



Neutral Citation Number: [2019] EWHC 2029 (Admin)

Case No: CO/10/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2019

Before:

LADY JUSTICE NICOLA DAVIES DBE
MRS JUSTICE MAY DBE

Between:

THE QUEEN (on the application of BETH GOLDING)	<u>Claimant</u>
- and -	
CROWN COURT SITTING AT MAIDSTONE	<u>Defendant</u>
- and -	
CHIEF CONSTABLE OF KENT POLICE	<u>Interested Party</u>

Cathryn McGahey QC (instructed by Cohen Cramer Solicitors) for the Claimant
Stuart Jessop (instructed by Kent Legal Services) for the Interested Party
The Defendant did not appear and was not represented

Hearing date: 11 June 2019

Approved Judgment

Lady Justice Nicola Davies and Mrs Justice May:

1. This is the judgment of the court to which we have each contributed.
2. This application for judicial review seeks to challenge the decision of the Maidstone Crown Court (HHJ MacDonald QC sitting with two lay justices) made on 19 October 2018 upholding an order made pursuant to section 4B of the Dangerous Dogs Act 1991 (“the 1991 Act”) for the destruction of a pit bull type dog named Harry (“Harry”).
3. Proceedings were issued challenging the Crown Court’s refusal to state a case: William Davis J in granting permission ordered that the claim continue as a challenge to the court’s decision on the substantive issues.

Facts

4. Harry is 4 years old. He is jointly owned by the claimant and her former partner. The claimant lives in Ellesmere Port, Cheshire. In August 2017 the claimant and her partner went on holiday, Harry was left in the care of her partner’s brother. Upon return, they found that the dog was absent. On 17 August 2017 Harry was collected by a dog warden in Kent. A police dog-handling expert examined Harry and concluded that he was a pit bull terrier, being a type of dog prohibited under the 1991 Act. It is not disputed that Harry is a dog of this type.
5. The interested party (“the Chief Constable”), in whom are vested powers and duties under the 1991 Act, applied to the magistrates’ court for an order under section 4B of that Act. At a hearing on 24 April 2018 the magistrates made an immediate destruction order.
6. The claimant appealed to the Crown Court. Following a hearing on 19 October 2018, the court upheld the magistrates’ decision.

The decision under review

7. HHJ MacDonald QC summarised the matters which the court was required to take into account in making its decision as follows (transcript p.68D-E):

“In reaching our decision we should consider the relevant circumstances, which must include the temperament of the dog, its past behaviour and whether the owner of the dog or the person for the time being in charge of it, in this case Ms Beth Golding, is a fit and proper person to be - to be in charge of the dog and may include other relevant circumstances. Various other factors apply to the fit and proper person aspect of the test.”

This was a reference to the factors specified in section 4B(2A) of the 1991 Act (paragraph 11 below).

8. In reaching its conclusion the court preferred the evidence of Mr Turner, an expert called on behalf of the Chief Constable, to that of the expert called on behalf of the claimant (transcript p.139C-E):

“Mr Turner ... was a fully objective, experienced and qualified expert. A lot of court experience, a lot of experience of dogs. He had two concerns which I think we have addressed: the concern about jumping out of the garden of the Golding premises and, at least for the time being, the concern about risk to other pets, which apparently are no longer extant. However, his other two points, play aggression and dog aggression, remain. We completely agree with him, particularly on dog aggression. We don't regard Ms Golding's evidence as central to the case. We think the expert evidence is central. We have two experts, only one is objective and independent, and we are sorry, genuinely sorry, to say that we cannot find there is no danger to the public here, so there will be a destruction order.”

9. It does not appear from the transcript of the hearing that at the time of making the original decision the Crown Court was referred to any relevant authority as to the approach to be taken to section 4B of the 1991 Act. However, although the authority of *R (Grant) v Sheffield Crown Court* [2017] EWHC 1678 was not cited to the court during the hearing, it was referred to in the application to state a case. In refusing to do so, HHJ MacDonald QC referred to *Grant*, stating that:

“... as a matter of true construction of section 4B it clearly was correct.”

It would appear that HHJ MacDonald QC and the justices took the same approach to section 4B as the court in *Grant*.

