

ENGLAND AND WALES / JUDGMENT

R v DFB

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Neutral Citation Number: [2026] EWCA Crim 399 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM THE CROWN COURT AT LEWES HHJ Jeremy Gold Ref: 47EE0959724 Case No: 202403308 A3 Royal Courts of Justice Strand, London, WC2A 2LL Date: 30/03/2026 Before : MRS JUSTICE FOSTER LADY JUSTICE WHIPPLE and MR JUSTICE HILLIARD

- ----- Between : Rex
- and – DFB
- -----
- ----- Respondent Appellant Francesca Levett (instructed by Blackfords LLP) for the Appellant James Oliveira-Agnew, Sophie Quinton-Carter and Hannah Williams (instructed by Crown Prosecution Service) for the Respondent Hearing dates : 23 January 2026
- ----- Approved Judgment This judgment was handed down remotely at 10:30am on Wednesday 1 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice. Note - include here the details of any specific reporting restrictions that have been made by the court. This will have been identified in the Criminal Appeal Office Summary under the Reporting Restrictions heading or from the Court Order. The wording of any reporting restriction must appear in RED TEXT. Judgment Approved by the court for handing down. R -v- DFB Mrs Justice Foster :

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person, shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.
2. On 22 August 2024 before HHJ Jeremy Gold KC in the Crown Court at Lewes the Prosecution offered no evidence against the Appellant in respect of a series of alleged offences against his ex-partner, including multiple counts of rape and coercive control. The Judge made a Restraining Order for five years after the acquittal under section 5A of the Protection from Harassment Act 1997. The Order was subsequently varied to one of four years' duration.
3. This application illustrates the difficulties that can arise in a case where an Order is sought following an acquittal without evidence being called, and where the complainant does not appear in person.
4. The case concerns an Order made in the Crown Court following the acquittal of the Appellant when the Complainant withdrew her consent to participate in a prosecution. She maintained in a detailed withdrawal statement that the facts in her original statements to the police were true, but the mental toll the proceedings were taking upon her was intolerable. The matter had been set down for trial in September 2024; she signed her statement of retraction on 14 July 2024.
5. The Appellant argues that a procedural irregularity in the original Application resulted in an unfair hearing and the subsequent Order of 22 August, although subsequently varied, should be quashed. Complaint is made that the Prosecution failed properly to set out the evidence upon which the application for the Order was made and explain why it was necessary. A written application ought to have been submitted at the outset but instead the CPS relied only on a draft Order uploaded to the DCS system.
6. Hearsay evidence alone was provided by the Prosecution to the effect that an officer had spoken to the complainant recently, who said she did not want to continue a relationship with the Appellant. No notice of this was given in advance; there was no statement from the officer and no hearsay notice, whereas the Criminal Procedure Rules require a notice.
7. By reference to R v Picken [2006] EWCA Crim 2194, it is said the Application ought not to have been granted in the first place without evidence from the Complainant that she wanted one, and the necessity for the Order ought to have been set out.
8. The Appellant submits that the amendment to the Order from 5 years down to 4 years on 29 January 2024 did not mean that what he argues was unfairness at the outset, was cured. Page 3 Judgment Approved by the court for handing down. R -v- DFB The Background

