
**OUTER HOUSE, COURT OF SESSION**

**[2019] CSOH 10**

**P209/17**

OPINION OF LORD BRAILSFORD

In the Petition of

JORDAN QUEEN

Petitioner

for

Judicial Review

of

Part 11 of Antisocial Behaviour etc (Scotland) Act 2004

**Petitioner: Mason; TC Young LLP**
**First respondent: O'Neill (sol adv); SGLD**

31 January 2019

[1] The petitioner seeks declarator that Part 11, et separatim section 131 of the Antisocial Behaviour etc (Scotland) 2004 ("the 2004 Act") is not law by virtue of section 29(1) and (2)(b) of the Scotland Act 1998 in respect that it is incompatible with the petitioner's rights under articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Answers were lodged on behalf of the Lord Advocate (the first respondent) and the Chief Constable, Police Scotland (the third respondent). There was no appearance on behalf of the third respondent at the substantive hearing. The petitioner and the first respondent lodged Statements of Issues in broadly comparable terms

for use at the substantive hearing. These statements were supplemented by Notes of Argument for each party represented at the substantive hearing.

[2] The legislation challenged in the petition is part 11 of the 2004 Act, comprising sections 128 – 134 of that provision. Section 128 defines the meaning of a "fixed penalty offence" for the purpose of part 11 of the 2004 Act, and further defines the offences to which part 11 apply. Section 129 provides;

> "(1) A constable who has reason to believe that a person aged 16 or over has committed a fixed penalty offence in a prescribed area may give the person a fixed penalty notice in respect of the offence.
>
> (2) In subsection (1)—
>
> 'fixed penalty notice' means a notice offering the opportunity, by paying a fixed penalty in accordance with this Part, to discharge any liability to be convicted of the offence to which the notice relates; and
>
> 'prescribed area' means an area prescribed by the Scottish Ministers by regulations."

Section 130 stipulates the levels of fixed penalty notices and makes provision for the form of such notice. Section 131 makes provision for the effect of fixed penalty notices as follows:

> "(1) This section applies if a fixed penalty notice is given to a person ('A') under section 129.
>
> (2) Subject to subsection (3), proceedings may not be brought against A.
>
> (3) If A asks to be tried for the alleged offence, proceedings may be brought against A.
>
> (4) Such a request shall be made by a notice given by A—
>
> (a) in the manner specified in the fixed penalty notice; and
>
> (b) before the end of the period of 28 days beginning with the day on which the notice is given.
>
> (5) If, by the end of the period mentioned in paragraph (b) of subsection (4)—
>
> (a) the fixed penalty has not been paid in accordance with this Part; and

(b) A has not made a request in accordance with that subsection,

then A is liable to pay to the clerk of the justice of the peace court specified in the fixed penalty notice a sum equal to one and a half times the amount of the fixed penalty.

(6) A sum for which A is liable by virtue of subsection (5) shall be treated as if it were a fine imposed by the justice of the peace court specified in the fixed penalty notice."

[3] The legislative history of the Act of 2004 was set forth in paragraphs 9 – 17 of the petition which were substantially admitted by the third respondent. It was a matter of admission that the petitioner contended that provisions in part 11 of the act of 2004 were incompatible with rights under articles 6 and 13 of ECHR.

[4] The factual circumstances which caused the petitioner to present the present petition are set forth in paragraphs 18 – 21 of the petition. It is admitted that on 12 August 2016 the petitioner was issued with a fixed penalty notice in the sum of £40.00. Beyond that the facts relied upon by the petitioner are said to be not known and not admitted by the first respondent. Given that the facts averred by the petitioner are essentially personal to him and therefore not within the knowledge of the first respondent this form of pleading is understandable. In the context of a petition for judicial review I can however have regard to these facts. In that regard it is to be noted that for the purposes of the substantive hearing the petitioner submitted an affidavit in which, on oath, he provides factual information to supplement the averments set forth in paragraphs 18 – 21 of the petition. On the basis of this material it is plain that the petitioner disputes the facts underlying the fixed penalty notice with which he was served on 12 August 2016. He maintains that he did nothing wrong. He further explains that he was initially unwilling to tell his parents about the fixed penalty notice intending simply to pay the sum in the hope that his parents did not find out

about it. Approximately two weeks after the issuing of the notice his father did find out about the notice and, after discussion between father and son, the petitioner's father informed him that he would "deal with the matter". His father in fact failed to do anything and on 18 September 2016 in accordance with the afore quoted statutory provisions the petitioner received a letter from the clerk of the Justice of the Peace Court at Paisley informing him that the fixed penalty notice had been registered as a fine. Thereafter the petitioner consulted with a solicitor. That solicitor contacted the clerk of court by letter dated 4 November 2016 but was advised that the matter could not be reopened. Subsequently the petitioner lodged a Bill of Suspension in the High Court of Justiciary. By interlocutor dated 1 February 2017 that Bill was refused.

