



Neutral Citation Number: [2024] EWCA Civ 75

Case No: CA-2023-001090

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER
MR JUSTICE FORDHAM
[2023] EWHC 497 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2024

Before:

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LORD JUSTICE STUART-SMITH

Between:

THE KING
(on the Application of KAYLEIGH DAWSON)

Claimant/Appellant

-and-

CROWN COURT SITTING AT PRESTON

Defendant/Respondent

-and-

CHIEF CONSTABLE OF LANCASHIRE POLICE

First Interested Party

-and-

SECRETARY OF STATE FOR
ENVIRONMENT, FOOD AND RURAL AFFAIRS

Second Interested Party

Cathryn McGahey KC (instructed by **Cohen Cramer Solicitors**) for the **Appellant**
The **Respondent** and **Interested Parties** did not appear and were not represented

Hearing date: 25 January 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 6 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

1. The Appellant is the owner of a pit bull terrier called Lightning. In May 2021 the Magistrates’ Court at Burnley ordered the dog’s destruction pursuant to section 4B of the Dangerous Dogs Act 1991 [“the Act”]. The Appellant appealed to the Crown Court at Preston, which provided an ex tempore reasoned judgment [“the Crown Court Judgment”] and dismissed her appeal. The Crown Court subsequently refused to state a case for the opinion of the High Court, again providing a reasoned judgment.
2. In April 2022 the Appellant brought these proceedings seeking judicial review of the decision of the Crown Court not to state a case. As alternative remedies she asked (a) for an order requiring the Crown Court to state a case or (b) for the High Court to hear and decide the substantive ground of complaint, namely that the Crown Court erred in law in imposing the destruction order. On 8 March 2023, at the Appellant’s invitation, Fordham J focused on and addressed the Appellant’s substantive complaints about the Crown Court Judgment and dismissed the Appellant’s judicial review claim for the reasons set out at [2023] EWHC 497 (Admin).
3. The Appellant now appeals against Fordham J’s decision. She is represented before us by Ms Cathryn McGahey KC, as she has been since the application to the Crown Court to state a case. Before Fordham J and before us, the Defendant and the Interested Party did not appear and were not represented.
4. The Grounds of Appeal raise five issues:
 - i) Ground 1 is that the Crown Court Judge erred in applying a higher standard to Lightning as a dog of a prohibited type than that applicable to any other dog. It is submitted that Fordham J erred in holding that that mistake had not been made;
 - ii) Ground 2 is that Fordham J had incorrectly held that Lightning had attacked another dog on the first occasion on which Lightning had been off a lead and unmuzzled, which is submitted to have been a highly significant finding;
 - iii) Ground 3 is that Fordham J wrongly took into account matters unfavourable to the Appellant as a keeper, when it was common ground that she was a fit and proper person to be the dog’s keeper;
 - iv) Ground 4 is that Fordham J failed to give any or any significant weight to the fact that an order for immediate destruction was, by analogy with the case of *R v Singh* [2013] EWCA Crim 2416, manifestly excessive or, in public law terms, irrational or unjustified on the evidence;
 - v) Ground 5 is that the decision of the Divisional Court in *R (Golding) v Chief Constable of Kent* [2019] EWHC 2029 was wrongly decided and that the Crown Court should have given more weight to the steps that the Appellant had taken to prevent Lightning escaping and to the fact that he would be muzzled and on a lead in public if made subject to a contingent destruction order [“CDO”].
5. For the reasons set out below, I would dismiss the appeal.

The factual and procedural background

The Crown Court's decision

6. Fordham J set out the entirety of the Crown Court Judgment, adding paragraph numbers for ease of reference. I follow the same course, since it permits the fullest understanding of the facts as found by the Crown Court and the reasons why it dismissed the appeal.

“[1] This is or rather started as an appeal against an order made under the Dangerous Dogs Act 1991 for the destruction of two dogs belonging to the appellant, a male known as Lightning and a female known as Storm. On 29th June 2019 Lightning was seized under the Dangerous Dogs Act suspected of being a dangerous dog as defined by section 1, namely a Pit Bull Terrier and the dog was assessed by PC Carruthers about a week later and was found to have the characteristics of such a breed. The dog was returned to the appellant on 9th November 201[9] having been made the subject of a contingent destruction order [“CDO”]. The order meant that Lightning was to be registered on the index of exempted dogs with conditions that it be neutered, microchipped, always on a lead and muzzled when in public, insured and kept by the appellant. As we have been told by Mr. Barnett during the course of his evidence, after two months from 15th October that order then became an exemption certificate with similar conditions as well as several more.

[2] On 7th February 2020 Lightning was again seized following a breach of the CDO in that there was an incident where the two dogs escaped the house and Lightning attacked a dog being walked by the witness Mr. Symon, biting him by the neck, forcing him to the ground and then when Mr. Symon tried to protect the dog leaping up at him, biting at the dog's leg and actually seems whilst going for the dog, biting Mr. Symon. The attack was for him and no doubt for the dog frightening and went on for several minutes and it only ended when the police intervened with a debilitating spray. We have no doubt it would have carried on had that spray not been administered.

[3] On the same day the second dog, Storm, who escaped with Lightning was also seized. Storm played no part in the attack on the other dog, demonstrating in our view quite clearly a different set of characteristics. Storm was assessed by PC Carruthers and found to have the characteristics of a dangerous dog under the Act. However, the respondent now concedes that the application in relation to Storm was not made in time and so the order made by the Magistrates is an invalid order, it has no force and insofar as we can we set it aside pursuant to the powers under the Civil Procedure Rules. That will mean that other procedures have to be undergone in relation to the dog but hopefully it will find its way back home.

[4] Lightning was returned to the appellant once more in May 2020. That was to say the very least an unfortunate error found to be on flawed legal grounds and the dog was seized again in December 2020. In the meantime, the police discovered that the appellant had further breached the CDO by not notifying DEFRA of a change of address and by failing to provide insurance for the dog for six days in October of that year.

[5] Application has been made therefore or was made therefore by Lancashire Constabulary under section 4B of the Act for a destruction order otherwise than on conviction for an offence and those orders were granted by the lower court as I have already said and the Crown have conceded that one of them was entirely wrong, but under that section where a dog cannot be released to its owner without contravention of section 1(3) of the Act as applies in this case, there must be a destruction order unless the court is satisfied to the civil standard, and the burden rests on the appellant, that the dog would not constitute a danger to public safety. In deciding whether the dog does or does not constitute a danger to public safety the court must take account of the temperament of the dog, of its past behaviour and whether the owner is a fit and proper person to be in charge of it.

[6] It is agreed by all parties that both dogs are of a Pitbull type and are therefore defined as dangerous dogs by section 1 of the Act. In this case we have heard about the history and the chronology which is broadly agreed and we have heard agreed evidence about the unfortunate incident on 7th February 2020. We have also heard from PC Carruthers about the assessment of the dogs and some of the history and we heard from the appellant and from the defence expert, Mr. Barnett.

[7] Mr. Barnett told us that in his examination conducted under circumstances of distress for the dog Lightning was excitable, he bit his lead for 6½ minutes at the start of the examination and from time to time thereafter. Mr. Barnett says that that amounts to a mild canine compulsive disorder, not an act of aggression and he points out that he calmed down and was no threat to him or his assistant. It is common ground that Lightning has not shown any aggression towards any examiner or indeed anyone else save for the behaviour on 7th February 2020 and it is further common ground that the appellant has put safety measures in place at her home address.

[8] The respondent raised concerns as to the appellant's fitness as an owner initially due to a number of issues, the incident in February albeit no direct blame was attributed to her for releasing the dogs but also the period where Lightning was not insured as well as the failure to notify DEFRA of the change of address. Finally, the respondent states that a reluctance to hand

over the dog in December 2020 suggests an unwillingness to comply with rules, as do her previous convictions, they say.