9. The Appellant had been charged on eleven counts including multiple allegations of rape, some as specimen counts between 2014 and 2023, the last in November 2023, with controlling and coercive behaviour down to 2024 and assault, in early 2024.
10. The matter came before the court in the following way. In August 2023 in relation to an unconnected matter the Appellant's phone was seized by the Police. On it they found messages between him and the Complainant who at that time was his partner. The messages suggested that he had raped and threatened her and had been coercive and controlling towards her. The Appellant was arrested and interviewed when allegations of this behaviour were put to him, which he denied. He was released on bail, with conditions including not to contact the complainant or go to her address.
11. Thereafter in February 2024, a friend of the Complainant's made a telephone call to the police in which she made allegations about the Appellant's treatment of the Complainant including matters that amounted to breach of his bail conditions namely attending the complainant's workplace, sexually assaulting her and repeatedly contacting her by phone. In March 2024, the Complainant gave a full account to police in an ABE video and in April 2024, the Appellant was again arrested and interviewed. He again denied all allegations made against him. He was charged and remanded in custody by the Magistrates' Court.
12. On 2 July 2024 the Appellant made a Defence statement in which he denied the charges. If he had been persistent, he said, it was due to his fear that she was meeting another man. The case was listed for trial in the Crown Court in September 2024.
13. On 14th July 2024 the complainant made a withdrawal statement as follows: "... I am giving this statement in relation to Police reference 47230244315 which involves myself and my ex-partner, DFB. I am giving this statement of my own free will and I am under no pressure from any other person to provide this. I have previously given two video recorded interviews on 19/03/2024 and 24/04/2024 regarding the offences of Rape, Sexual Assault, Coercive and controlling behaviour and criminal damage committed by DFB. What I said within these recordings is truthful, accurate and I stand by what I said. I, however wish to retract my statement and no longer wish to proceed in this investigation. My reasons for retracting are as follows; This investigation is having a severe impact on my mental health, it has been causing me increased anxiety and stress to the point where I cannot concentrate on anything else other than the investigation. Whenever I hear something related to this investigation, I instantly think about everything which has happened and feel terrible. I also suffer from depression which I take medication for, however this investigation has aggravated this, resulting in me having to seek help from the doctors who have upped my medication dosage. This investigation has also been having an impact on my physical health. I often struggle to sleep or wake up in the middle of the night. This investigation has also had an impact on my children's wellbeing, they are Page 4 Judgment Approved by the court for handing down. R -v- DFB often upset and missing their father and I feel responsible for causing this. I feel like I'm having to pick up the pieces and comfort them in his absence. I consider my relationship with DFB to be over, and do not want to hear from

him again unless it is regarding our children, I would consider any other communication from him as harassment. The time spent away from DFB has put me in a much better headspace and made me realise how toxic the relationship was, and the imbalance of control where I was always giving, while he would only take. I wish to put this relationship behind me and move on with my life.”

14. After the Prosecution notification to the Defendant’s solicitors on 21st August 2024 that they intended to offer no evidence, those solicitors wrote to the Court asking for the case to be listed on the next day. The case was listed for a mention for 22nd August at 2pm.
15. The Prosecution uploaded an ‘Application for a Restraining Order’ pursuant to section 5A of the Protection from Harassment Act 1997 to the Digital Case System. The document stated in its entirety as follows: “PROPOSED RESTRAINING ORDER The defendant is prohibited from:
 1. Having any contact with the complainant directly or indirectly save for any indirect contact in regards to arrangements for the children [name given] and [name given] that is to be conducted through [name given] and [name given]
 2. Attending at [address given or any address that the defendant believes that [the complainant] resides, for any reason
 3. Attending at [address given] or any address where the defendant believes that [the complainant is employed, for any reason Until further Order” The challenged hearing on 22 August 2024
16. The Appellant filed a Note on 22nd August 2024 stating the application for a Restraining Order after acquittal was opposed, and a copy of R v Picken [2006] EWCA Crim 219 was uploaded.
17. Counsel appeared on each side. The Complainant did not appear. The Prosecution relied first on the withdrawal statement, submitting nothing suggested the allegations made had been false. Prosecution counsel indicated the Complainant had had a conference with the Officer in the Case (“the OIC”) saying she did not want to stop the Appellant from seeing their children. She volunteered an address to facilitate this. She was concerned that previously, whilst he was on bail, sexual assaults at her workplace, breaching bail, had taken place there.
18. The Appellant submitted that if the court were considering a restraining order there should be a section 9 statement from the Complainant and an opportunity to cross examine her. His evidence was that the Complainant had contacted him whilst he was in prison and had written letters, although under a pseudonym. His case was the Complainant wished to remain in a relationship with him and for him to come home to her and the children as soon as possible, and that should be put to the Complainant. Page 5 Judgment Approved by the court for handing down. R -v- DFB A restraining Order was too onerous it was said, particularly in the absence of properly tested evidence.