Grounds of challenge

10. Ms McGahey QC, for the claimant, raises three grounds of challenge:
- i) The principal ground is that the court's decision on dangerousness wrongly failed to take into account mandatory conditions of exemption which require particular controls (including neutering and use of muzzle/lead when in public) over a dog of a type such as Harry.
 - ii) The second and third grounds are linked to each other and to the first: it is said that the court's decision – that Harry remained a danger to public safety – was perverse as there was no history of his acting aggressively and the matters relied upon by the judge in arriving at his conclusion were accepted characteristics of any young dog, whether of a type prohibited under the 1991 Act or not.

The law

11. The Dangerous Dogs Act 1991 (as amended) states:

“An Act to prohibit persons from having in their possession or custody dogs belonging to types bred for fighting; to impose restrictions in respect of such dogs pending the coming into force of the prohibition; to enable restrictions to be imposed in relation to other types of dog which present a serious danger to the public; to make further provision for securing that dogs are kept under proper control; and for connected purposes.

...

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 ...

...

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.”

Dangerous Dogs Exemption Scheme (England and Wales) Order 2014 (“the 2015 Order”)

12. The existence of an exemption scheme for individual pit bulls that are not considered to be a danger to public safety is provided for by section 1(5) of the 1991 Act; the terms of the scheme are currently contained in the 2015 Order. 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-

...

(c) third-party insurance in respect of the dog is obtained ...

(d) a certificate of exemption is issued ...

...

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;

...

(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; ...”

13. In *Webb v Chief Constable of Avon and Somerset* [2017] EWHC 3311 the Divisional Court analysed the scheme of the Act, concluding at [34]:

“In broad terms, the 1991 Act, as amended, provides that a dog which is a prohibited dog within section 1 is to be regarded as inherently dangerous. The Act makes provision for such a dog to be seized and destroyed. But, as a result of the 1997 and 2014 amendments to the Act and the provisions in the 2015 Order, it also makes provision for those dogs which a court finds are not in fact a danger to the public to be exempted and not destroyed. To avoid the destruction of the dog, stringent conditions as to their retention including neutering, microchipping, taking out third-party insurance, and about their owner or keeper must be met.”

At [43] the court stated:

“... The ultimate effect of the Act, as seen from the provisions requiring the destruction of dogs unless exempted and the neutering of prohibited dogs, is intended to be the elimination of such dogs from the United Kingdom. On the other hand, the amendments introduced in 1997 reflected a desire to enable dogs which were not in fact dangerous, in certain circumstances, to avoid destruction, and those circumstances were refined by the 2014 amendments and the 2015 Order. The circumstances and safeguards considered necessary are reflected in the strict controls about the conditions to be met to qualify as an exempt dog and as to the transfer of such dogs”

14. The 1991 Act provides for the destruction of pit bulls in two situations:
- i) in the context of criminal proceedings where the owner/keeper of the dog has been convicted of an offence under section 1;
 - ii) in civil proceedings where there has been no prosecution.

Interpretation of section 4B of the 1991 Act

15. There was no prosecution in respect of Harry. The destruction order was applied for, and made, pursuant to section 4B of the 1991 Act.
16. In *R v Flack* [2008] Cr App R (S) 70 (a criminal appeal against sentence) the Court of Appeal considered the approach to be taken by a court under section 3(1) of the 1991 Act (having a dog dangerously out of control). It identified the principles to be followed in such a case at [11] of the judgment of Silber J:

“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) [we believe the intended reference must have been to 4(1A)(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 4(a)(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."

17. *Flack* has been followed in subsequent cases, in particular *R v Baballa* [2010] EWCA Crim 1950. *Baballa* was an appeal against ancillary destruction orders made in respect of three pit bulls following the conviction of their owner of three offences of possession of a prohibited dog under section 1. Having considered sections 4 and 4A of the 1991 Act and identified the principles enunciated in *Flack*, the Court of Appeal concluded at [22] and [23]:

"22. As we have observed, *Flack* was concerned with section 3(1) of the 1991 Act. Nevertheless, we consider that the same principles are applicable to a case which falls within section 1(3) of the 1991 Act.

23. Applying those principles to the present case, we consider that, before ordering the immediate destruction of the three dogs, the judge should have considered whether to exercise his power under section 4A(1) to make a contingent destruction order. He should have considered whether he could be satisfied that 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 ..."

