



Neutral Citation Number: [2021] EWHC 766 (Admin)

Case No: CO/1830/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2021

Before:

ROGER TER HAAR Q.C. SITTING AS A DEPUTY HIGH COURT JUDGE

Between:

THE QUEEN
On the application of
JENNER STRONGE

Claimant

- and -

THE COMMISSIONER OF POLICE FOR THE
METROPOLIS

Defendant

-and-

THE SECRETARY OF STATE FOR THE
ENVIRONMENT, FOOD & RURAL AFFAIRS

Interested
Party

CATHRYN MCGAHEY Q.C. (instructed by **Wheldon Law**) for the **Claimant**
GEORGE THOMAS (instructed by **Metropolitan Police Directorate of Legal Services**) for
the **Defendant**

Hearing date: 17 March 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00pm on 22nd March 2021

Roger ter Haar Q.C.:

1. This case concerns the question of the fate of “Bleu” a dog owned by the Claimant and to whom the Claimant is devoted.
2. As set out above, before me the Claimant was represented by Ms Cathryn McGahey Q.C., and the Defendant by Mr George Thomas. The Interested Party provided Grounds of Resistance settled by Mr Ned Westaway of counsel however the Secretary of State was not represented before me, the Government Legal Department having reiterated in a letter dated 5 March 2021 the Secretary of State’s position that the claim should be refused.
3. For the avoidance of doubt, I recognise the Secretary of State as an Interested Party who opposes the claim.
4. The decision under challenge is the refusal of the Defendant to transfer Bleu to the kennels of the Dogs Trust, a large national charity specialising in the rescue and rehoming of dogs. As I have said, the Claimant is the owner of Bleu. Bleu has been seized by the Defendant and is currently being held in the kennels of private contractors appointed by the Defendant, pending the outcome of a Crown Court appeal against a destruction order imposed in respect of Bleu.

Factual Background

5. Bleu is a pit bull type dog, and so is a prohibited dog under section 1 of the Dangerous Dogs Act 1991 (“the 1991 Act”). It is common ground that he is of excellent temperament and is not known ever to have shown aggressive or dangerous behaviour.
6. On 5 January 2017 the Claimant was convicted of the offence of possessing a dog of a prohibited type, contrary to section 1 of the 1991 Act. The magistrates ordered that Bleu be made subject to a contingent destruction order pursuant to section 4A of the 1991 Act, under which Bleu was permitted to live with the Claimant, subject to a number of statutory conditions imposed by the Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 (“the 2015 Order”). Bleu was put on the register of dogs exempted from mandatory destruction. This register is known as the Index and is administered by DEFRA.
7. The Claimant accepts that in order to comply with the statutory scheme he should have ensured that Bleu was on a lead and wearing a muzzle at all times while in public. On 23 February 2018 the Claimant was sentenced by Uxbridge Magistrates’ Court for three offences under section 1(2) of the 1991 Act of having failed to keep Bleu on a lead and muzzled in public. An immediate destruction order was made in respect of Bleu. The Claimant was disqualified from keeping a dog for five years. The basis of the destruction order was that the Claimant was not a fit and proper person to be in charge of Bleu: the police did not suggest that Bleu’s temperament or behaviour made him a danger to the public.
8. The Claimant was ordered to take Bleu to Wimbledon police station for destruction. It is the Claimant’s case that because he was given incorrect and incomplete advice by his previous solicitors he did not appeal. In any event, whether that is right or not, he

did not appeal, but instead, being desperate to save his dog from destruction, he did not surrender Bleu.