19. Accordingly, there was an issue as to whether or not the complainant had been in contact with the Appellant very recently, and what her desires and intentions were.
20. The learned judge said he understood those submissions and the Appellant, if he wished, could seek to discharge the Order once made, and adduce the material at that point. The material contained in the retraction statement satisfied him that he was justified and it was desirable to make an order. He made an order for five years, prohibiting any contact with the complainant directly or indirectly save for any indirect contact in regard to the arrangements for the children. That was to be conducted through the complainant's parents. There were various other prohibitions on attending at certain addresses. The Variation
21. On 12 December 2024 the Complainant emailed the Lewes Crown Court in the following terms, giving her name and saying (in material part): " ... I got your contact details through DFB's family. " I was emailing to ask if ... could please make it possible that me and him could message (no phone calls) each other regarding the children. I don't want him to be allowed to come to my property without permission and don't want him to be allowed to message me about anything else other than the boys. Please could you let me know if you can make this possible?" She also wanted her parents' address removed from the Order as drafted.
22. On 15 January 2025 before Mr Recorder Monteith the Appellant appeared but was not represented. The Claimant did not appear.
23. The Prosecution indicated that the original OIC had contacted the Complainant following her letter of 12 December 2024 to the court, in order to make a risk assessment. The officer had suggested using a particular computer app used for contact in child cases. It appeared the Complainant's work-place manager wanted the absolute ban lifted such that the Appellant could do work for him (as in the past) when the Complainant was absent.
24. The Recorder ascertained that the Appellant was unprepared for the potential amendment, saying they would see if the proposals could be resolved that day and if not, whether an adjournment was possible. In the event the hearing was adjourned.
25. The Recorder emphasised that there were real concerns and clear evidence concerning the employment issues and proposals was required. He indicated that if the Appellant wished to vary anything in the Order it needed to be put into writing so it could be checked and an attempt made at agreeing terms. There was no evidence in court about the matters pertaining to work. The Recorder continued the Order in the form drafted.
26. On 29 January 2025 at the request of the Prosecution the Order was varied, following a hearing before HHJ Gold KC. Both sides were represented. Counsel for the Appellant expressed concern that instructions seem to be coming from the Page 6 Judgment Approved by the court for handing down. R -v- DFB complainant but via the OIC, explaining what the Complainant wanted. Variations were made to the prohibitions upon communication. The Appellant was prohibited from attending the complainant's workplace save for when she

was not present. The Judge then made the order for four years from that date.