[5] Against the foregoing background the petitioner's submission was that part 11 of the 2004 Act operates in contravention of the right of fair trial provided for in article 6 of ECHR and is therefore not law in terms of section 29(1) of the Scotland Act 1998. There were subsidiary arguments that *esto* part 11 of the 2004 Act is law the petitioner did not waive his right to be tried by an independent and fair tribunal.

[6] The submission in support of the proposition that part 11 of the 2004 Act was not law by reason of failure to provide the right to a fair trial proceeded on the proposition that the Act provided, in terms of section 133, for revocation of a fixed penalty notice by a constable in two circumstances (section 133(2)). The Act made no provision for revocation in circumstances where, for whatever reason, a person issued with a fixed penalty notice failed to give notice of their wish to stand trial within 28 days. It was submitted that the absence of any revocation provision other than those stipulated in section 133(2) of the Act of 2004 rendered part 11 of the Act incompatible with article 6.

[7] This argument was developed by submitting that notwithstanding the provisions of the 2004 Act the finding that the person issued with the fixed penalty notice constitutes a conviction, or at least a finding, that the person so issued committed the offence. As such it constitutes a criminal charge. Such charge it was submitted was not determined in accordance with article 6 and, moreover, part 11 of the Act precludes the possibility of a review by a court satisfying the requirements of article 6. Finally, on this part of the argument, it was submitted that the charge in the fixed penalty notice issued against the petitioner violates the presumption of innocence.

[8] The second, and separate, argument advanced on behalf of the petitioner was that in the event that part 11 of the 2004 Act is law the petitioner did not waive his right to be tried by an independent and impartial tribunal. This argument was based upon the information provided to the petitioner in the fixed penalty notice failing to provide the petitioner with information as to the allegation made against him. He was not provided with the nomen juris of the alleged offence. Having regard to that consideration it was submitted that he could not be said to have waived his right to a fair trial.

[9] A separate argument was advanced by the petitioner to the effect that part 11 of the 2004 Act violated his right to an effective remedy under article 13 of ECHR. Submissions in support of this proposition were limited and confined, as I understood it, to stating that the absence of possibility of review of the fixed penalty notice after the expiry of the 28 day period "points to a contravention of this article".

[10] In response the first respondent submitted that a fixed penalty notice is "a notice offering the opportunity… to discharge any liability to be convicted of the offence to which the notice relates" (2004 Act section 129(2)). Unless a person receiving a fixed penalty notice asks to be tried for the alleged offence before the expiry of 28 days from the day the fixed

penalty notice is given "…proceedings may not be brought" against the recipient of the notice (2004 Act section 131(2)). A consequence of this framework is that the petition is fact dependant. On the basis of the petitioner's own averments he understood that he was entitled to reject the fixed penalty notice and elect to proceed to trial and, further, it was his intention to do so. He had entrusted, or delegated, the practicalities of that course to his father. Through inadvertence on his father's behalf the necessary steps were not taken to challenge the fixed penalty notice within the statutory timeframe stipulated by the 2004 Act. Inadvertence or error in relation to compliance with the statutory formalities can, it was submitted, have no bearing on the question of part 11 of the 2004 Act's compatibility with convention rights.

[11] The first respondent accepted that the issue to the petitioner of a fixed penalty notice under part 11 of the 2004 Act constituted a charge with a criminal offence for the purposes of article 6 of ECHR. That charge however ceased to exist at the point at which it became impossible by operation of section 131(2) of the Act for proceedings to be brought against the petitioner, that is at the end of the 28 day period following the giving of the notice during which the petitioner had not asked to be tried. In support of that proposition reliance was placed upon *S* v *Miller* (No 1) 2001 SC 977 at paragraph 23 and *R* v *Durham Constabulary* [2005] HRLR 18 at paragraph 12.

[12] Separately it was submitted that the system of penalties established by part 11 of the 2004 Act was compatible with article 6 of ECHR. A method exists whereby the recipient of a fixed penalty notice such as the petitioner has a right to insist that the charge be determined by a tribunal that complies with the requirements of article 6. In support of that submission reliance was made upon *McDonald* v *HM Advocate* [2007] HCJAC 75 at paragraph 20; *Sutherland* v *Barbour* [2009] HCJAC 29 at paragraph 5.