9. On 5 April 2019 the Claimant was convicted of an offence of failing to deliver up Bleu to the police. On 18 October 2019, Bleu was re-seized by the police.
10. The Claimant has now been advised by new solicitors, and the Crown Court has agreed to hear an appeal out of time against the order for destruction. However, in order to succeed on the appeal, the Claimant has to demonstrate that either he or another “*person for the time being in charge*” of Bleu is a fit and proper person to be Bleu’s keeper: section 4 of the 1991 Act. The Claimant remains subject to the disqualification order, so, unless the Crown Court quashes the conviction, he will be ineligible to be Bleu’s keeper. The Claimant accepts that his past conduct makes it unlikely that the Crown Court would, in any event, regard the Claimant as a fit and proper person.
11. Any person who has had responsibility for Bleu (and is not otherwise disqualified) before the Crown Court appeal hearing is eligible to be put forward as the “*person for the time being in charge*” of Bleu. The more recent the responsibility, the more likely it is that the Crown Court will regard the proposed keeper as a person “*for the time being in charge*”.
12. In January 2020 the Claimant’s current solicitors asked the Defendant to enquire whether any carer at the kennels where Bleu is presently being held would be willing to put himself or herself forward as Bleu’s keeper. The Defendant did not pass on that message.
13. The solicitors also raised with the Defendant the possibility of Bleu being moved from the kennels being used by the police to Dogs Trust kennels, with a view to a Dogs Trust staff member taking responsibility for Bleu and therefore being eligible to be Bleu’s keeper and/or with a view to Bleu being exported to Dogs Trust kennels in the Republic of Ireland, where dogs of this type can be legally re-homed.
14. After further correspondence, on 20 February 2020 Ms Tina Wagon, of the Claimant’s solicitors, sent an email to Detective Sergeant Keller. Her email read as follows:

“Dear Penny

“You have not responded to my email of 7th February regarding my above-named client and I am conscious that the appeal at Kingston Crown Court is now only 8 days away. I will be copying the crown court in on our correspondence as it is clear that this hearing is now going to have to be adjourned.

“The onus is on us to satisfy the court that this dog does not pose a danger to the public, so I repeat my request for our expert, Jeff Turner, to be allowed to assess the dog. He will carry out a full behavioural assessment which will assist the court in its decision. It is a matter for us whether he also

assesses the dog for type at the same time, but we are entitled to have access to the dog.

“I note that you have not responded to my request for the dog to be moved to Dogs Trust staff or, which is more likely, for him to be exported to Eire where he can lawfully be rehomed by the Dogs Trust branch there. May I remind you that current government policy is that we should be doing everything possible to save these dogs (evidence given by David Rutley to the Efra committee) and that efforts should be made to explore the role that rescues can play in this regard. It is my understanding that this is a dog that has a nice disposition and Dogs Trust are a reputable rescue. You therefore have a lawful and practical alternative to euthanasia being proposed and I invite you again to consider this proposition.

“Given the proximity of the appeal date, I must write to the court tomorrow. Would you please confirm to me by no later than 12 o’clock noon tomorrow whether the police consent to the appeal being adjourned?”

15. Within an hour D.S. Keller responded:

“Morning Tina,

“I apologise, but I never received an email from you dated 7th Feb and assumed you had not replied to my email of 4th Feb. I have just checked my junk mail folder and found it in there for some reason, so apologies for that.

“As I said before, the police are not arguing the temperament of the dog concerned, so a temperament exam is a waste of time and money all round, including police money, therefore I do not deem it necessary. We will happily say there is nothing wrong with the dog’s temperament, and this has not been the issue. You’re quite right, the dog has not done anything that we know of.

“We will not move the dog, which is evidence of an offence, as it is our responsibility as a result. We cannot be expected to trust a public kennel to not let the dog ‘disappear’ and then you will hold us liable on behalf of your client should anything happen to the dog. I absolutely do not believe the police should have a hand in exporting dogs abroad to avoid the legislation in this country.

“I am at a loss as to why people are so concerned about this one dog, when there are hundreds of dogs up and down the country who need homes; many of which get put to sleep because no home is found, and no-one seems to care about them as they are not S1 dogs.

“My lawful and practical alternative to euthanasia is that you argue your client is fit and proper and the dog can be registered to him and he needs to comply with the conditions if he loves and wants his dog back.

“I do not see why the hearing needs to be adjourned. PC Davies will be at the court and the court can decide how they wish the police to proceed on the facts. Adjourning it further seems a needless exercise when the dog can go back to his owner if the court agrees with you. Of note though, Mr STRONGE failed to appear at Willesden on 6th Feb. You would need to get his disqualification overturned. Does Mr STRONGE know you are trying to get the dog a new owner, or does he want his dog back?”