18. *Flack* and *Baballa* were considered by Jonathan Swift QC (as he then was) sitting as a Deputy High Court Judge in *Grant* which considered the same challenge as this court; a decision of the Crown Court upholding an order for the destruction of a pit bull made by magistrates pursuant to section 4B of the 1991 Act. In considering the approach of the court, Jonathan Swift QC stated at [20]:

“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’.”

Jonathan Swift QC set out the six principles identified in *Flack* at [22] and at [23] to [25] considered the authorities of *Flack* and *Baballa* as follows:

“23. I could not and do not disagree with any part of this, but it is important to recognise that it is said in the context of a case where there had been a conviction under section 3 of the 1991 Act. That is the premise of Silber J’s third subparagraph; and what is said in that subparagraph specifically follows section 4A(4) as enacted. Section 4A(4) is a provision which on its face applies only to cases where there is a conviction under section 3.

24. In *R v Baballa*, Swift J, who gave the judgment of the court, cited paragraph 11 of Silber J’s judgment in *R v Flack* and then at paragraph 22 said this:

‘As we have observed *R v Flack* was concerned with section 3(1) of the 1991 Act. Nevertheless, we consider that the same principles are applicable to a case which falls within section 1(3) of the 1991 Act.’

R v Baballa was a case concerning convictions under sub section (1). Given the terms of section 4A(4) of the 1991 Act as enacted, I am not sure that paragraph 22 of Swift J’s

judgment can fairly be understood as applying Silber J's third subparagraph to a section 1 case. But even if Swift J's judgment were to be so understood, there could be no read-over from that to the present case. The present case is one under section 4B. There is no basis on which section 4A(4) can somehow be read into the scheme of section 4B. The premise of section 4B is that there has been no conviction. Section 4A(4) assumes, if not a section 3 conviction, at least some conviction under the 1991 Act.

25. Thus I do not consider that either decision of the Court of Appeal is a case in point. Neither *R v Flack* nor *R v Baballa* was a case under section 4B. Each was a case under section 4 of the 1991 Act with the consequence that section 4A(4), which appears to have borne on the reasoning of the court in each case, was in play ...”

At [26] Jonathan Swift QC concluded that section 4A(4) has no application to a case under section 4B.

19. *Grant* was cited and approved by the Divisional Court in *Webb* (paragraph 13 above). Although the court in *Webb* was dealing with different aspects of section 4B, namely the concepts of “owner”, “person for the time being in charge” and “fit and proper person”, it engaged in a detailed analysis of the 1991 Act, in particular of section 4B. The court explained the operation of the section, at [36]:

“Where the court finds that the dog is not a danger to the public, section 4B(2A) of the Act ... empowers the court to make a [contingent destruction order] to provide time for the dog to be exempted (or possibly, re-exempted). The court is required to consider the temperament of the dog and its past behaviour (section 4B(2A)(a)(i)) and the fitness of the owner of the dog or the person for the time being in charge of it (section 4B(2A)(a)(ii)). The court is empowered to consider ‘any other relevant circumstances’ (section 4B(2A)(b)).”

At [37] the court said that *Grant*:

“provides an illustration of how the magistrates or Crown Court should conduct that exercise.”

20. *Webb* was followed in *Henderson v Commissioner of Police for the Metropolis* [2018] EWHC 666 (Admin), which considered the meaning of “owner” and/or “person for the time being in charge” of the dog for the purposes of the application of section 4B. The court considered the operation of section 4B and the approach to be taken at [22] and [23]:

“22. ... Section 4B(1)(b) relates to pit bulls. Where such a dog has been seized, then the court must make a destruction order unless it is satisfied that the dog would not constitute a danger to public safety – see s.4B(2)(a). In these circumstances,

s.4B(2A) requires the court to consider particular matters in deciding whether a dog would constitute a danger to public safety. The matters which the court must consider are set out at s. 4B(2A)(a). In addition, the court may consider any other relevant circumstances: see s.4B(2A)(b).

23. If consideration of those matters led to the conclusion that the pit bull would not constitute a danger to public safety, then the court would apply s.4B(3) and make a contingent destruction order which would bring into play the exemption scheme contained in the Dangerous Dogs Exemption Schemes (England and Wales) Order 2015.”