27. We look below at the provisions for Restraining Order applications in the Criminal Procedure Rules 2025 (which are unchanged in their present form from those in force at the relevant time). First, we turn to the submissions and previous consideration of the in caselaw of these civil orders in the criminal jurisdiction. Appellant's Case
28. The Appellant argues that procedural irregularity in the original Application resulted in an unfair hearing and the subsequent Order, although varied, must suffer from the same defect and should be quashed. Complaint is made that the Prosecution failed to submit a written application at the outset but instead relied on a draft Order failing properly to set out the evidence upon which the Application was made, and why the Order was necessary.
29. It is argued by reference to R v Picken [2006] EWCA Crim 2194 that the Judge ought not to have granted the Application in the first place without evidence from the Complainant that she wanted one, and he ought to have expressed the necessity for the order.
30. Only hearsay evidence was provided to the effect that an officer had spoken to the complainant recently, and that she did not want to continue a relationship with the Appellant and the Appellant states no notice of this was given in advance; there was no proper statement from the officer and no hearsay notice.
31. Whilst in custody, the Appellant said he had received a letter from the complainant, albeit in a false name. He made telephone calls to his son, during which the Complainant indicated directly to him that she wanted to continue her relationship with him. When she knew the case was not being pursued, so he said, the Complainant made arrangements to visit him at his address the day after his hearing.
32. The Appellant submits that the amendment to the Order from '5 years, down to 4 years' on 29 January 2024 did not mean that what he argues was unfairness at the outset was cured. Respondent's Case
33. The Respondent submits no unfairness vitiated the making or the amendment of the Restraining Order. Prosecution counsel in the hearing identified the relevant facts in the evidence supporting the Order, and they were also contained in the Complainant's statement withdrawing her support for the prosecution, to which reference was made and which had been read by the Judge. The written application otherwise complied with Criminal procedure Rules r.31. The Crown had acted quickly once the decision was taken to offer no evidence, and the case had been fully reviewed because the Appellant had been remanded into custody. The case was listed by the court on the day following the Prosecution's notification. Page 7 Judgment Approved by the court for handing down. R -v- DFB
34. It was made clear that the case was based on evidence uploaded onto the digital case system, that was the evidence in support of the charges themselves, and also the retraction statement – which clearly had been considered by the defence and by the Judge. It did support the necessity of the Order. Text messages he admitted sending over a period of eight

years from 2015 to 2023 established that a Restraining Order was necessary. The retraction statement showed she wanted no further contact with the Appellant, save in relation to the children. By reference to R v Baldwin [2021] EWCA Crim 417, there was sufficient material to support a restraining order to protect the Complainant.

35. The Respondent does not accept that the case of Picken requires that a complainant formally to consent to the imposition of a Restraining Order. Nor need a complainant give evidence. Counsel for the prosecution emphasised that the retraction statement included: “I consider my relationship with DFB to be over, and do not want to hear from him again unless it is regarding our children, I would consider any further communication from him as harassment”.
36. In any event, the OIC spoke to the Complainant before the hearing, and she confirmed she wanted a Restraining Order to be made in the proposed terms. It is accepted there was no hearsay notice indicating an intention to introduce the OIC’s conversations with her. With respect to the new evidence from the Appellant, on the day of the hearing the OIC contacted her again, when it was said by the Appellant that she wanted to continue a relationship. She confirmed again to the officer that she did indeed want the Order. This was also explained to the court in the hearing.
37. The Respondent submits the Judge sufficiently identified the evidential basis on which he made the restraining order: “on the material that’s in front of me contained in ... the retraction statement” as the Transcript shows. Further, he identified the basis for the Order and explained the reasons for the restraining order directly to the Appellant. Framework
38. The Crown Court has power in certain circumstances subject to various statutory provisions to make Orders which are civil in nature in criminal proceedings, including following acquittal. One such is under the protection from Harassment Act 1997 section 5A which provides s.5A Protection from Harassment Act 1997 provides: Restraining orders on acquittal
 - (1) A court before which a person (“the defendant”) is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.
 - (2) The order may have effect for a specified period or until further order. (2A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3. Page 8 Judgment Approved by the court for handing down. R -v- DFB (2B) The prosecutor, the defendant or any other person mentioned in the order may apply to the court that made the order for it to be varied or discharged by a further order. (2C) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (2B). (2D) It is an offence for the defendant, without reasonable excuse, to do anything that the defendant is prohibited from doing by an order under this section. (2E) A person guilty of an offence under this section is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
- (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine, or both. (2F) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.
- (3) Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section.
- (4) Where—
 - (a) the Crown Court allows an appeal against conviction, or
 - (b) a case is remitted to the Crown Court under subsection (3), the reference in subsection (1) to a court before which a person is acquitted of an offence is to be read as referring to that court.
- (5) A person made subject to an order under this section has the same right of appeal against the order as if—
 - (a) he had been convicted of the offence in question before the court which made the order, and
 - (b) the order had been made under section 5.
- 39. The Criminal Procedure Rules (“the Crim PR”) 2020 make provision by Rule 31 to reflect that a civil order may be made as well as or instead of a sentence, and may require a person to do or not do something. Under the Rule they are referred to collectively as “behaviour orders”.
- 40. Different obligations of notification apply depending on what type of behaviour order is in issue.
- 41. The current Rules are referred to here. The material sections are as follows When this Part applies 31.1 —(1) This Part applies where— (a)a magistrates’ court or the Crown Court can make, vary or revoke a civil order— (i)as well as, or instead of, passing a sentence, or in any other circumstances in which other legislation allows the court to make such an order, and (ii)that requires someone to do, or not do, something; ... Behaviour orders: general rules 31.2.—
 - (1) The court must not make a behaviour order unless the person to whom it is directed has had an opportunity— (a)to consider— (i)what order is proposed and why, and (ii)the evidence in support; and (b)to make representations at a hearing (whether or not that person in fact attends). Page 9 Judgment Approved by the court for handing down. R -v- DFB