16. It is the decision in this email to refuse to move Bleu which is the subject of challenge in these proceedings.

The relevant legislative provisions

17. Section 1 of the 1991 Act as amended provides:

“(1) This section applies to –

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

...

“(2) ... No person shall –

“(a) ...

“(b) sell or exchange such a dog or offer, advertise or expose such a dog for sale or exchange;

“(c) make or offer to make a gift of such a dog or advertise or expose such a dog for sale or exchange;

”(d) ...

“(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 these provisions;

...

“(4) ...

“(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”

18. Section 4 provides:

“(1) Where a person is convicted of an offence under section 1 or 3(1) ... above of an offence under section 2 above the court

–

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

“(b) may order the offender to be disqualified, for such period as the court thinks fit, for having custody of a dog.

“(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; ...

“(b)”

“(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.”

19. Section 1 provides power for the Secretary of State to make a “scheme”. The relevant subordinate legislation is contained in The Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 (“the Scheme”).

20. Article 4 of the Scheme provides:

“(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.

“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 9”

21. Part 3 of the Scheme regulates substitution of the person in charge of a dog of a type covered by the DDA. Article 12 provides:

“When a dog has been exempted from the prohibition in section 1(3) of the Act in accordance with Part 2 of this Order, a person (in this Part referred to as “the applicant”) may apply to a magistrates’ court to be substituted as the person in charge of the dog only if the person determined by the court under section 4(1B) or 4B(2A) of the Act or under this Part as being a fit and proper person is unable to continue to be in charge of the dog by reason of –

“(a) the death of that person;

“(b) serious illness rendering that person unable to be in charge of the dog.”

22. Article 15 provides:

“(1) The court may only grant the application for substitution of the applicant as the person in charge of an exempted dog if satisfied that the dog does not constitute a danger to public safety.

“(2) In determining whether the dog constitutes a danger to public safety the court –

“(a) must consider –

“(i) the temperament of the dog including its past behaviour; and

“(ii) whether the applicant is a fit and proper person to be in charge of the dog; and

“(b) may consider any other relevant circumstances.”

23. Part 4 establishes what is called the “Interim Exemption Scheme”.

24. Articles 20 and 21 provide:

“20. (1) This Part applies where a dog suspected of being a dog to which section 1 of the Act applies is seized under a power conferred by the Act or under any other enactment and prior to the court’s final determination in respect of the dog under section 4(1)(a) or 4B(1) of the Act.

“(2) The chief officer of police for the area in which the dog was seized may release the dog to the person intending to apply for exemption of the dog under Part 2 of this Order (in this Part referred to as “the person in interim charge”) only in accordance with this Part.

“(3) Nothing in this Part requires a chief officer of police to release a dog to which this Part applies.

“21. (1) The chief officer of police for the area in which the dog was seized may only release the dog under this Part if satisfied that the dog does not constitute a danger to public safety.

“(2) In determining whether the dog constitutes a danger to public safety the chief officer of police –

“(a) must consider –

“(i) the temperament of the dog including its past behaviour; and

“(ii) whether the applicant is a fit and proper person to be in interim charge of the dog; and

“(b) may consider any other relevant circumstances.”

Authorities on the Act and the Scheme

25. In *Webb v the Chief Constable of Avon and Somerset Constabulary* [2017] EWHC 3311 (Admin), this Court considered the effect of the Act and the scope of the Interim Exemption Scheme. The Court concluded at paragraph [77] of the judgment:

“We have referred to the criticisms of the 1991 Act. Ms McGahey argued her primary case about the meaning of section 4B(2A) of the Act with considerable skill. She was able to make a number of telling points about some of the factors relied on by the Chief Constable and the Secretary of State. We have carefully considered the statutory language, the background to, the purpose of, the legislation, and all the factors we have discussed above. Having done so and considered the legislative structure and scheme as a whole, we are entirely satisfied that section 4B(2A) does not permit a court to make a finding that someone who is not “the owner” or “a person for the time being in charge of a dog” is a fit and proper person to be in charge of it. We have concluded that it only enables the court to consider whether someone from a limited class, namely, the owner or a person for the time being in charge of the dog, is a fit and proper person to be in charge of it, with the result that only such a person can apply for a certificate of exemption under article 9. We are satisfied, however, that because Sky is no longer exempt, it is section 4B(2A) and not article 12 which applies in this case.”