21. *Dodsworth v Chief Constable of West Yorkshire Police* [2019] EWHC 330 (Admin) considered the approach to assessing danger to public safety under section 4B. Having set out the passage from paragraph 20 of *Grant* cited above, the court stated at [34]:

“Eventually, Miss Rose confirmed to me in oral submission that she was not asserting that the Judge had got it wrong in *Grant* and accepted that his approach was correct. In those circumstances I need say no more than I agree with the Judge’s conclusion and reasoning on the point in the *Grant* case. ...”

22. The same conclusion was reached in the Scottish Appeal Court authority of *Hunter v Procurator Fiscal* [2019] HCJAC 19. This was an appeal in respect of an order following an aggravated offence under section 3 of the 1991 Act (not involving a pit bull). In addressing the provisions relevant to that type of case, the court drew conclusions in respect of pit bull dogs under section 4B as it proceeded on the basis that the correct approaches are analogous. At paragraphs 30 and 31 of *Hunter* the court stated:

“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 4(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.

That this is the correct interpretation is strengthened by the amendment with the introduction of sub-section 4(1B), which, in determining public safety, requires the court only to consider

the temperament of the dog, its past behaviour and whether the owner (or the person in charge of it at the time) was a fit and proper person. The court may consider other relevant circumstances. Perhaps it would be bound to do so if the circumstances were indeed relevant, but the alternative, of lesser court ordered controls, is not such a circumstance. The focus is on the dog and its owner (or minder) and not what the court could do to reduce the public risk which it requires to assess.”

Ground 1

The claimant’s case

23. It is the claimant’s primary contention that in accordance with the approach advocated by the court in *Flack* and followed in *Baballa* the judge should have taken into account the specific control measures mandated under articles 4 and 10 of the 2015 Order when determining whether Harry would be a danger to public safety. Reliance was placed upon the fact that *Flack* has been followed in a number of subsequent decisions, in particular *Baballa*. The effect of these decisions is said to be to require a court considering an order for the destruction or contingent destruction of a pit pull in criminal proceedings under section 4 and 4A of the 1991 Act to take into account the mandatory conditions attached to exemption under the 2015 Order.
24. It is the claimant’s case that as the statutory provisions permitting a court not to order immediate destruction of pit bulls are worded in the same way under section 4(1A) and (1B) (where there has been a prosecution) as they are under section 4B(2) and (2A) (where there has not) the court should adopt the same approach in each case. There is no reason in law or logic for a court to follow a different approach. If a court, in the civil context, was bound to apply the narrow approach to section 4B adopted by the court in *Grant* then a pit bull owner/keeper who has been convicted would stand a better chance of preserving their dog than an owner who has not been prosecuted at all, which appears neither logical nor fair.
25. The claimant contends that the decision in *Grant* is not binding on the court and it should not be followed. The judge in *Grant* wrongly distinguished *Baballa*, the reasoning at [24]-[26] of *Grant* demonstrates a misunderstanding of the court’s decision in *Baballa*. The judge in *Grant* appears to have assumed that the dogs in *Baballa* came within subsection 4A(4) of the 1991 Act and the application of this subsection was key to the court’s decision in that case. It was not. The dogs in *Baballa* were pit bulls to which subsections 4A(4) and (5) do not apply. Had the judge in *Grant* correctly understood the decision in *Baballa* then he could not have distinguished it in the way that he did and might have reached a different conclusion.

The case of the interested party

26. The interested party identifies the approach to section 4B set out in *Grant* as being correct. Reliance was placed on subsequent decisions, cited above, where *Grant* has been approved and/or followed. It is submitted that when section 4B is considered with article 4A of the 2015 Order it is clear that the issue of whether the particular pit bull is a danger to public safety is a prior question to be decided according to the

matter specified in subsection 4B(2A) alone and without reference to the requirements of exemption. These requirements come into play only once the court has determined that the dog is not a danger to public safety.

