that was the Crown Court's decision, the answer is Yes, for the reasons previously stated. However, on my reading of the judgment, nowhere does the Crown Court state in terms that Yosser would be a danger to the public even if ownership/keepership was transferred to Terry Fitzgerald. Indeed, in my view, the failure to grapple with that issue is one of the main omissions in the Crown Court judgment.

43. **Question 4: On the facts of this case, was out conclusion that there were no conditions whatsoever that could be put in place that would ensure, on balance, that the dog constitute a danger to public safety was so unreasonable that no reasonable tribunal could have come to it?**

It is probably not necessary to decide this question, because of my answers to the first three questions. But if required, I would say Yes, for the reasons set out above.

Disposal

44. Accordingly, if my Lord agrees, I would allow this appeal. That then raises the question of the appropriate disposal. On one view, it might then have been appropriate to refer

the matter back to the Crown Court. However, given the passage of time, I would be reluctant to sanction such a course now, particularly in circumstances where Yosser has been detained for almost two years, and where the CPS has chosen to play no part in the appeal.

45. Pragmatically, therefore, I think that the just outcome is for this court to quash the DDO and to replace it with a CDO with four conditions, namely the two existing conditions as to the lead and the muzzle in public; a third condition that ownership and care of Yosser be transferred to Mr Terry Fitzgerald; and a fourth condition that, when in a public place, Yosser will be controlled by someone other than the appellant, who is over 18 and physically capable of controlling him. Once ownership/transfer is effected, Yosser can be released into Terry Fitzgerald's care.

46. I am very grateful to Mr March for his submissions, and for agreeing to draw up the relevant order.

MR JUSTICE JEREMY BAKER

47. I agree.