[13] In relation to the article 13 submission counsel for the first respondent pointed out that the article was not incorporated into domestic law and did not constitute a "convention right" (section 1, schedule 1, Human Rights Act 1998). Article 13 did not therefore confer any free standing right to the petitioner.

[14] Having regard to the submissions the first respondent submitted that the provisions of part 11 of the 2004 Act were ECHR compliant and that the prayer of the petition should be refused.

[15] I am satisfied that the present petition requires to be considered having regard to the relevant facts insofar as these are known to the court. In that regard I have already observed that the petitioner's narrative of the factual background was not denied by the first respondent. Moreover the facts in the petition were supplemented by an affidavit. That document sworn under oath contains material which in the context of the petition for judicial review I consider the court is entitled to rely upon.

[16] I have already narrated the factual circumstances. These are, in my view, clear. It is plain that the petitioner intended to challenge the basis of the fixed penalty notice. It is equally plain that when the fixed penalty notice came to the attention of his father the petitioner permitted that person to "deal with the matter", that is effectively delegated to his father responsibility for either paying the fixed penalty notice, which had been the petitioner's original intention, or in the alternative have the matter resolved by way of a trial. As a result of forgetfulness the petitioner's father took neither of those courses and did nothing thereby allowing the 28 statutory day period to elapse. The situation in which the petitioner found himself is, on these facts, the result of a deliberate course undertaken by himself, albeit that course may not have resulted in the outcome he desired. It cannot have a bearing on the compatibility of the statutory provision challenged with article 6 of ECHR.

[17] Going further, I am satisfied that the framework set forth on part 11 of the Act is compliant with the provisions of article 6 of ECHR. The statutory provisions expressly provide that the recipient of a fixed penalty notice may ask to be tried for the alleged offence (2004 Act section 131(3)). The Act further stipulates that such a request must be made by notice before the end of the period of 28 days from the date notice is given (2004 Act section 131(4)). The Act does not therefore, in my view, deprive the recipient of a fixed penalty notice of a right to fair trial. On the contrary the provision entitles and guarantees the recipient of a fixed penalty notice a right to trial subject only to a provision that the right to elect for trial must be exercised within a stipulated time period. There was no submission that the imposition of a time restriction in which an election to proceed to trial must be exercised rendered a statutory provision non-compliant with article 6 of ECHR. In my view that is not surprising. In circumstances where the legislature determined to offer a person charged with a criminal offence the right to proceed to trial or, in the alternative, accept a penalty which expressly discharges liability to be convicted of the offence it is, again in my view, both reasonable and administratively necessary to provide a time period within which the decision whether or not to elect for trial must be made.

[18] My construction is further strengthened by consideration of the terms of section 129(2) of the Act of 2004 providing that a fixed penalty notice once paid discharges any liability to be convicted of the offence to which the notice relates. In relation to that provision I am bound by the authority of *S* v *Miller* (*supra*) the ratio of which was that where a procurator fiscal decided not to proceed with a charge against a person "… there is no longer any possibility of proceedings resulting in a penalty, any subsequent proceedings under the 1995 Act are not criminal for the purposes of article 6" (paragraph 23). In my view

section 129(2) of the Act of 2004 is of the same effect and therefore the same conclusion as reached in *S* v *Miller* (*supra*) applies.

[19] The petitioner's submission based upon article 13 of ECHR can be dealt with briefly. I agree with the proposition advanced by counsel for the first respondent that article 13 of ECHR has not been incorporated into domestic law and is not one of the "convention rights" defined by section 1, schedule 1 of the Human Rights Act 1998. In these circumstances it is my opinion that no free standing right arises from article 13. That conclusion would be determinative, I am however satisfied that the factual circumstances of the present case fail to disclose any contravention of article 13. As already discussed part 11 of the 2004 Act is clear and provides a readily understandable and operable framework. A person, such as the petitioner, served with a fixed penalty notice is given a clear choice of either proceeding to trial and thereby no doubt challenging the basis of the criminal offence in the fixed penalty notice or, in the alternative, accepting the notice which thereby discharges any liability to be convicted of the offence. In my opinion that statutory framework constitutes an effective remedy available to the petitioner.

[20] Having regard to my foregoing conclusions I will refuse the prayer of the petition.