26. Thus, for a person who is not the owner of the relevant dog to be allowed to be considered as a proper person to have charge of the dog she or he must already be in charge of the dog. In the *Webb* case it happened that the proposed new keeper of the dog was already in charge of the dog (“Sky”) because she worked at the kennels where the owner had left him when the owner had departed these shores for Australia. Thus, by chance, the requirements of the statute could be satisfied.

27. The effect of *Webb* was summarised in a later case in this Court, *Henderson v Commissioner of Police for the Metropolis* [2018] EWHC 666 (Admin), at paragraph [13]:

“In *Webb* the court at [89-89] confirmed that the phrase “for the time being in charge” in s.4B(2A)(a)(ii) of the Act cannot extend to someone who has had no contact with or responsibility for the dog, but intends to be that person in the future. At [77-78] the court concluded that “other relevant

circumstances” which may be taken into account under s.4B(2A)(b) do not extend to the existence, fitness and suitability of a person who is not “for the time being in charge”, but who intends to be, and who would be, a fit and proper person to be in charge of the dog.”

28. In paragraph [39] of the judgment in *Henderson* the Court set out 4 questions and answers:

“1. Does an individual who has never owned, possessed or been in charge of a dog have standing to intervene in an application under s.4B(1) of the Dangerous Dogs Act to contend that the dog is not one to which s.1 of the Act applies?”

“Answer: No: only the owner of the dog or a person with a relationship to the dog such that its destruction would be an interference with his or her right to family or private life under Article 8 of the European Convention on Human Rights has such standing.

“2. Can an individual who has never owned, possessed or met a dog fall within the definition of a “person for the time being in charge” of the dog in s.4B(2A) of the Dangerous Dog Act 1991?”

“Answer: They may or may not. The answer depends on an evaluation of the facts in the light of the decision in *Webb v Chief Constable of Avon & Somerset*, and in particular paragraphs [77], [78], [88] and [89].

“3. Can the fitness of an individual who is neither an owner nor a “person for the time being in charge of the dog” be a relevant circumstance for the purpose of s.4B(2A) (b) of the Dangerous Dogs Act 1991?”

“Answer: No.

“4. Does an individual who is neither the owner nor a “person for the time being in charge” of the dog have standing to contend that the dog would not constitute a danger to public safety?”

“Answer: No.”

Government Guidance

29. In January 2019 the Government produced a response to the Ninth Report of the House of Commons Environment, Food and Rural Affairs Committee, “*Controlling dangerous dogs*” which had been published in October 2018. In that response the Government responded to Recommendations made by the Committee. Recommendation 4 was as follows:

“To avoid imposing an unnecessary death sentence on good-tempered animals, the Government should remove the ban on transferring Section 1 dogs to new owners. This should be accompanied by adequate regulation of animal centres and appropriate safeguards to ensure the re-homing of Section 1 dogs is conducted responsibly and safely.”

30. In its response the Government said this:

“....

“18. Being responsible for a prohibited dog is a significant undertaking and the law expects the person in charge of the dog not to pass that responsibility onto someone else. It is an offence under the DDA to sell, exchange or gift a prohibited dog, or make an offer to do so, which, for example, prevents the passing of fighting dogs between gang members.

“19. The law was further clarified by a recent case (*Webb v the Chief Constable of Avon and Somerset Constabulary* [2017] EWHC 3311 (Admin)). In *Webb* the owner of a pit bull terrier type dog emigrated to Australia and left the dog in kennels. The case confirmed that only the owner of a prohibited dog or “*the person for the time being in charge*” of it may apply to the Court to permit them to retain possession of a prohibited dog.