- (2) That restriction does not apply to making— (a)an interim behaviour order, but unless other legislation otherwise provides such an order has no effect unless the person to whom it is directed— (i)is present when it is made, or (ii)is handed a document recording the order not more than 5 business days after it is made ... Application for behaviour order and notice of terms of proposed order: special rules 31.3. —(1) This rule applies where— ... (c)a prosecutor proposes a restraining order whether the defendant is convicted or acquitted. ...
- 6) Where paragraph (1)(c) applies (restraining order proposed), the prosecutor must — (a)serve a draft order on the court officer and on the defendant as soon as practicable (without waiting for the verdict); and (b)in the draft order specify— (i)those prohibitions which, if the defendant is convicted, the prosecutor proposes for the purpose of protecting a person from conduct which amounts to harassment or will cause fear of violence, or (ii)those prohibitions which, if the defendant is acquitted, the prosecutor proposes as necessary to protect a person from harassment by the defendant. ... The Note to the Rule provides: “[Note.]21The orders listed in rule 31.3(1)(a)may be made on application by the prosecutor. The orders to which [rule 31.3(1)(b), (c) and (d)]22apply require no application and may be made on the court’s own initiative. Under section 8 of the Serious Crime Act 2007a serious crime prevention order may be made only on an application by the Director of Public Prosecutions or the Director of the Serious Fraud Office. See also paragraphs 2, 7 and 13 of Schedule 2 to the 2007 Act.”] evidence to assist the court: special rules 31.4. —(1) This rule applies where the court can make on its own initiative—
- (a) ... (b)a restraining order; or (c)...
- (2) A party who wants the court to take account of evidence not already introduced must— (a)serve notice on— (i)the court officer, and (ii)every other party, as soon as practicable (without waiting for the verdict); and (b)in the notice, identify that evidence; and (c)attach any written statement containing such evidence. [Note. If a party relies on hearsay evidence, see also rules 31.6, 31.7, and 31.8.] Page 10 Judgment Approved by the court for handing down. R -v- DFB
42. The effect of these requirements is that where a behaviour order is made r. 31.2 requires that the court shall not make one unless the person to whom it directed has had a chance to consider what order was proposed, the reasons for it and the evidence in support. Further, he must have been given the opportunity to make representations at a hearing.
43. Special rules under 31.3 apply to the various types of case described within the Rules. In the present case r.31.3(1)(c) applies since the prosecutor proposed a restraining order on acquittal. Subsection (6) requires the prosecutor to serve a draft order on the court officer and on the defendant as soon as practicable, specifying the prohibitions that are proposed. The notes to the rule explain that orders under r.31.3 (1)(b) or (c) or (d) may be made by proposal of the prosecutor and may be made on the court’s own initiative.