[9] In response, the appellant pointed out that it was not her fault that the dogs were released in February 2020, there is no evidence that they have ever before or since been out unmuzzled or not on a lead. The failure to notify DEFRA and the short period without insurance were technical breaches, in particular she did not appreciate the need to inform DEFRA as she had told the police of the move and the insurance issue was simply a direct debit failure. Finally, she was understandably reluctant to hand the dog over given the history of this case and her convictions pre-date her turning her life around and regaining residence of the daughter.

[10] We accept those points broadly and the prosecution this afternoon quite properly conceded that the appellant is a fit and proper person to look after a dog given all the facts. However, it is still said these slippages in compliance may point to something of a sloppy attitude to compliance no matter that the breaches were minor and only discovered later in the proceedings by the police. We accept what Miss Woods says that the lower court found in October 2019 that the dog was not found to be dangerous but of course things have rather moved on since the incident in February.

[11] We have considered the evidence in this case carefully and have taken particular care in remembering that this is an unusual case for these courts involving as it does the potential destruction of a living being as well as the consequences for those who consider dogs very much part of the family. So far as Lightning is concerned the single issue that we have to decide is whether the appellant has demonstrated on the balance of probabilities that the dog does not constitute a danger to public safety.

[12] Mr. Barnett says that so far as the incident in February was concerned, there could be some past event which might cause him to attack another dog, he could have been scared of seeing other dogs, he could be socially incompetent or frustrated or there could be inter-male competition. If indeed the behaviour was as a result of any of those traits or causes none of those sources of behaviour provide the court with comfort so far as future behaviour is concerned. We found the evidence of Mr. Barnett whilst in assessing Lightning was no danger rather too keen to excuse what happened on 7th February and to remind the court of the evidence of others, particularly PC Carruthers, when he had said something positive about the dog.

[13] Right it is though that so long as the conditions imposed under the CDO or conditions later imposed by DEFRA are rigorously complied with the dangers would be significantly

mitigated but there has plainly been some slippage in compliance by the appellant over the course of the order and whilst the escape of the dogs was not directly her fault, it cannot be ignored that circumstances existed which allowed the dogs to escape and these events did happen.

[14] Miss Woods says that the events on 7th February were out of her control. Well, that is really the worry. She points out also that the dog was returned and there has been no incident since and we accept that. We do not accept however that the police released the dog back because they had no concerns about it. That was an error as to the law. The behaviour on 7th February occurred when there was an exemption certificate with stringent conditions in place.

[15] The starting point for this court therefore is that Lightning is currently not an exempt dog, he is a dog which is banned under the legislation and he has attacked and hurt a dog and its handler. Whilst of course one cannot ever say in relation to every dog that exists that they will not ever attack any other dogs, most dogs are not banned as being dogs bred specifically for fighting.

[16] It is our view, in particular bearing in mind his past behaviour and what we find to be his temperament, namely his serious and continued aggression towards another dog as an immediate response to being set free, as well as the potential causes as identified by Mr. Barnett as to that aggression, reminding ourselves of the evidential burden on the appellant, we cannot conclude to the civil standard that the dog would not constitute a danger to public safety and consequently we are bound to order the destruction of the dog under section 4B of the Act. Consequently, this appeal must fail.

[17] There is a great deal of sympathy for the appellant's position on the Bench given the removal of Storm and also given what she has been through with the repeated and incorrect return of Lightning before his further removal and we can understand why she would wish to pursue every action that she has including this appeal in order to try to secure the dogs' return and I am afraid, as I say, Miss Woods, the appeal fails."

The application for a case stated

7. By an application dated 16 December 2021 the Appellant applied to the Crown Court to state a case for the opinion of the High Court. There were two questions on which the Appellant sought the opinion of the High Court:
 - i) Question 1 was "whether the Crown Court erred in that it applied too high a test to the question of whether Lightning was a danger to the public, namely that the Court could not say that Lightning "would not ever attack in the way that it had.""

- ii) Question 2 was whether the Crown Court reached its decision without there being any evidential basis for it. It was submitted that there was no proper evidential basis for the Crown Court's decision and no evidence at all to indicate that Lightning might escape again while under the keepership of the Appellant.
8. The Respondent's reply was, in summary, that the Crown Court's approach had been to concentrate on the question whether, to the civil standard of proof, the Court was satisfied (the burden being on the Appellant) that the dog would not a danger to the public taking into account the factors identified in section 4B(2A) of the Act; and that this had been the correct approach.
9. The Crown Court's ruling on the Appellant's application for a case stated gave a brief outline of some of the background facts, including the fact of the "serious breach" on 7 February 2020 of the CDO then in force and the more minor breaches that followed. The Court accepted that the Appellant herself had not released the dog on 7 February 2020, that she had informed the police of her change of address and that the period without insurance was only six days. The kernel of the Court's reasoning was at paragraphs 6-12 as follows:

"6. The application for a destruction order was made pursuant to s4B of the Dangerous Dogs Act 1991. By s4B (2) "Nothing...shall require the justice or sheriff to order the destruction of the dog if he is satisfied (a) that the dog would not constitute a danger to public safety...". The Court, in determining the same "must consider (a) (i) the temperament of the dog and its past behaviour and (ii) whether the owner of the dog...is a fit and proper person to be in charge of the dog and (b) may consider any other relevant circumstances."

7. The Respondent and the Court accepted that the Applicant was a fit and proper person to be in charge of the dog.

8. The burden of proof rested on the Applicant, to the civil standard.

9. The Applicant seeks that the High Court determine:

(a) Whether the Crown Court erred in that it applied too high a test to the question of whether Lightning was a danger to the public, namely that the Court could not say that Lightning "would not ever attack again in the way that it had".

(b) Whether in any event the Crown Court erred in that it reached that conclusion without there being any proper evidential basis for it.

10. So far as question (a) is concerned, in my judgment the proposed question is based on a false premise. The Court in its judgment directed itself as to the test and applied the correct test, explicitly referring to the above law more than once (written version of oral remarks are provided herewith). The context of

the phrase used in the Application, namely that the Court applied the test whether the dog "would not ever attack again in the way that it had" is entirely incorrect. The only time that phrase appeared in the judgment of the Court was when the Court said "Whilst of course one cannot say in relation to any dog that they will not ever attack any other dog, most dogs are not banned as being dogs bred for fighting." The Court went on to say remind itself again [sic] of the correct legal test to be applied. It is further incorrect to state that the dog "became involved in a fight" with another dog. It did not; Lightning attacked another dog which was on a lead, then bit its owner. The Court manifestly did not apply the test contended for by the Applicant; indeed, the phrase complained of was making precisely the opposite point to that contended for.

11. As to the second question, the Court concluded there was evidence to support the conclusion reached considering the dog's temperament and other relevant circumstances, namely:

- a) The fact that the dog was allowed to escape, although not directly the Applicant's fault;
- b) The attack on a dog and its owner on the only occasion that the dog was ever known to be in public unrestrained;
- c) The dog had to be restrained by the use of Biteback spray after several minutes of aggression;
- d) The evidence from the Applicant's expert that the dog may have been suffering with a fright of other dogs, social incompetence or frustration or his attack may have been as a result of inter-male competition. Whichever was the cause of his aggression, the underlying condition was still extant;
- e) The fact that there were two further (albeit more minor breaches of the contingent destruction order). Notwithstanding the minor nature of the breaches, each of them would render the contingent order void; and
- f) The fact that the Applicant was obstructive in complying with lawful requests to hand over the dog in December 2020.

12. The application to state a case is therefore refused on the grounds that application is frivolous."

10. As Fordham J noted, the word "frivolous" as it appears in paragraph 12 of the Crown Court's ruling may be found in rule 26(6) of the Crown Court Rules and means "futile, misconceived, hopeless or academic".