27. The characteristics of dog and owner which are required to be considered under section 4B(2A) are to be distinguished from methods of control mandated as conditions of exemption under the 2015 Order. The dog's behavioural history, its temperament and whether the owner is a fit and proper person are matters bearing directly on whether the particular pit bull, being one of a type deemed inherently dangerous under the 1991 Act, is nevertheless by nature and training an animal that will not be a danger to public safety.
28. The drafting of the test in subsection 4B(2A) in a negative form is significant as it emphasises the default setting of dangerousness in respect of pit bulls invoked by the terms of the 1991 Act. The methods of control required to be put in place by the owner/keeper as requirements of exemption are necessary restrictions placed upon a type of dog deemed inherently dangerous by the 1991 Act and are conceptually distinct from the essential nature of the pit bull in question. The controls imposed as conditions of exemption are intended to afford an additional layer of protection to the public in respect of any particular pit bull which the court has found is not a danger to public safety.
29. The distinction, between matters going to the nature of the dog and methods of control reducing risk, precludes the latter from qualifying as "any other relevant circumstances" which the court "may" consider under subsection 4B(2A)(b) of section 4B. If the mandatory requirements attaching to exemption under the terms of the 2015 Order had been intended to be relevant to the court's assessment of dangerousness then subsection 4B(2A) would specifically have referred to them.
30. The case of *Flack* concerned the approach to dogs other than pit bulls (i.e. not deemed inherently dangerous under the 1991 Act) found to be dangerously out of control under section 3(1) and was to be distinguished on this basis. *Baballa* was a decision about the operation of sections 4 and 4A of the 1991 Act in the context of criminal proceedings; the court did not consider the provisions of section 4B. Further, *Baballa* was decided before the introduction of subsections 4(1B) and 4B(2A) by section 107 of the Anti-Social Behaviour, Crime and Policing Act 2014. For the first time, these subsections identified matters to which a court must have regard when considering whether a dog would constitute a danger to public safety and, by implication, what must be excluded from such consideration.

Ground 1 – Discussion and conclusion

31. The purpose of the 1991 Act and the intention of Parliament, was to identify as inherently dangerous and to outlaw certain types of dog (referred to in this judgment as pit bulls, although the Act also specifies other breeds/types). Consistent with this intention it is an offence under section 1 of the 1991 Act to own a pit bull, unless it has been granted a certificate of exemption under the scheme currently provided for by the terms of the 2015 Order. A certificate of exemption may not be granted unless or until "a court has determined that the [pit bull] 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” (Article 4(1)(a) of the 2015 Order).

32. It is evident from the scheme of the 1991 Act, as discussed in *Webb*, that the default assumption to be made in respect of any pit bull is that it represents a danger to public safety and should accordingly be destroyed. This approach underpins and explains the negatively drafted proviso at section 4B(2)(a) of the 1991 Act, requiring a court to be satisfied that the dog “would not constitute a danger to public safety” (our emphasis).
33. It is only where a court is satisfied in respect of a specific dog that it would not constitute a danger to public safety that such a dog will escape destruction, and then only on the mandatory terms and conditions set out in the 2015 Order; these must be complied with throughout the lifetime of the dog.
34. Given the intention of Parliament and the wording of the relevant sections, we consider that the approach to section 4B set out in the decision of Jonathan Swift QC in *Grant* was correct.
35. We acknowledge that the courts in *Webb* and *Henderson* were not considering what is to be taken into account in an assessment of danger to public safety; it was not necessary for either court to consider *Flack* or *Baballa*. However, in each case the court conducted a careful analysis of section 4B of the 1991 Act, and how it is intended to operate. In neither case did the court conclude that a consideration of matters under section 4B(2A)(a) and (b) would necessarily include control measures designed to limit any danger identified. In each case the court plainly contemplated that such measures would only come under consideration after the individual pit bull had been assessed as not being a danger to the public.
36. In our judgment the only matters to be taken into account in determining the issue of danger to public safety in respect of a particular pit bull are those set out at section 4B(2A) of the 1991 Act. This subsection is aimed at matters touching on the dangerousness of the dog itself, not on matters which might control or minimise the risk it represents. The temperament of the dog, the way it has behaved in the past, whether its owner is a fit and proper person to have charge of it are all factors having to do with the nature and demeanour of the pit bull itself, they are inherent to the particular dog, its presentation and behaviour. The methods of control are conceptually distinct. This is the distinction made by the Scottish Court of Appeal in *Hunter*.
37. The claimant contends that *Hunter* is a Scottish authority and not binding on this court. Further, that as an authority in respect of orders following a conviction under section 3 of the 1991 Act, it conflicts with the decision in *Flack*. The approach of the court in *Flack*, in respect of orders made following a conviction under section 3, has been approved by the Court of Appeal in subsequent cases under section 3 of the 1991 Act. As such, the authority is binding upon this court in respect of section 3 orders. Nevertheless, the court in *Hunter* draws an important distinction, when considering public safety, between the dog (together with its owner/minder) and means of control.
38. We recognise the force of Ms McGahey’s argument that the approach to the destruction of pit bulls under sections 4/4A following a conviction should be the same