44. Rule 31.4 indicates that in such a case, namely as here, under r.31(3)(1)(c), a party who wants the court to take account of evidence not already introduced, as would be the case where no evidence had been offered, must serve it on the court officer and every other party as soon as practicable and in the notice identify the evidence, attaching any written statement of it.
45. Furthermore, as the note to the rule indicates, rules 31.6, 31.7 and 31.8 apply, requiring a party who wishes to introduce hearsay evidence to serve a hearsay notice, setting out the evidence including why the maker is not to be called to give evidence. Under 31.7 an application to cross-examine must be made in writing on five business days' notice.
46. Although it is possible for the court under that rule to decide the application without a hearing, the Appellant must have at least an opportunity to make representations at a hearing, and those served have an opportunity to make representations. Rule 31.8 explains how credibility or consistency may be challenged in a statement where another party seeks to introduce hearsay. The maker of the statement may be called and again, notice provisions apply. Consideration
47. Caselaw has given guidance on the application for a Restraining Order under s.5A after acquittal in a number of cases.
48. The Appellant relies upon the case of Picken. That however appears to us to be rather different on its facts. There, the Court was dealing with a Restraining Order after conviction. Following pleas of guilty the applicant was sentenced to two years' imprisonment for putting a person in fear of violence through harassment, and to three months' concurrent for common assault. No separate penalty was imposed for breach of a community order. A Restraining Order was made for five years. The applicant was granted leave to appeal the Restraining Order, which was quashed.
49. The Restraining Order had been made there even though the Applicant's representative was instructed that the Complainant had visited the Applicant in prison, shortly before and said she was willing for him to move back to their home on release. There was no evidence to confirm that position and the judge of the Crown Court observed in that case that some women needed to be protected from themselves. Page 11 Judgment Approved by the court for handing down. R -v- DFB
50. The CACD said (in paragraph 17): "The judge had no information coming from the prosecution as to whether Miss W wanted a restraining order to be made or not. Very often the police will have spoken to the victim of the offence and will have raised the question of a restraining order. That does not seem to have occurred in this case. In our view the judge should not have made an order without finding out what Miss W's position was. If he had been satisfied that she wished to continue relations with the applicant, then it would have been inappropriate for him to have made the order. It was not for him to decide that she should not do so. We consider that he should have adjourned the question of the restraining order so that the police could speak to Miss W. In the circumstances we consider that the order should not have been made."

51. That was not what happened in the present case. Here the judge did know. Further, the case does not support the proposition relied upon in the Grounds of Appeal to the effect that the Court may not make a Restriction Order without positive evidence that the complainant herself has expressed a desire for one. That would be an unlikely outcome given that the judge is not here deciding an inter partes issue, but exercising the power of the court in the interests of justice to mitigate risks that have been shown to exist, notwithstanding the fact of the acquittal.
52. In our view the rules of fairness do require that the subject of a Restraining Order is entitled to know in advance and to challenge, if he or she wishes, the evidence said to show the necessity for the Order. The rules reflect this position. It is also reflected in by Dingeman's LJ in the case of John Baldwin [2021] EWCA Crim 703. That case is in some ways analogous to this.
53. In that case, as here, no evidence was offered on the trial of certain offences including assault because the complainant did not attend trial to give evidence. The judge in the case raised the issue of a restraining Order against Mr Baldwin who had denied the charges in interview, and pleaded not guilty. His defence statement, as his interview, asserted a malicious allegation by the complainant, matters of bad character were in play (he had a number of relevant convictions) and the complainant herself had an assault conviction and had previously made a false complaint of assault against Mr Baldwin. The complainant in Baldwin did not attend. No adjournment was sought although instructions that were taken from the appellant. No evidence was called on either side in respect of the Restraining Order. The judge relied on the evidence in the papers and the body worn video footage from the police to the effect that an assault had taken place. He stated the order was necessary to protect the complainant.
54. In that case the court allowed the appeal against the Order, setting out the principles. They appear to us to be applicable in the current case. "34. As the terms of section 5A of the 1997 Act make clear this is an order which is imposed after an acquittal. It may be imposed even where the prosecution has offered no evidence. A restraining order is a civil order and does not reflect on the guilt of the appellant. The civil standard of proof applies, see R v Major at paragraph 15. Section 5A of the 1997 Act addresses a future risk of behaviour by the appellant which might amount to harassment. Page 12 Judgment Approved by the court for handing down. R -v- DFB
35. An order can only be imposed if the statutory conditions are met and fairly explained. There has to be a course of conduct which might alarm a person or cause distress. There has to be an identification of the victim. This is because the order is for the protection of a particular vulnerable person or possibly an identifiable group of vulnerable persons, see R v Smith at paragraph 27. The legislation was aimed at protecting victims of domestic violence, but was not limited to such circumstances. The order must be "necessary ... to protect a person from harassment" and the word necessary must not be ignored, see R v Smith at paragraph 28.