The judgment of Fordham J

11. Having set out the Crown Court’s Judgment and dealt with various preliminary matters, the Judge identified a number of “themes” which he regarded (correctly in my view) as “key reference points” for the Appellant. The first was the acceptance by the police and the Crown Court that the Appellant remains a “fit and proper person to be in charge of the dog” for the purposes of section 4B(2A)(a)(ii) of the Act: see [18]. Second was the recognition that the incident on 7 February 2020 was beyond the Appellant’s control and that she was herself blameless for it, which had been expressly accepted by the Crown Court. It was not her fault that the gate had been left open, which allowed her dogs to escape; and the Appellant had since moved to a home where the gate required a key and had deadbolts with a padlock. Third was the recognition that there had been no other similar incident before or since. This had been recognised in paragraph [9] of the Crown Court Judgment, which recorded that “there is no evidence that they have ever before or since been out unmuzzled or not on a lead.” Fourth, there had been an assessment of Lightning by the police dog expert, PC Carruthers, and an examination by the Appellant’s expert, Mr Barnett, without the dog showing any aggression to any examiner or anyone else, as was recorded at paragraph [7] of the Crown Court Judgment. The final key reference recorded by the Judge was the case of *R v Singh*, to which I will return, where the Court of Appeal overturned a destruction order imposed by the Crown Court in relation to a German Shepherd dog. At [25] the Court of Appeal in *Singh* said “it is not possible to be absolutely confident that no risk of recurrence exists.”
12. Having identified these key features, the Judge confirmed that he was exercising a conventional standard of public law adjudication involving no substitutionary jurisdiction based on a merits disagreement. This approach, we understand, was accepted and agreed by Ms McGahey and was correct. After a paragraph in which he “encapsulated” the Crown Court Judgment (while identifying that there was substitute for reading it in full), he turned to the issues.
13. The first line of argument, addressed by the Judge at [22]-[23], was the submission that the Crown Court failed to take account of “relevant considerations” or, alternatively, unreasonably attributed to them no or insufficient weight. The considerations identified by Ms McGahey were listed as being:

“(1) The Police evidence of PC Carruthers with his observations as to Lightning’s temperament ... and the absence of any positive assertion by the Police that Lightning would constitute a danger to public safety. (2) The fact that the Incident was a one-off incident for which the Claimant had no blame or fault. That includes no “indirect” blame or fault. The word “direct” was introduced without justification (3) The fact that the Incident was a ‘dog on dog’ incident, with no evidence adduced as to any injury to the other dog and with non-serious injuries to its owner, arising incidentally from his intervention. (4) The fact of no other incidents, before or after. (5) The fact of the security arrangements at the Claimant’s new property.”
14. At [23] the Judge rejected this submission, subject to one minor qualification. The qualification was that the Crown Court had introduced the words “direct” and

“directly”; but, viewed overall, there could be no doubt that the Court was well aware that there was no blame and no fault to be attributed to the Appellant for the 7 February 2020 incident even though it engaged the Appellant’s “strict liability” pursuant to Article 10 of the Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 [“the 2015 Order”]. Otherwise, the Judge held, it was plain that all of the matters to which the Appellant referred had been taken into account by the Crown Court.

15. The Judge then turned to Ms McGahey’s submission that the Crown Court was wrong to reject the evidence of Mr Barnett, whose expressed opinion was that he did not believe Lightning to be a danger to public safety. The Judge rejected this criticism, holding that the Crown Court had to reach its own conclusion having weighed all the evidence. Part of that evidence had been Mr Barnett’s evidence about what may have made Lightning attack the other dog, which the Crown Court recorded and assessed at paragraph [12] of the Crown Court Judgment: see [6] above. The Judge held that it was open to the Crown Court to reject Mr Barnett’s opinion and evidence about whether Lightning would constitute a danger to public safety and to do so based on the reasons he gave for Lightning’s aggression on 7 February 2020.
16. From [25]-[31] the Judge considered and rejected a submission that other “breaches” (e.g. the short lapse in insurance cover) were irrelevant and had been wrongly taken into account by the Crown Court. In doing so he noted the relatively limited weight that appeared to have been attributed to the breaches, referring to the Crown Court’s use of the phrase “some slippage” (which he considered to be “carefully chosen and apt”) as “one factor, being considered alongside an observation that “rigorous” compliance with conditions could significantly mitigate dangers”.
17. The Judge next addressed the submission that the Crown Court had applied an unjustified standard of perfection – a no-risk “guarantee” – in relation to Lightning as a banned dog. This was the substance of the first point that the Appellant had requested the Crown Court to incorporate in a statement of case for the High Court: see [7] above; and it forms the substance of Ground 1 in this appeal: see [3] above and [52] below.
18. The Judge rejected the submission in a detailed passage that deserves to be read in full:

“33. I cannot accept this line of argument. The starting point is that the Crown Court was very well aware of what the statutory test was. It identified the test (Judgment paragraph [5]) and described it as the single issue (Judgment paragraph [11]). It asked and answered that test (Judgment paragraph [16]). Next, the Court recognised the reality that there was no guarantee or perfection or the elimination of all risk, and it recognised explicitly that this was the case in relation to every dog (Judgment paragraph [15]). The Court did not proceed from the recognition of that reality to its conclusion in the application of the statutory test. If that had been the position the outcome would have been inevitable. The Crown Court’s reasoning would have been very different and much shorter. The Judgment emphasised that Lightning is a “banned dog”. But this did not involve misappreciating or misapplying the statutory test, as I have explained. The Court’s observation reflected the structure of the 1991 Act, and what has been called “the default assumption” in

the case of “any pit bull” being “that it represents a danger to public safety and should accordingly be destroyed” (Golding at §32). Ms McGahey KC showed me the exchange earlier in the transcript where the Judge had referred to the legislation as if operating to require the destruction of a dog whenever risk could not be eliminated (with a guarantee), but when Counsel had gone on to make the point that there is no automatic conclusion that a dangerous fighting dog cannot meet the statutory test, the Judge had agreed. In the Judgment at paragraph [15] it was explained that Lightning was “banned under the legislation” and also that he had “attacked and hurt a dog and its handler”. Nor did the Court stop at paragraph [15]. It went on in paragraph [16] to identify the key points that led to the way in which the statutory question was answered by the Court.

34. The Crown Court took into account the absence of any guarantee, and that risk could not be eliminated by the Claimant, which it then described as its “worry” (Judgment paragraphs [14] and [15]). But in my judgment there was nothing unlawful or unreasonable in having regard to that truth, viewed against the other features of the case. I asked Ms McGahey KC whether that truth – the absence of a guarantee – could ever be a relevant consideration. Her answer was that yes it could be relevant depending on the other evidence as to the dog’s past behaviour and temperament. In my judgment, that answer was correct, as a matter of principle. To test the logic, suppose a case of extreme evidence as to past behaviour and temperament. The absence of a guarantee – for example, as to whether the dog might get away unmuzzled – would obviously be a highly significant feature. In the present case, Lightning’s past behaviour and temperament – the two remaining statutorily-prescribed relevancies (section 4B(2A)(a)) – plainly troubled the Crown Court. The Judgment referred to serious and continued aggression towards another dog as an immediate response to being set free. It had described the circumstances in which, immediately having escaped the house, Lightning had made a sustained attack on a dog, which continued for several minutes and involved the owner being bitten and “only ended when the police intervened with a debilitating spray” (Judgment paragraph [2]). That was relevant behaviour of Lightning. It was relevant behaviour on the only occasion when Lightning had been at large and in public without a lead and unmuzzled. The Crown Court needed to put that alongside the other evidence in the case. That included the expert witness’s assessment that Lightning was not a danger. But the Court gave cogent reasons why it could not accept this ...). So, the Court was having regard to the fact that risk could not be eliminated, alongside other features. These included the fact that circumstances had arisen which had allowed Lightning to escape which was a fact that could not be ignored. It included the fact that there had been “some slippage in compliance.”