as that under section 4B in the civil context. We accept that the approach adopted by the Court of Appeal (Criminal Division) in *Baballa* regarding applications for destruction orders of pit bulls made under sections 4 and 4A following a conviction under section 1 of the 1991 Act appears to require a consideration of mandatory controls required for exemption when considering public safety under section 4(1A). To this extent, the *Baballa* approach is in conflict with that in *Grant* and subsequent decisions on the approach to public safety under 4B(2)(a), which preclude any such consideration. However, the court in *Baballa* did not consider section 4B, it had no reason to do so. It cannot be said that the court purported to identify the proper approach to civil orders under section 4B.

39. We regard it as significant that *Baballa* was decided before the introduction of specific provisions setting out what matters a court should (and, by implication, should not) take into account when considering whether a particular pit bull is a danger to public safety. Subsections 4(1B) and 4B(2A) were introduced into the 1991 Act by the Anti-social, Crime and Policing Act 2014. Prior to this there was no specific legislative guidance concerning matters bearing upon the assessment of danger to public safety. There is now. The cases to which we have referred above, discussing, approving and (in the case of *Dodsworth*) following *Grant* all post-dated the introduction of that specific guidance.
40. For the reasons given we find that HHJ MacDonald QC and the justices adopted the correct approach to the assessment of danger to public safety under section 4B of the 1991 Act. Accordingly, we dismiss the claimant's challenge under the first and principal ground of review.

Grounds 2 and 3

41. Ms McGahey accepted at the hearing that grounds 2 and 3 are linked to ground 1.
42. Pursuing her second ground, Ms McGahey challenged as perverse the court's finding that it could not be satisfied that Harry did not constitute a danger to public safety. She submitted that this finding was out of line with reported cases (applying *Flack*), where findings of dangerousness have only been made when the dog in question has shown aggression by attacking a person or another dog. In Harry's case the evidence showed no history of any aggressive behaviour towards people or dogs.
43. In our view, and for the reasons given, *Flack* does not apply to cases which come before the court on an application under section 4B. *Flack* dealt with non-prohibited types of dog. In the case of pit bulls like Harry, the 1991 Act requires the court to start from the position that the dog is, by reason of its type, inherently dangerous. We have carefully considered the transcript of the hearing before HHJ MacDonald QC and the justices. In our view their approach to section 4B and the conclusions which they drew from the evidence cannot be criticised. It is clear from the evidence of Mr Turner (the expert called by the Chief Constable), whose opinions the court preferred, that Harry showed aggression to him, by tugging on the lead, and to a toy dog.
44. Ms McGahey submitted that Mr Turner had not sufficiently taken into account the fact that Harry had lived with another dog for a long period of time and had shown no aggression to it. However, this was Mr Turner's response when the question was put to him:

“I didn’t realise it’d been there before, going to this family where a dog’s been away from, as we know, for over a year, with another dog. I could not put my hand on my heart and say it’s safe to go back and I have to live with those decisions.”

45. We are satisfied that the judge’s conclusions drawn from this and other evidence, including a video of Harry’s behaviour when interacting with Mr Turner, were justified.
46. Ms McGahey’s third ground must also fail, for similar reasons. She submitted that the Crown Court’s findings were based on behaviour traits (aggressive behaviour to other dogs and play aggression) which Mr Turner accepted were present in many young dogs. It was perverse to treat normal canine behaviours as indicative of dangerousness just because a dog was of a prohibited type.
47. In our view this is all beside the point. Section 4B requires a court to consider the history and characteristics of a particular dog and to reach a view as to whether that particular animal constitutes a danger to public safety. Behaviours commonly seen in young dogs that are not of a prohibited type may nevertheless be a matter for concern when seen in pit bulls. It will depend on the evidence in any particular case.
48. In this case the Crown Court applied the right test and reached its conclusions on all the evidence in a manner that cannot be impeached.
49. Accordingly, Grounds 2 and 3 must also fail.

Conclusion

50. For the reasons given, the claimant’s application for judicial review of the Crown Court’s decision is dismissed.