“20. *Webb* also clarified that “*the person for the time being in charge*” of the dog can include someone who has had previous contact with the dog. The case also confirmed that prohibited dogs with no owner, such as stray pit bulls, cannot be transferred or rehomed to a new person, even if they have been the “*person for the time being in charge*” of it under any circumstances. Primary legislation would be needed to be amended to allow this.

“21. Therefore, the law allows the Court to transfer a prohibited dog only where: (a) the original owner has died or is seriously unwell and unable to properly care for the dog; or (b) where there is an existing owner and also another person for the time being in charge of the dog, who the dog could be transferred to if the Court agrees. For a person to be the person for the time being in charge of a prohibited dog they must have had some contact with the dog. In this group of cases, possession is not seen to be transferred in a strict sense, rather the exemption order recognises that there were two people responsible for the dog at the same time and both can apply to the Court to retain possession of the dog. The law does not allow prohibited dogs to be transferred to a person who has had no previous contact with the dog. But a dog already on the Dangerous Dogs Index (DDI), which would have satisfied the Court about its level of risk when it was initially put on the DDI, and which is then

abandoned and subsequently walked by a person at a rescue centre, could then be rehomed if the Court approves that person as the new keeper and approves where the dog is being kept. This ability to rehome a prohibited dog has been established in a number of court cases and Defra is not seeking to reopen or challenge these court rulings.

“22. Any proposals to amend the law here, for example to allow prohibited dogs which have no previous court approved owner to be rehomed, or to transfer a prohibited dog to people who have had no contact with the dog, would require an amendment to the DDA and the supporting secondary legislation. The Government does not consider that it is a priority to amend legislation at this time. We would also need to consider the implications for public safety and the increased burden on the Courts before any legislative change could be made, as well as the implications for rescue and rehoming centres themselves.

“23. In relation to rescue and rehoming centres, the Government recently invited comments from the public and stakeholders on the issue of licensing such establishments in connection with a possible ban on the third party selling of puppies and kittens. The Government considers that, should a decision in future be made to amend the DDA around rehoming prohibited dogs, licensing would be a necessary prerequisite before considering whether such establishments could have a formal role in any rehoming.”

31. My attention was also directed to an earlier DEFRA note issued in September 2016 entitled “*Transfer of “keepership” of prohibited type dogs*”. This advised:

“This note deals with concerns arising from the Exeter Crown Court case involving “Stella” , a pit bull terrier that has been made subject to a Contingent Destruction Order (“CDO”) in the charge of someone other than the original owner of Stella. Stella is a dog that was not exempt and never had been. It is illegal to give away or abandon a prohibited dog so the Crown Court order (HHJ Cottle and two Magistrates) should be seen in this context.

“The CDO was made saying Carolyne Pharaoh, the kennel owner where Stella was held for over a year, could become the keeper....

“Following amendments made to the *Dangerous Dogs Act 1991* (“the DDA”) any person proposed to be in charge of a prohibited dog must have been assessed by a Court as a “fit and proper person” for this purpose as part of the Court’s determination as to whether the dog poses a danger to public safety. Only a natural person may be assessed by a Court (i.e.

not a company or charity etc.) This position is made plain in article 2 of the *Dangerous Dogs Exemption Schemes (England and Wales) Order 2015* (“the 2015 Order”) which confirms that “person” for the purposes of that Order is a natural person only.

“Does the case of “Stella” create authority for casual transfer of “keepership”?”

“1. The case of Stella does not create a precedent allowing Courts to transfer “keepership” to anyone that appears before the Court wishing to take charge of a dog that would otherwise be destroyed. (This was a Crown Court case on appeal from a Magistrates’ Court decision to order the destruction of Stella and therefore has no precedent value.)

“2. The circumstances of the Stella case were that Carolyne Pharaoh, the kennel owner, had been in charge of the dog at the time the matter was being considered by the Crown Court and had been closely involved in modifying Stella’s behaviour whilst at the kennels. The Court was properly able to consider Carolyne Pharaoh for the “fit and proper person” test in accordance with the wording of section 4(1B)(a)(ii) of the DDA The Court was satisfied from hearing Carolyne on oath that she was a fit and proper person to be in charge of the dog including evidence of a police assessment of Carolyne Pharaoh’s ability to cope with and minimise the potential risks posed by the dog, taking into account the home and conditions where Stella would be kept. The Court also considered that Stella’s own modified temperament at the point the Court was considering the case meant “there was no danger to public safety”.