19. Next, the Judge rejected the argument that the Crown Court had failed to consider all the relevant features of the case, which he regarded as a rerun of the Appellant’s first line of argument. In rejecting it he said at [35]:

“The Crown Court was statutorily obliged by section 4B(2A) to consider Lightning’s temperament and past behaviour, together with whether the Claimant was a fit and proper person to be in charge of Lightning; and was statutorily empowered to consider any other relevant circumstances. The Judgment makes very clear that all the evidence in the case was carefully considered. All of the points identified by Ms McGahey KC can be found expressly referenced within the Judgment, as I have already explained. The Crown Court was plainly undertaking an evaluative judgment, recognising the factors which could cut one way or the other in assisting it on the question of whether Lightning would constitute a danger to public safety. It had to be satisfied that that was not the case. The Court gave clear reasons why, in its evaluative judgment, it was not satisfied. There was no error of approach, and no failure to weigh competing and cumulative points. Rather, there was an adverse evaluative outcome having done so.”

20. Finally, the Judge addressed the submission that there was no sufficient evidence in law to sustain the outcome reached by the Crown Court. This was the substance of the second point that the Appellant had requested the Crown Court to incorporate in a statement of case for the High Court: see [7] above. Having referred to *Singh* as providing “powerful reasons for reflection” he concluded at [37]-[38] that:

“... Singh was a case on its own facts and evidence. The crown court sentencing judge had made an immediate DO without giving any reasons. The DO was linked to an adverse finding on fitness and propriety, which was itself overturned. Clear and positive reasons had been expressed by an expert, but no reasons had been given by the court for rejecting those views, and none was identified in the Court of Appeal. In the present case, the Judgment is a carefully and fully reasoned evaluative assessment. It comprehensively and expressly references each relevant feature of the evidence in the case. It acknowledges all of the positive points. It gives cogent reasons for not accepting expert evidence, and for the answer to the statutory question arrived at.

38. In my judgment, the outcome was one for which there was a sufficiency of evidence, and one within the bounds of reasonableness. There was no error of public law.”

The statutory framework

The Act

21. The statutory framework provided by the Act is well known but bears setting out again.

1. Dogs bred for fighting

(1) This section applies to-

(a) any dog of the type known as the pit bull terrier;

...

(3) After such day as the Secretary of State may by order appoint for the purposes of this subsection no person shall have any dog to which this section applies in his possession or custody except-

(a) in pursuance of the power of seizure conferred by the subsequent provisions of this Act; or

(b) in accordance with an order for its destruction made under those provisions;

...

(5) The Secretary of State may by order provide that the prohibition in subsection (3) above shall not apply in such cases and subject to compliance with such conditions as are specified in the order and any such provision may take the form of a scheme of exemption containing such arrangements (including provision for the payment of charges or fees) as he thinks appropriate.

(6) A scheme under subsection (3) or (5) above may provide for specified functions under the scheme to be discharged by such persons or bodies as the Secretary of State thinks appropriate.

(6A) A scheme under subsection (3) or (5) may in particular include provision requiring a court to consider whether a person is a fit and proper person to be in charge of a dog ...

...

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.

...

4. Destruction and disqualification orders

- (1) Where a person is convicted of an offence under section 1 ... 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
- ...
- (1A) Nothing in subsection (1)(a) above shall require the court to order the destruction of a dog if the court is satisfied—
- (a) That the dog would not constitute a danger to public safety;
- ...
- (1B) For the purposes of subsection (1A)(a), when deciding whether a dog would constitute a danger to public safety, the court—
- (a) must consider—
- (i) the temperament of the dog and its past behaviour, and
- (ii) whether the owner of the dog, or the person for the time being in charge of it, is a fit and proper person to be in charge of the dog, and
- (b) may consider any other relevant circumstances.
- ...

4A. Contingent destruction orders

- (1) Where—
- (a) A person is convicted of an offence under section 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.

...

4B. Destruction orders otherwise than on a conviction

- (1) Where a dog is seized under section 5(1) or (2) below or in exercise of a power of seizure conferred by any other enactment and it appears to a justice of the peace, or in Scotland a sheriff—

- (a) that no person has been or is to be prosecuted for an offence under this Act or an order under section 2 above in respect of that dog (whether because the owner cannot be found or for any other reason); or
- (b) that the dog cannot be released into the custody or possession of its owner without the owner contravening the prohibition in section 1(3) above,

he may order the destruction of the dog and, subject to subsection (2) below, shall do so if it is one to which section 1 above applies.

- (2) Nothing in subsection (1)(b) above shall require the justice or sheriff to order the destruction of a dog if he is satisfied—

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

...

- (2A) For the purposes of subsection (2)(a), when deciding whether a dog would constitute a danger to public safety, the justice or sheriff—

- (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.

- (3) Where in a case falling within subsection (1)(b) above the justice or sheriff does not order the destruction of the dog, he shall order that, unless the dog is exempted from the prohibition in section 1(3) above within the requisite period, the dog shall be destroyed.”

The 2015 Order

- 22. The existence of an exemption scheme for individual pit bulls and other dogs that fall within the prohibition in section 1(3) but are not considered to be a danger to public safety is provided for by section 1(5) of the Act. The terms of the scheme are currently contained in the 2015 Order, which sets out the conditions that are to be met for a dog to be exempted and the enduring requirements to be complied with if the dog is to remain exempt. Relevant provisions provide:

“Exemption scheme and requirements

- 4.(1) The prohibition in section 1(3) of the Act shall not apply to a dog provided that—

- (a) a court has determined that the dog is not a danger to public safety under section 4(1A) or 4B of the Act and has made the dog subject to a contingent destruction order under section 4A or 4B of the Act;
 - (b) the conditions set out in paragraph (2) are met in respect of the dog within the time period set out in paragraph (3); and
 - (c) the requirements attached to the certificate of exemption in accordance with article 10 are complied with throughout the lifetime of the dog.
- (2) The conditions referred to in paragraph (1)(b) are that-
- (a) the dog is neutered in accordance with article 6;
 - (b) the dog is microchipped in accordance with article 7;
 - (c) third-party insurance in respect of the dog is obtained in accordance with article 8; and
 - (d) a certificate of exemption is issued in accordance with article 9.
- ...

Third-party insurance

8.(1) The owner or person in charge of the dog must have in place a policy of insurance in respect of the dog that is to be exempted from the prohibition in section 1(3) of the Act throughout the dog's lifetime

Issue of certificate of exemption

9. The Agency must issue a certificate of exemption in respect of the dog if it is satisfied that-
- (a) the court, in determining that the dog is not a danger to public safety, has decided the person to whom the certificate is to be issued is a fit and proper person to be in charge of the dog and has made the dog subject to a contingent destruction order;
- ...
- (c) the conditions referred to in articles 6 to 8 have been met.

Requirements attached to certificate of exemption

- 10.(1) A certificate issued under article 9 must contain requirements—
- (a) to keep the dog at the same address as the person to whom the certificate is issued save for any 30 days in a 12- month period;

(b) to notify the Agency of any proposed change of address (not to include any changes of address in the 30 days mentioned in paragraph (a));

...

(e) to keep the dog muzzled and on a lead when in a public place;

(f) to keep the dog in sufficiently secure conditions to prevent its escape;...”

23. The Act has been amended since its original enactment. Specifically:

- i) Sections 4(1A), 4A and 4B (other than subsection 4B(2A)) were inserted by amendment in June 1997;
- ii) Sections 1(6A) and 4(1B) and 4B(2A) were inserted by amendment in May 2014.