36. Although an order may be made after acquittal it must be made on the evidence. Rule 31.2 of the Criminal Procedure Rules requires the person to whom the order is directed to have had an opportunity to consider “the evidence in support”. If a prosecutor applies for a restraining order on acquittal, the prosecutor is required to identify, under Rule 31.3, what evidence is relied on to justify the making of the order. If hearsay is relied upon the parties are required to serve hearsay notices and counter-notices under Rules 31.6, 31.7 and 31.8.
37. In circumstances where a judge decides to consider imposing a restraining order after an acquittal where no evidence was offered, natural justice and the Criminal Procedure Rules require that the person against whom an order may be made, must be given the opportunity to consider what order is proposed and why, to consider the evidence in support, and to adduce evidence against the making of the order. Proceedings for a restraining order under section 5A of the 1997 Act are civil in nature, but in civil proceedings it is still necessary to identify what evidence is admissible in support of an application for an order. It is right to record that in civil proceedings an application for an interim injunction to restrain a person from harassing another the order is likely to be obtained on witness evidence alone. A contested application for a final injunction to restrain harassment, however, is likely to require the hearing of oral evidence where there is a relevant contested issue of fact to be determined.”
55. In the present case the Prosecution were likely constrained to rely upon hearsay evidence in support, given the Complainant’s reluctance, and given the contrary facts asserted by the Appellant, in our view the more structured the process anticipated by the Rules ought to have been given effect. It appears the judge was not given the assistance of this, nor of this authority when he had to make the decision under appeal. Result
56. As a result, we consider the Order was made in circumstances that were procedurally unfair and it must be quashed. We have had regard to the materials that were before the judge and we well understand his reliance upon the initial materials uploaded to the digital case system, and also the subsequent terms of the Complainant’s retraction statement. This was powerful evidence, and the terms of the Order make very good sense on this basis.
57. We have considered what the effect of the procedural unfairness is and, as indicated, have concluded, reluctantly, on authority, the Order must be quashed. The matter is not remediated by the application to vary the Order.
58. In the recent case of Khan [2021] EWCA Crim 1526, again before Lord Justice Dingemans, a similar challenge was made on appeal in circumstances where no Page 13 Judgment Approved by the court for handing down. R -v- DFB evidence was offered and an order pursuant to section 5A was sought. In that case, the Appellant had not been heard because he had arrived late, and evidence had been canvassed in his absence. The case was not reopened once he arrived. In allowing the appeal the Court reflected in that case there was unfairness where, no evidence having been offered – “ ...the Applicant had not had an opportunity (a) to cross-examine the witnesses called in support of the application for a

restraining order; (b) to advance evidence in his own defence (including giving evidence himself and being cross-examined); or

- (c) to make submissions on whether the evidence demonstrated that a restraining order was necessary, and upon the terms and duration of any order.