3. The circumstances of Stella’s case were almost unique as Carolyne Pharaoh, without breaching the law, had as a matter of fact been in charge of Stella at the time the matter was considered and therefore exceptionally the Court was able to assess someone other than the owner of Stella as part of the “no danger to public safety test”.”

The Claimant’s challenge

32. The 1991 Act is intentionally restrictive. Its preamble describes it as “An Act to prohibit persons from having in their possession or custody dogs belonging to types bred for fighting”. Whilst some of the rigours of the 1991 Act have been mitigated in the thirty years since it was passed, it remains very restrictive.
33. This is illustrated by the prohibition on sale, exchange or giving of any such dog in Section 1(2) of the Act, and the restriction contained in Article 12 of the Scheme on substitution of one person in charge of such a dog for another to cases where the first keeper dies or falls seriously ill, coupled with the requirement for that process to be controlled by a magistrates’ court. The restrictive intent of the legislation is further

illustrated by the requirement in Article 4 of the Scheme for an exempted dog to be neutered.

34. The restrictive nature of these provisions is controversial and strong views are held about them. There are undoubtedly cases in which a fit and healthy dog of excellent temperament may be destroyed not because of anything he or she may have done, but because the owner of the dog is not a fit and proper person to have charge of the dog.
35. It is concerns of this sort which led to the recommendation which I have set out at paragraph 29 above. As has been seen in paragraph 30 above, the Government did not accept that recommendation.
36. In this case, as I have set out above, the Claimant accepts that at the forthcoming appeal in the Crown Court, it is unlikely that he will be regarded as a fit and proper person to have charge of Bleu. If there is no other person who is already in charge of Bleu who can persuade the Court that he or she is a fit and proper person to whom Bleu can be released then the inevitable result will be that the existing destruction order will be implemented.
37. The requirement that such a person should be somebody who is already in charge of Bleu is clear from the cases of *Webb* and *Henderson* to which I have already referred.
38. The case of *Webb* and the case of the dog Stella discussed in the DEFRA note referred to at paragraph 31 above show that if there happens to be a person already in charge of a relevant dog when the matter comes before the Court then notwithstanding any inadequacies of the owner the dog may be saved.
39. In this case Bleu has been seized by the Defendant and is being held in commercial kennels under contract. The Claimant does not know where the dog is presently being held and it is therefore impossible for him to identify a person presently in charge of Bleu who could be presented to the Court as a fit and proper person under the legislation.
40. The Claimant is devoted to Bleu – indeed many of the present problems arise from his inappropriate conduct in giving effect to that devotion.
41. The Claimant has had and still has the benefit of the support of a charity devoted to the welfare of dogs, the Dogs Trust. The Dogs Trust and its lawyers have come up with a number of proposals, but in essence the proposal is the same in each proposal: whilst Bleu would remain legally under the control of the Defendant, the day to day operational custody of Bleu would be delegated to a suitable person so that by the time the case comes before the Crown Court there will be a fit and proper person to whom Bleu can be released, as happened in *Webb*, and thereby the dog's life can be saved.
42. I was told that some other police forces have acquiesced in such arrangements.
43. Ms McGahey submits firstly that such a transfer is lawful, and secondly that Detective Sergeant Keller failed to consider the exercise of the discretion vested in her to affect such a transfer.

The Interested Party's Position on this Challenge

44. The Secretary of State has filed Grounds of Resistance. His position and that of the Defendant are identical subject to one additional point to which I refer below. The Secretary of State's position is stated as follows:

"20. In relation to who is permitted to be in charge of a dog, the Secretary of State recognises that the decisions of the Divisional Court in Webb and Henderson v Commissioner of Police of the Metropolis [2018] EWHC 1092 (Admin) anticipate that a CDO may be made in favour of any "person for the time being in charge" which could include a person who has been responsible for the dog while it is seized. As was explained in the Government's response to the EFRA Select Committee, the Secretary of State is not seeking to re-open or challenge those rulings (see quotation at SFG 37).