24. In summary, the Act did not originally qualify the duty to order the destruction of a dog pursuant to section 4 where there had been an offence under section 1 or an aggravated offence under section 3(1). The amendments in June 1997 tempered the duty pursuant to section 4 and incorporated the same tempering provision as part of the introduction of section 4B. The June 1997 amendments also introduced CDOs. In 2014, the amendments that were inserted as sections 4(1B) and 4B(2A) laid down what the Court *must* consider (i.e. the temperament of the dog and its past behaviour, and whether the owner is a fit and proper person) and *may* consider (i.e. any other relevant circumstances) when deciding (pursuant to section 4(1A)(a) or section 4B(2)(a)) whether the dog would or would not constitute a danger to public safety following a conviction under section 1 or 3(1) or where the dog has been seized and, although there has been no conviction, the dog cannot be released into the custody of its owner without the owner contravening the prohibition in section 1(3). The cumulative effect of the amendments was that, where a court is satisfied that a dog whose destruction would otherwise be mandatory would not constitute a danger to public safety, the destruction of the dog will no longer be mandatory, though it would remain within the discretionary power of the court.

Ground 5: *R v Golding* and what may be “any other relevant circumstances” pursuant to section 4B(2A)(b) of the Act

25. The first issue that arises under this ground turns on what may be included as “any other relevant circumstances” within the meaning of section 4B(2A)(b) of the Act. Ms McGahey submits that the words are wide enough to comprehend circumstances that would arise as a consequence of a CDO, if one were to be imposed. She goes further and submits that a Court deciding whether a dog would constitute a danger to public safety should consider steps that the owner has taken or will take to guard against any risk that the dog would otherwise constitute a danger to public safety. For example, she submits that it is a relevant circumstance that the Court may and should take into account in the present case that, if a CDO is made, the Appellant will be required to keep Lightning muzzled and on a lead when in a public place and to keep the dog in sufficiently secure conditions: see Article 10(e) and (f) of the 2015 Order. Similarly,

she submits that it would be a relevant circumstance if the owner had already constructed what amounted to an impregnable Fort Knox from which it would be quite impossible for the dog to escape: so, in the present case, she submits it is a relevant circumstance that the Appellant has increased the levels of security for preventing a further escape by Lightning as her present home has a gate that requires a key and has deadbolts with a padlock.

26. The second issue is whether, if Ms McGahey is right on the first, the Crown Court failed to have adequate regard to those relevant circumstances.
27. On the first issue, Ms McGahey relies upon authorities which she submits support her submissions. I refer to them below. Although Fordham J made reference to *Golding* in his judgment, no submission was made to him that *Golding* was wrong or that the Crown Court followed *Golding* and was wrong to do so. We are told that the issue was not raised by the Appellant until this Court on the basis that the lower courts (the Crown Court and Fordham J) were bound by *Golding*.

R v Flack

28. The first authority on which Ms McGahey relies is *R v Flack* [2008] EWCA Crim 304. The appellant had been convicted of an aggravated offence under section 3(1) of the Act. The Crown Court ordered the destruction of the dog pursuant to section 4(1) of the Act. The grounds of appeal to the Court of Appeal, Criminal Division, were that the dog did not constitute a danger to the public and therefore should be exempted from destruction under section 4(1A)(a) of the Act. It was submitted that, under the Act as it then stood, it had been open to the Crown Court to impose stringent conditions upon the appellant in relation to the future behaviour of the dog with the sanction of it being destroyed if there was non-compliance. I presume that the reference to “stringent conditions” was to those which the Court was empowered to make under section 4A(4) and (5) of the Act since *Flack* was decided before the 2015 Order existed. It may also be noted that, although section 4(1A) had been inserted in 1997, section 4(1B) had not yet been enacted. I note also a feature which is common to a number of the cases to which I shall refer, namely that the prosecution was not represented at the relevant hearing.
29. Without engaging in any other analysis of the provisions of the Act, Silber J giving the judgment of the court said:

“ 11. The relevant principles that can be made in respect of a dog whose owner has been convicted under section 3(1) of the 1991 Act of failing to keep a dog under control in a public place are that:

(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) [sic] 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 4(a)(5) [sic] 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."

30. The Court then noted that the Crown Court Recorder did not appear to have considered whether to impose a suspended destruction order. If he had done so, the Court held that it would have been relevant that, apart from the episode that led to the conviction, the dog had not otherwise been aggressive and that the Appellant was a man of good character and a conscientious dog owner. The Court set aside the destruction order and imposed a contingent destruction order with terms that the dog must be muzzled and on a lead with a special collar in public.
31. While recognising that (a) *Flack* was a decision in relation to section 4, not 4B, and (b) section 4(1B) had not yet been inserted, Ms McGahey submits that this provides direct support for her submission because the wording of section 4(1A) is materially identical to the wording of section 4B(2).

R v Baballa

32. The *Flack* statement of principles as set out above was adopted by a different constitution of the Court of Appeal, Criminal Division, in *R v Baballa* [2010] EWCA Crim 1950. Once again, the case was decided before the 2014 amendments to the Act or the existence of the 2015 Order; and, once again, only the appellant was represented. As a result of an attack in the course of which one out of a pack of four dogs bit the victim, the appellant was charged with one aggravated offence contrary to section 3(1) in respect of the dog that bit the victim, and an offence contrary to section 1(3) in respect of each of the other dogs, which were pit bull terriers. The Crown Court ordered the destruction of the dog that bit the victim, against which there was no appeal. The appeal to the Court of Appeal was in respect of the Crown Court's order that the three pit bull terriers should also be destroyed. The Crown Court had declined to make an order disqualifying the appellant from having custody of a dog.

33. Giving the judgment of the court, which allowed the appeal, Swift J adopted the *Flack* principles and said that they applied equally to a case falling within section 1(3) of the Act: see [22]. The Court held that the judge “should have considered whether the imposition of the conditions which would be attached to a certificate of exemption would be sufficient to ensure that the dog would not constitute a danger to public safety.”: see [23]. Once again, subject to the points that section 4(1B) had not yet been inserted and that this was a case falling within section 4, not 4B, Ms McGahey relies upon this decision as supporting what she says is the correct approach generally, including to a case arising now under section 4B of the Act.

R v Hill

34. The appeal of *R v Hill* [2010] EWCA Crim 2999 was also heard before the 2014 amendments to the Act. It was a case where the prosecution was represented. The *Flack* principles as set out above were set out again and described as helpfully pulling the threads together. The appellant’s Staffordshire Bull Terrier bit and wounded two victims and attacked (but did not injure) a third. There were therefore two aggravated offences under section 3(1) of the Act. The sentencing judge had not considered the possibility of a CDO. The Court of Appeal accepted that “other than by way of a contingent rather than an immediate destruction order, there was no realistic prospect of demonstrating that the dog would not constitute a danger to public safety.” The sense is clear even if the syntax is somewhat confusing: unless the restrictions that could be imposed as terms of a CDO were brought into account, it was impossible to conclude that the dog would not constitute a danger to public safety. Despite recognising that theoretical possibility, the court concluded that on the facts of that case the making of an immediate destruction order was inevitable.

R v Singh

35. In *Singh*, the appellant’s German Shepherd attacked and badly injured a 12 year-old boy. The appellant was convicted of an aggravated offence contrary to section 3(1). An expert expressed the opinion that the dog could safely be returned to the appellant’s care subject to the imposition of conditions that he should be kept on a leash held by a responsible adult, should be muzzled in public places, and should be surgically castrated. The sentencing judge disqualified the appellant from owning a dog for 4 years and ordered the destruction of the dog without referring to the possible imposition of a contingent destruction order incorporating the conditions suggested by the expert.
36. Giving the judgment of the Court, Swift J referred to *Flack* and to the guideline that was then current which said that “the relevant circumstances” included the circumstances of the incident, in particular the degree of harm caused by the dog’s behaviour, the past behaviour of the dog, the owner’s character, and whether that person is a fit and proper person to own the dog in question. Having recorded the appellant’s submission that the sentencing judge had failed to consider the option of a CDO, the Court’s reasoning was set out in a passage on which Ms McGahey places great weight. Accordingly I set it out in full so that it may be fully understood:

“21. The judge's sentencing remarks do not reveal his reasons for finding that the appellant was not a fit and proper person to have custody of a dog. Nor do they identify the matters which he took into account when reaching that decision. He had of course found

that, on the day of the incident, the appellant had let Ace off the leash in the enclosed area and had left the gate open. He did not indicate whether he considered that the appellant had left the gate open accidentally. However, it seems unlikely that he would have done so deliberately. It is much more likely that this was an act of momentary carelessness. The judge characterised the appellant's conduct as giving rise to lower culpability for the purpose of sentencing.