59. The Court concluded therefore the Appellant had not received a fair trial.

60. The Court in Khan said this as to remedy:

30. It does not inevitably follow that an order will be set aside on the ground of unfairness arising from errors in the conduct of the trial; it is a matter of degree: *Bernard -v- The State of Trinidad and Tobago* [2007] 2 Cr App R 22 [27]. Ordinarily, however, the consequence of a determination that a litigant has not had a fair trial is that the decision challenged is set aside: *Serafin -v- Malkiewicz* [2020] 1 WLR 2455 [49]: “What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in *Jones -v- National Coal Board* [1957] 2 QB 55... ‘No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it’. Lord Reed PSC observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them.”

31. Having reached the conclusion that the proceedings against the Applicant were procedurally unfair and that the restraining order should be set aside, our provisional view was that the case should be remitted for the application to be reheard. The matter, however, was potentially complicated by the nature of appeal route against the imposition of a restraining order under s.5A.

61. The court referred to the effect of section 11 of the Criminal Appeals Act 1968. That provision requires the court, if they consider an appellant should be sentenced differently for an offence for which she was dealt with by the court below to:

- (a) quash any sentence or order which is the subject of the appeal; and
- (b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence; but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.”

62. Further, explaining the effect of section 11 of the CJA:

35. s.11(3) limits the orders that the Court of Appeal can make on a “sentence” appeal against a restraining order on acquittal to either quashing the original order, or imposing a fresh restraining order (providing its terms are not more onerous than Page 14 Judgment Approved by the court for handing down. R -v- DFB the terms of the original order). Remitting the application for the restraining order to be reconsidered by the first instance Court is not expressly included as an option.
36. This point has caused us to consider what steps might properly be taken. We are satisfied that the absence of an express power to remit in s.11(3) does not stand as any impediment, if we were to quash the original restraining order made in this case, to the prosecution making a further application under s.5A.
37. We have reached this conclusion for the following reasons. The fact that s.5A(5) treats the imposition of a restraining order under the section as the imposition of a “sentence” for the purposes of an appeal does not alter the fact that proceedings under s.5A are civil in nature. If a restraining order under s.5A is quashed by the Court of Appeal, that represents no bar to the prosecution making a fresh application to the Crown Court under s.5A. There is no need for the Court of Appeal formally to remit the case. It is for the prosecution in any case to decide whether to apply for a restraining order under s.5A. When a sentence after conviction is quashed by the Court of Appeal, it is necessary for that Court to impose a lawful sentence in its place. Here, if the Court of Appeal quashes the restraining order under s.5A, there is no requirement to impose another “sentence” in its place. Indeed, where the Court has found that the original proceedings were procedurally unfair, it is likely that the Court will lack a proper evidential basis upon which to do so (for the reasons explained in the passage from Serafin quoted above). After the restraining order in this case is quashed, the Isleworth Crown Court remains the “court” before which the Applicant was acquitted of the offences with which he was originally charged. It therefore retains jurisdiction to consider an application under s.5A afresh once the original order has been quashed by the Court of Appeal.
38. We have reached this conclusion simply on the proper interpretation of s.5A. Had it been necessary to do so, we would have been satisfied that the duty to interpret legislation compatibly with the Human Rights Act 1998 would have required such an interpretation, so as to protect the Article 6 rights of both the Applicant and the complainant. Where the Court has determined that a trial process has been unfair and the resulting order must be set aside, the ordinary course is that the proceedings can be heard de novo. We are satisfied that there is nothing in s.11 and s.5A which prevents the Crown Court from hearing and determining a fresh application by the prosecution for a restraining order under s.5A following our decision to quash the original order imposed on 18 September 2020.”
63. Accordingly, we must allow this appeal.

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64. For the reasons given in Baldwin paragraphs 37 and 38 above, this must be the outcome. It will be a matter for the CPS whether they decide to instigate a further application which of course will depend upon the facts as they now appear to them to be. Page 15
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