"21. In his evidence to the Select Committee on 6 February 2019, Marc Casale, Deputy Director, Animal Welfare and Exotic Disease Control at DEFRA, referred to discussions about what might happen in practice with re-homing centres (see quotation at SFG 36). Those discussions are ongoing.

"22. As far as the present claim is concerned, the Secretary of State's position is as follows:

"a. The police may hold a prohibited dog in pursuance of powers of seizure under the 1991 Act or in accordance with an order for destruction made under the Act (s.1(3)). The question of where a dog in police custody is physically located is an operational matter for the discretion of the relevant police force. Individual forces will have their own criteria and procedures for selecting where they hold the dogs for which they are responsible.

"b. The Court should be slow to interfere with operational decisions made by police forces as to where seized dogs re kennelled, even if the Court concludes that such decisions are open to judicial review (see in this regard R (Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 57; [2003] ICR 599 at para. 32.

"c. The reasons given by the Defendant for not transferring Bleu to third party kennels in this case include concerns about retaining responsibility and accountability for the dog. The Secretary of State submits that those concerns are well-founded and supported by the legislative scheme. It would be unlawful under s.1(2) of the 1991 Act for the Defendant to transfer Bleu to a third party, and Bleu can only be held pursuant to a power of seizure under s.1(3). Moreover, there are strictly limited provisions by which the police may on an

interim basis release a seized dog to a “person intending to apply for exemption of the dog” under Arts. 20-26 of the 2015 Order. In Webb the Divisional Court held that such release could only be to the owner or a person for the time being in charge of the dog – in other words, it could not be to a prospective keeper (para. 73). Moreover, any interim release is a matter wholly for the discretion of the relevant chief officer of police, see Art.20(3):

“Nothing in this Part requires a chief officer of police to release a dog to which this Part applies.”

“While the interim exemption scheme does not apply in this case, it is clear that the statutory framework gives the police very considerable discretion as to how they accommodate seized prohibited dogs pending magistrates’ court hearing (or any appeal).

“d. The proposal presented by the Claimant failed to appreciate the legal constraints on the Defendant. First, it requested that Bleu be moved to private kennels – *not* paid for by the Defendant (see SFG 44(i)). It is disingenuous to claim that the dog in those circumstances would remain seized or under the control of the Defendant (cf. SFG 42). Unless there was a contractual agreement in place whereby the Defendant remained responsible for the dog and clear lines of accountability were established, it would more probably amount to an unlawful transfer of the dog. Second, it suggested that “someone from Dogs Trust” [39] or to “a member of Dogs Trust staff” [42] might become Bleu’s keeper, but that if no-one came forward the dog “would be exported to Eire” [ibid]. Such an approach would clearly evade the protections in the statutory scheme.

“e. For those reasons, the Secretary of State submits that the Defendant was correct not to facilitate the *ad hoc* transfer proposal presented, and in any event was clearly entitled to exercise her discretion to keep Bleu at the secure contracted kennels where the dog is currently held.

“23. The Secretary of State is not aware of any policy that contradicts the Defendant’s approach in this case. The most recent relevant statement remains that of September 2016 (referred to in Webb at para.65) and included in the claim bundle (at [64-66]). The 2016 statement makes clear that CDOs will only be made by non-owners in “limited cases” (para. 9) and that

“[s]uch applications should rarely be successful given (i) the prohibition on gifting a prohibited dog; (ii) the restrictions on who may be considered for the “fit and proper person” test; and (iii) if successful the dog must then remain with that

person unless they die or become seriously ill” (para.10 [65]).

“24. The caution in the September 2016 statement is consistent with the Defendant’s approach in this case.

“25. As far as the police arrangements for dealing with dangerous dogs, the relevant publication is *Dangerous Dogs Law: Guidance for Enforcers*. This states under the heading “The Police” on p.5 that

“It is vital that every police service within the UK has a good, robust strategy and policy for dealing with dangerous dogs.

“The policy must include identifying secure kennels that can be contracted by police should it be necessary for a dangerous dog to be seized prior to any prosecution.