22. There was no evidence that such an incident had occurred previously. It was clear that the appellant had taken proper steps to provide suitable facilities for Ace at Norwood Hall so as to prevent him in general from coming into contact with members of the public. The character references that were produced described the appellant as a caring and responsible dog owner and of otherwise exemplary character. The contents of those references accorded with the observations of Dr Mugford and the facilities which he observed at the appellant's home. The judge should have considered all those positive matters and weighed them in the balance when deciding whether or not to make a disqualification order. That he failed to do.

23. As a result we consider that the order was wrong in principle and we quash it.

24. The judge stated that he was not satisfied that Ace would not constitute a danger to the public. He gave no reasons for that decision, or for his rejection of the views expressed so clearly by Dr Mugford. He did not refer specifically to the possibility of a contingent destruction order, or to the conditions that Dr Mugford had suggested should be attached to such an order. He did not explain why he did not consider that those conditions would successfully operate to prevent Ace from presenting a danger to the public in the future.

25. A significant reason for his decision may have been that he did not regard the appellant as a fit and proper person to own a dog. However, as we have already said, the judge does not appear to have carried out the balancing exercise necessary when deciding whether that was the case. There is no doubt that Ace was allowed to run free on the occasion in question and that he acted aggressively. We do not minimise the seriousness of the incident. It is not possible to be absolutely confident that no risk of recurrence exists. However, given the lack of any previous incidents, the appellant's character, Ace's temperament as Dr Mugford observed it to be, and the nature of the conditions that he recommended, we consider that those conditions would mitigate such risk.

26. That being the case, we consider that the imposition of an immediate destruction order was manifestly excessive.”

R v Golding

37. It is convenient now to jump to *Golding* since the Divisional Court summarised the relevant authorities on which it relied in reaching its decision in that case. The Claimant sought to challenge the decision of the Crown Court upholding the order of the Magistrates for the destruction of a pit bull type dog. Three preliminary points may be noted. First, *Golding* post-dated the 2014 amendments to the Act. Second, it was a case arising under section 4B. Third, as well as the Claimant (who was represented by Ms McGahey) the interested party was represented by counsel.
38. The first ground of challenge was that the Crown Court wrongly failed to take into account mandatory conditions of exemption that would arise if a CDO were made, including neutering and the use of a muzzle and lead in public.
39. The Divisional Court relied heavily on the reasoning and decision of Mr Jonathan Swift QC (then sitting as a deputy High Court Judge) in *R (Grant) v Crown Court at Sheffield* [2017] EWHC (Admin) 1678. The Claimant in *Grant* (who was the only party to be represented) applied for judicial review of the decision of the Crown Court affirming the decision of the magistrates to impose a destruction order under section 4B. The Claimant's pit bull terrier type dog had escaped but no prosecution had followed. The dog had been assessed "as a generality the dog is a pleasant dog. He is not aggressive and he is a nice dog." The magistrates accepted that evidence.
40. The Divisional Court set out [20]-[23] of the judgment in *Grant*. For present purposes it is sufficient to set out [20] here.

"Under section 4B there are two sequential steps. The first is whether or not to make a destruction order. There is the requirement, in a case such as the present, under subsection (1) to make a destruction order and then the exception to that requirement is subsection (2). Second, and only if at the first step no destruction order has been made, the second step is whether to make a contingent destruction order under subsection (3). In a case like this, there is an obligation to make such an order. Therefore, under section 4B the court does not at the outset have a free choice between a contingent destruction order and a destruction order. Under section 4B, the court is not able to opt for a contingent destruction order simply because, on the evidence it might for the view that such an order would provide sufficient protection for public safety. Rather, the scheme under section 4B is much more prescriptive. A contingent destruction order arises and must be made only if the court has already decided not to make a destruction order. A court may only decide not to make a destruction order, again in a case such as the present, if it has decided that the dog 'would not constitute a danger to public safety'."

41. Having set out the *Flack* principles (as set out above) the Deputy Judge said (at [23]-[25]) that he did not disagree with them but held that there could be no read-over from *Flack* and *Baballa* to the present case because section 4B is premised on there being no

conviction whereas the premise for section 4A(4) is that there has been a conviction of some kind under the 1991 Act.

42. The Divisional Court in *Golding* said that the decision in *Grant* had been cited with approval in *R (Webb) v Chief Constable of Avon and Somerset* [2017] EWHC 3311 (Admin). Ms McGahey submits that the issue in *Webb* was different from the issue in *Grant* and *Golding*. I agree with that submission; but *Webb* remains relevant as a decision on section 4B which broadly endorsed the decision in *Grant*; and for the observations on the underlying policy of the 1991 Act (as amended), which are at [34] of the judgment in *Webb*. Similarly, the decision in *Henderson v Commissioner of Police for the Metropolis* [2018] EWHC 666 (Admin), while acknowledging that section 4B(2A)(b) permits the Court to consider “any other relevant circumstances”, does not directly address the question what may constitute “relevant circumstances” in this context.
43. *Golding* also referred to the decision of the Scottish Appeal Court in *Hunter v Procurator Fiscal* [2019] HCJAC 19. The case arose from an aggravated offence under section 3, which did not involve a dog of a type prohibited under section 1. The Scottish Court treated the approach to be adopted under sections 4 and 4B as analogous. The reasoning of the members of the Court differed, though they agreed in the result. At [30], Lord Carloway LJG explained why the prospect of a CDO only arose after a court had decided that the dog did not constitute a danger to public safety, as follows:

“[30] The provision in relation to a contingent destruction order is in a different section (not sub-section) of the Act (section 4A). Despite the anomalous sub-section 4A(1) ... , it can only apply in a situation in which a decision not to destroy the dog under section 4(1)(a) has already been made. The purpose of the section was, and is, to allow the court the flexibility, which it had been, and continued to be, permitted under the Dogs Act 1871, to make a control order where destruction was not ordered. It was not to “tilt the balance” further towards leniency than had already been done with the introduction of sub-section (1A). Indeed, if the prospect of a contingent destruction order were a consideration in determining whether a dog did constitute a danger to public safety, it is doubtful whether a destruction order could ever be made, given the ability effectively to chain a dog to its kennel or to prohibit its appearance in public.”

44. Lord Drummond Young agreed in the result but not for the reasons given by Lord Carloway. Lord Turnbull agreed with Lord Carloway that:

“... the provisions in section 4A of the Act, which provide for a contingent destruction order, can only apply in a situation in which the decision not to destroy the dog under section 4(1)(a) has already been made.”

45. Ms McGahey submits that *Golding* is wrong and that the *Flack* principles as set out above should be read across to a case arising under section 4B. She makes a number of points quite apart from the fact of the repeated decisions of the Court of Appeal, Criminal Division. She did not go so far as to submit that we are bound by *Flack* and

Baballa but she did urge upon us that there is no material difference between the provisions of section 4B on the one hand and sections 4 and 4A on the other. She also takes the point that section 4A(5) specifically contemplates that a dog which has been assessed as dangerous in the absence of mitigating conditions may be the subject of a CDO because an such an order may, if it appears to the court that the dog is male *and would be less dangerous if neutered*, require it to be neutered. She submits that if, for example, the owner had built Fort Knox and the court was satisfied it would keep the dog in, it would be perverse to consider the dog a danger to public safety. And, if that is right, it would be equally perverse to ignore other mitigating features such as the owner keeping the dog muzzled and on the lead, whether that is done because of sensible dog management or because required by a CDO. So she submits that in deciding whether the dog would not be a danger to public safety it would be perverse and wrong not to take into account all future precautions that will be taken. Any other approach would have the effect that the test and procedure was more onerous for a dog being processed under section 4B, which had not led to the committing of an offence, than for a dog which had led to the committing of an offence. The point was expressed in rather different terms by Macur LJ in the course of argument: the duty to order destruction in the case of a section 1 offence or an aggravated section 3 offence is tempered by the power not to do so subject to finding that the dog is not a danger to public safety. It is therefore at least arguable in public law terms that it would be unreasonable for the decision maker not to consider the consequences of exercising the tempering power before resolving to comply with the untempered duty.