“Experience has shown that the costs to the police service can be considerable and therefore it is essential there is a standard operational procedure in place. The welfare of any dog seized is also a factor the police need to consider, and they should note their duty to ensure the welfare of animal under their control (s9 of the Animal Welfare Act 2006).

“If procedures are not set in place to ensure that both the animal and the progression of cases are monitored closely, costs will escalate, and the animal’s welfare may suffer” (original emphasis).

“26. The Defendant is specifically identified as a police force that operates “good practice” in this regard.”

Conclusion

45. There was some debate before me as to whether this case is a suitable subject for judicial review, regardless of the merits. For the Defendant, Mr Thomas submitted that it was an important part of the Claimant’s case that all that was requested was a simple operational move of a type not suitable for judicial review. It is fair to say that he did not press this point with any vigour.
46. In my view this case raises what is in practical terms an important point as to what the police can be asked to do with a dog under their control. Accordingly, I reject the submission that this is not a case suitable for judicial review. However, I accept that the practical implications of the case, even if the Claimant is right about the power to transfer, make this a case in which the Court should be cautious about granting relief.
47. In my judgment, it is of central importance to consider why the Defendant had Bleu in her control.

48. There was some debate before me as to whether the Defendant seized the dog “as evidence” or for the purpose of destruction.
49. By the time that Bleu was re-seized, he was the subject of an immediate destruction order. The reality of the situation was that he was seized in part so that effect could be given to the destruction order if there was no successful appeal against that order of the magistrates. He was also seized so that in certain circumstances he could be the subject of examination, either to establish whether he is a dog of a prohibited type or to assess his temperament.
50. The purpose of the transfer sought by the Dogs Trust on behalf of the Claimant was different: the primary purpose of that transfer was to promote the chances of the appeal to the Crown Court being successful, by enabling a fit and proper person already in charge of the dog to be presented to the court or by enabling the dog to be exported to Ireland.
51. The latter idea (export to Ireland) is, I understand, no longer possible, and was abandoned as a suggestion in the course of the oral hearing before me.
52. In my judgment, a transfer for the express purpose of promoting a particular result in the Crown Court rather than for the purposes for which the dog had been lawfully seized is not a lawful exercise of any discretion on the part of the Defendant.
53. For this reason, and for the other reasons put forward in the Secretary of State’s submissions (which reflect also the position of the Defendant) I reject the Claimant’s submission that the transfer proposed would have been lawful.
54. The Defendant further relied upon a submission that such a transfer would be contrary to the Public Contracts Regulations 2015. Given the decision I have reached on other grounds, I do not need to explore that issue further.
55. However, in my view, as the Secretary of State submitted, insofar as the Defendant had any discretion to transfer the dog for the purposes put forward, she was entitled to take into account in the exercise of her discretion the degree of control which the Defendant’s arrangements with specified kennels conferred on the one hand and the changing and uncertain proposals put forward by the Dogs Trust on behalf of the Claimant.
56. Detective Sergeant Keller was asked to consider the proposed transfer at very short notice in the context of a request that she should agree to an adjournment of the appeal. She responded by email, as has been seen.
57. In those circumstances her expression of her reasons should not be subjected to fine textual analysis, and a considerable margin of appreciation should be afforded to her as to the circumstances in which she was being asked to assess the practicality of the proposal made.
58. In my judgment, if and to the extent that there as any discretion on her part to be exercised (which I have found there was not) her decision cannot be said to be irrational.

59. For these reasons this challenge must fail. It seems overwhelmingly probable that as a result a fit dog of excellent temperament may die, the unfortunate victim of the fact that his owner has proved not to be a fit and proper person to have charge of him. That sad consequence is a result of the draconian nature of the legislation: the draconian nature of that legislation is the result of considerable public concern as to the consequences of certain types of dog not being under effective control. Where this difficult balance is to be struck between the interests of preserving such dogs where they are of good temperament on the one hand and the dictates of the safety of the public on the other is a matter of policy for the Government and Parliament. I have no doubt that the device suggested to avoid the rigour of the existing legislative scheme was not lawful.