Resolution of Ground 5

46. I am disinclined to decide the question raised by the first issue (the correctness or otherwise of the decision in *Golding*) unless it is essential to do so; and, for the reasons set out below, I do not consider it to be essential. There are a number of reasons for my reticence. First is the complete absence of any analysis at any stage to provide a reasoned basis for the asserted *Flack* principles as set out above. Second is the fact that the prosecution was not represented in either *Flack* or *Baballa*.
47. Third is that *Flack* and *Baballa* asserted and established their statements of principle before the 2014 amendments inserted sections 4(1B) and 4B(2A). It seems to me that the 2014 changes have at least arguably changed the landscape: the mandatory considerations go to the inherent reliability or unreliability of the dog. If that is right, it seems to me that it is at least arguable that the mandatory considerations lend colour to the non-mandatory “other relevant circumstances.” At the same time, I have sympathy with the argument that it would be unrealistic not to take any notice of an existing circumstance such as the actual construction of what I have described as Fort Knox. On the other hand, there seems to me to be a difference in quality between things that have actually been done and those that might be done in the future, whether voluntarily or pursuant to an order of the Court. In raising these points I have not forgotten that Hickinbottom LJ said in *Killeen v Birmingham Crown Court and others* [2018] EWHC 174 (Admin), after the 2014 insertions had been enacted, that the *Flack* principles were “uncontroversial”: see [34].
48. Fourth, I am persuaded that (subject to the matters raised in my third point above) the normal tools for interpretation of statutes do not provide a clear answer one way or another about what is meant by “other relevant circumstances”. Fifth, I find the reasoning of the Deputy Judge in *Grant* and the reasoning of the majority in the Scottish

appeal in *Hunter* to be highly persuasive. Sixth, neither the Chief Constable nor the Crown Court are represented before us. We have therefore not had the benefit of full argument either about the points made by Ms McGahey or those sketched above or, for that matter, about the persuasive or possibly binding effect of the previous decisions to which I have referred. While I fully understand the financial and other constraints that may have led to the decision by the Respondent and the Interested Party not to attend, I cannot pretend that the decision is not regrettable from the point of view of resolving a point that is likely to recur.

49. However, as I have said, I do not consider it to be essential to resolve the first issue under Ground 5. That is because, assuming Ms McGahey is right on the first issue, the Crown Court did not fail to have adequate regard for those relevant circumstances. On the contrary, the Crown Court expressly considered what would be the position if the conditions of a CDO were imposed at paragraph [13] of the Crown Court Judgment: see [6] above. In paragraph [12] the Crown Court explained why Mr Barnett's evidence about the causes of Lightning's behaviour on 7 February 2020 gave the court no comfort that he would not constitute a danger to the public. At paragraph [13] the Crown Court considered and rejected reliance upon conditions as giving satisfactory assurance, pointing out that rigorous compliance with conditions had not been achieved in the past while the dog had exempt status. The Crown Court's assessment that there had been "some slippage" and that "whilst the escape of the dogs was not directly her fault, it cannot be ignored that circumstances existed which allowed the dogs to escape and these events did happen" was measured and justified. At paragraph [14] the Crown Court addressed head on the Appellant's submission that the events on 7 February 2020 were "out of her control". The Court was again justified in saying "Well, that is really the worry." Albeit concisely, the Crown Court made clear that it had taken into account the possibility of relying upon conditions and that it did not consider that the imposition of conditions would provide adequate protection for the public. The fact that the breaches had occurred without personal fault on the part of the Appellant merely demonstrates that there will always be a risk of repetition, the seriousness of that risk being for the Crown Court to assess and weigh in the balance.
50. The transcript of the hearing before the Crown Court does not record the making of a submission by either party to the effect that the Crown Court either should or should not take into account the potential restrictions that would be imposed as part of a CDO. That did not prevent the Crown Court from taking those matters into account in the way that Ms McGahey says that it should have done had it correctly understood the law as she submits it to be.
51. I would dismiss the appeal on Ground 5.

Ground 1: applying a higher standard to Lightning as a dog of a prohibited type.

52. Ms McGahey submits that the phrase "most dogs are not banned as being dogs bred specifically for fighting" in paragraph [15] of the Crown Court Judgment shows that the Crown Court was applying a higher test to dogs of a prohibited type than would be applied to other dogs.
53. Fordham J dealt with this criticism at [32]-[34] of his judgment, which I have set out at [18] above.

54. In my judgment, Ms McGahey’s submission is unsustainable. When the phrase is read in context, it can be seen to be a reasonable response to a submission on behalf of the Appellant that “one cannot ever say in relation to every dog that exists that they will not ever attack any other dogs.” What the Court was saying in response is that, although the Appellant’s observation may be strictly true, the question of constituting a danger to the public does not arise in relation to a labrador, poodle or dalmatian. It is therefore idle to make a generalisation about “*every dog that exists*” when the Act is only concerned with the limited categories of dogs that fall within its terms. The Court did not say or imply that a different standard should be applied to a dog prohibited under section 1. If a labrador, poodle or dalmatian (or any other dog, prohibited or not) were to fall within the scope of section 3 of the Act because of being dangerously out of control, the test would be the same: is the Court satisfied that the dog would not constitute a danger to public safety? The Crown Court correctly identified that test and applied it: see paragraphs [5], [11] and [15] of the Crown Court Judgment. The fact that one can never say of any dog that there is no risk at all is nothing to the point. Where the absence of a guarantee will be relevant is where a dog has previously exhibited dangerous behaviour, since that falls within the mandatory consideration of “the temperament of the dog and its past behaviour.”
55. For these reasons, which are essentially the same as those given by Fordham J, I would dismiss the appeal under Ground 1.

Ground 2: error in respect of a material fact

56. At [34] of his judgment, Fordham J said that Lightning’s attack on the other dog “was relevant behaviour on the only occasion when Lightning had been at large and in public without a lead and unmuzzled.” That is said to be a material error of fact.
57. Ms McGahey supports her submission by saying that the incident on 7 February 2020 was the only one to have occurred; that Lightning was subject to no restrictions at all for the first two years of his life; that he had lived with other dogs without incident; that he had shown no aggression while in police kennels; and that the police officer who gave evidence had seen no concerning behaviour.
58. In my judgment this criticism is misconceived. What mattered was that Lightning attacked the other dog on the only occasion when he had been “at large and in public without a lead and unmuzzled.” That statement was correct in the light of the finding at paragraph [9] of Crown Court Judgment that “there is no evidence that [Lightning] had ever before or since been out unmuzzled or not on a lead.” That finding has not been and cannot now be challenged. For the avoidance of any doubt, the transcript of the hearing before the Crown Court says nothing to cast doubt on the finding. The matters on which Ms McGahey rely do not affect the finding, since none of them refer to times when Lightning was at large and in public without a lead and unmuzzled.
59. I would dismiss the appeal on Ground 2.

Ground 3: taking into account matters unfavourable to the Appellant as a keeper

60. Before the Crown Court it was accepted on behalf of the Chief Constable that the Appellant was a fit and proper person to have a dog and that the three identified breaches (escape, no insurance for a week, and failing to notify DEFRA of a change of

address) occurred without personal fault on the part of the Appellant. One of the points made by the Appellant, which was broadly accepted by the Crown Court, was the absence of personal fault: see paragraphs [9] and [10] of the Crown Court Judgment. The complaint under Ground 3 is that, despite that acceptance, these matters were “held against” the Appellant by the Crown Court and by Fordham J.

61. The submission on behalf of the Chief Constable to the Crown Court, recorded at paragraph [10] of the Crown Court Judgment was that “these slippages in compliance may point to something of a sloppy attitude to compliance no matter that the breaches were minor and only discovered later in the proceedings by the police.” The response of the Crown Court was set out at paragraph [13] and [14] from which it is clear that the only inference drawn from the identified breaches was to show that the events of 7 February 2020 had happened despite the restrictions being in place and there could be no guarantee that similar circumstances would not arise in the future. The important one, of course, was the potential for Lightning to escape and be out of control. It is plain from the overall context that these matters were not “held against” the Appellant in the sense of being criticisms of her behaviour: their sole relevance was to show that accidents can happen. That was a justifiable and correct observation. As Fordham J pointed out, the fact that the breaches had occurred was relevant not only to the question whether the Appellant was a fit and proper person but also to the potential for there to be similar slippages in the future.
62. For these reasons, which are essentially the same as those of Fordham J at [31] of his judgment, which I have summarised at [16] above, I would dismiss the appeal under Ground 3.

Ground 4: the analogy with R v Singh

63. Ms McGahey submits that a comparison between the facts of *Singh* and the present case shows that the imposition of the destruction order in the present case was manifestly excessive or, in public law terms, irrational and unjustified. In oral submissions Ms McGahey developed two main themes. First, she submitted that the attack by the dog in *Singh* was more serious than the attack in the present case. Second, she submitted that the decision of the Court of Appeal in *Singh* was based upon the Court’s own assessment of the evidence and that, by parity of reasoning, the Courts below and this Court in the present case should by analogous reasoning reach the same conclusion as in *Singh*.
64. Fordham J provided a succinct analysis of the reasons for the decision in *Singh* at [37]-[38] of his judgment, which I have set out at [20] above. The Appellant criticises that analysis, submitting that the failure of the Crown Court in *Singh* to give reasons had not been the reason for setting the destruction order aside. I consider that this criticism is unfounded. It is plain from [21]-[23] of *Singh* that the failure to provide reasons or to explain what matters had been taken into account formed the basis of the conclusion that the order was wrong in principle and should be quashed:

“21. *The judge's sentencing remarks do not reveal his reasons for finding that the appellant was not a fit and proper person to have custody of a dog. Nor do they identify the matters which he took into account when reaching that decision.* He had of course found that, on the day of the incident, the appellant had let Ace

off the leash in the enclosed area and had left the gate open. He did not indicate whether he considered that the appellant had left the gate open accidentally. However, it seems unlikely that he would have done so deliberately. It is much more likely that this was an act of momentary carelessness. The judge characterised the appellant's conduct as giving rise to lower culpability for the purpose of sentencing.

22. There was no evidence that such an incident had occurred previously. It was clear that the appellant had taken proper steps to provide suitable facilities for Ace at Norwood Hall so as to prevent him in general from coming into contact with members of the public. The character references that were produced described the appellant as a caring and responsible dog owner and of otherwise exemplary character. The contents of those references accorded with the observations of Dr Mugford and the facilities which he observed at the appellant's home. *The judge should have considered all those positive matters and weighed them in the balance when deciding whether or not to make a disqualification order. That he failed to do.*

23. *As a result we consider that the order was wrong in principle and we quash it.* [Emphasis added]

65. Turning to the question of constituting a danger to public safety the Court continued in similar vein:

“The judge stated that he was not satisfied that [the dog] would not constitute a danger to the public. He gave no reasons for that decision, or for his rejection of the views expressed so clearly by [the expert].” [Emphasis added]

66. In my judgment, Fordham J was right to analyse the basis for the decision as he did. Having decided that the decision should be quashed because it was wrong in principle, it fell to the Court of Appeal to substitute its own assessment.
67. That is not the case here. As Fordham J correctly noted, the Crown Court Judgment in the present case is a carefully and fully reasoned evaluative assessment which evidently takes into account all of the features now raised on behalf of the appellant. It acknowledges the positive points and gives cogent reasons for its assessment of the expert evidence.
68. In support of her submission that imposing a destruction order in the present case makes it a “very significant outlier” Ms McGahey refers to the facts of other decisions. She describes the 7 February 2020 incident as the dog was “involved in a minor dog fight, with accidental and minor injury being caused.” Elsewhere in her submissions she asserts that the dog “had not sought to attack” the other dog’s owner and that there was “no evidence of injury to the other dog”, which was a refrain repeated in oral submissions.

69. I am not able to accept this characterisation of what happened as “a minor dog fight” with no evidence of injury to the other dog. More importantly, the Crown Court was entitled to take a less benign view of the incident than Ms McGahey urges on us. The uncontradicted evidence of the eye-witnesses was read by agreement to the Crown Court. The person in charge of the other dog, which was a Staffordshire bull terrier cross described seeing the Appellant’s two dogs and continued:

“The larger Pitbull type looking dog immediately ran over towards and to grab hold of [my dog’s] neck and pinning him to the floor. I was trying to stop the large dog biting [my dog]. However nothing stopped the dog from going at him. I’ve kept hold of [my dog] on his lead whilst the other dog was attacking him, I’ve been very panicked, knocked on the door of a house for help. ... In order to try and stop the dog attacking [my dog] I’ve picked him up and tried to place him on my shoulders. The big Pitbull type dog has then bitten me on my hand causing minor grazing, a small piercing mark on my hand and I had pain in my thumb. The dog then began jumping up and was attempting to bite the rear legs of [my dog], managing to get hold of his legs, biting on and keeping hold causing him to fall to the floor. The big Pitbull type dog continued to attack [my dog] for approximately five minutes in total before police arrived.”

He then described taking the dog to the vet for treatment.

70. One of the police officers who attended described how their initial reaction on coming across the dogs was to get back into their car for safety. Later, their evidence continued:

“After a matter of minutes a job came in with reports of dogs fighting and a male being attacked We were seconds away from that location and as I pulled on to Bright Street one of the dogs from earlier with blood around its mouth attacking another dog which appeared to have an owner trying desperately to assist the dog and he himself had blood on him and appeared to have been attacked.”

The attack continued until the disabling spray was used by another police officer.

71. The references to blood on the dog’s mouth and the need to go to the vet for treatment contradict the assertion that there was no injury to the other dog. What emerges clearly is persistent serious aggression over a number of minutes, with another dog being attacked, pinned to the ground and bitten despite the other dog’s keeper doing all that he could to get the dog off and being himself bitten for his pains.
72. It is true that other cases (of which *Singh* is one) involved the infliction of more serious injuries. However, there was ample evidence to contribute to and justify the finding that *Lightning* was and remained a danger to public safety. Neither *Singh* nor the other cases to which Ms McGahey referred were or purported to be guideline cases on the severity of injuries that were required before a finding could be made that a dog constituted a danger to public safety. Nor could they be: each case will be factually different and resolution of the statutory question will be fact sensitive in every case.

73. I would for these reasons dismiss the appeal under Ground 4.

Conclusion

74. In my judgment the Crown Court was entitled to come to the conclusion that it did for the reasons it gave, which were sufficient. The Crown Court was entitled to refuse to state a case for the reasons it gave, which I have set out at [9] above. Neither the original Crown Court Judgment nor its ruling on the application to state a case disclosed an error of law that rendered it susceptible to judicial review. Fordham J was right to dismiss the Appellant's claim. I would dismiss this appeal.

Lady Justice Macur

75. I agree.

Lord Justice Lewison

76. I also agree.