



[2019] EWCA Crim 1339

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)

Case No: 201803110 A1

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26th July 2019

Before :

LORD JUSTICE GREEN
MR JUSTICE SPENCER
MR JUSTICE MORRIS

Between :

THE QUEEN
- and -
A D

Kate Chidgey for the Appellant
Simon Heptonstall for the Crown

Hearing date: 10th May 2019

Approved Judgment

Mr Justice Spencer :

1. On 10th May 2019 we heard the appellant's renewed application for leave to appeal against sentence following refusal by the single judge and reserved judgment. This is the judgment of the Court.
2. At the hearing on 10th May when the case was argued we granted leave. We reserved judgment so that counsel could consider some interesting and difficult issues raised at the hearing and furnish us with further written submissions. We are grateful to Ms Chidgey on behalf of the appellant and Mr Heptonstall on behalf of the Crown for the detail and clarity of all their submissions, written and oral.
3. The victim of the offences was a young child, only 4 years old at the time. The provisions of section 45 and 45A of the Youth Justice and Criminal Evidence Act 1999 are therefore engaged. We are informed that an order was made in the lower court although a copy is not available. We have made a further order under s.45A. This judgment has been anonymised accordingly.

The issues in the appeal

4. On 28th June 2018 in the Crown Court at Canterbury the applicant, now 40 years of age, was sentenced by Her Honour Judge Norton for three offences of administering a poison or noxious substance so as to endanger life, contrary to section 23 of the Offences Against the Person Act 1861 (counts 1-3), and for child cruelty, contrary to section 1 (1) of the Children and Young Persons Act 1933 (count 4). The appellant had pleaded guilty to these offences on 23rd December 2016. On each count the judge imposed concurrent extended sentences of 8 years, comprising a custodial term of 5 years and an extension period of 3 years. She also made a restraining order under section 5 of the Protection from Harassment Act 1997 until further order, by which the appellant was:
 - (1) not to have any unsupervised contact with any child under the age of 16
 - (2) not to have any employment either paid or unpaid that involves bringing her into contact with any child under 16 years.
5. When this case was first listed before the Full Court in February 2019 for the hearing of the renewed application for leave, Fulford LJ directed that the case be removed from the list so that the prosecution could be represented. The Court was concerned about the lawfulness of the restraining order, although this was not then a ground of appeal. We shall explain the issue in due course. It is for this reason that we granted leave.
6. The sole complaint, when the appeal was lodged, was that the judge was wrong to pass an extended sentence. It is said that she was wrong to conclude that the appellant was dangerous. Alternatively, if the appellant was properly found to be dangerous, an extended sentence was unnecessary because the protection of the public could be achieved by the restraining order.

7. Ms Chidgey also now submits that the restraining order was unlawful and/or unnecessary.

The offences and the proceedings in the Crown Court

8. In view of the narrowness of the issues we need summarise the facts only briefly. The appellant is the mother of BD who was born on 19th August 2010. For a number of years the child had suffered from seizures, the cause of which could not be diagnosed. At times he had appeared to be suffering from a catatonic state and had been drowsy and unsteady on his feet although there was no obvious explanation for his symptoms. He had been hospitalised on a number of occasions and had been given medication which the applicant would administer.
9. On 19th September 2014, shortly after his fourth birthday, BD informed his teacher at school that he was unwell. He was collected from school by the appellant. In the early hours of the following morning one of BD's siblings woke his parents and said BD had been vomiting. An ambulance was called and the child was admitted to hospital. After a prolonged stay in hospital, during which he attended the hospital school, a doctor ordered a number of blood and urine tests.
10. During this period the appellant's behaviour appeared to the clinical staff to be unusual. She began talking to other parents, telling them that the doctors had suggested what might be wrong with BD, whereas in fact no doctor had made any such suggestion. She was also noted to be taking an abnormal interest in the condition of other children, listening intently to medical conversations about them and watching when other children had to undergo uncomfortable interventions.
11. On 6th October 2014 the appellant was seen by a doctor coming out of the bathroom with a carrier bag containing brown bottles and other objects. The appellant then packed the contents into a suitcase. She appeared agitated as she did so. The same doctor subsequently examined BD and was so disturbed by the child's symptoms that he suspended BD's discharge from hospital, which had been imminent.
12. The doctor made a referral to the toxicology team. Owing to the concerns of the medical staff the child was eventually asked directly whether he had been given any medicine. He reported that his mother, the appellant, had given him some white medicine in a syringe. Safeguarding procedures were immediately put in place and a list of medications which had been prescribed for the appellant and for a sibling of BD was obtained.
13. On 8th October 2014 toxicology reports confirmed a significant number of abnormalities. It was discovered that the child had ingested Carbamazepine (count 1) and Levetiracetam (count 2), both of which are powerful drugs prescribed for epilepsy. They had been prescribed for one of BD's siblings. The child had also been given Pregabalin (count 3), which is a drug used for therapy for partial seizures and for the treatment of pain and anxiety disorders. The appellant herself had been prescribed this drug in the past until September 2014 when she had collected 56 capsules from the pharmacy, which presumably she retained.

14. The doctors concluded that the ingestion of these unauthorised drugs would give rise to the symptoms seen in BD which were consistent with poisoning and were strongly suggestive of fabricated or induced illness.
15. Subsequently a hair specimen from BD was analysed, which confirmed that for two months leading up to his admission to hospital these drugs had been ingested by the child.
16. As the judge observed in her sentencing remarks, from the age of 9 months the child had suffered from unexplained seizures requiring hospital admissions, seizures for which no diagnosis had been made. Since leaving the appellant's care he had become a perfectly normal child. Fortunately there did not appear to be any lasting ill effects.
17. The appellant was arrested on 8th October 2014. A number of packets of Pregabalin were recovered from her possession on arrest. She was interviewed on three occasions. She denied the offences, insisting she had only given BD the medication prescribed for him. She had no idea how the unauthorised medication had got into his system.
18. The appellant entered her guilty pleas on 23rd December 2016, eighteen months before she was sentenced. The reason for the delay was the need for a lengthy period of assessment under a succession of interim hospital orders. The psychiatrists who examined the appellant were unanimous in their conclusion that she had a diagnosis of Factitious Disorder and Factitious Disorder Induced on Another, in the past known as Munchausen's by Proxy. Some experts had also concluded that she had post-traumatic stress disorder as a result of abuse she had suffered in her childhood, but that was not the opinion of Dr Husain, the psychiatrist who had been responsible for her care during the period of the interim hospital orders.
19. The judge had reports from several psychiatrists, the details of which we need not rehearse. Dr Husain gave evidence at the sentencing hearing in support of his recommendation that the appropriate disposal was a "hybrid order", that is to say a custodial sentence coupled with a hospital direction and limitation direction, pursuant to section 45A of the Mental Health Act 1983.
20. Dr Husain's evidence was that there was no cure as such for the appellant's disorder. He was sceptical as to whether she would respond to the only treatment available, which was psychotherapy. Initially he had thought there was a poor prognosis for change because she was still in denial, still continued to fabricate her own illnesses, and lacked insight. He was concerned about the appellant's responses when asked why she had committed the offences. She had suggested that it was to escape from married life and housework, or as a means of exacting vengeance on her husband. There was also concern that her reactions to the suffering of children suggested that she derived sadistic pleasure from seeing the suffering of others.
21. Dr Husain's opinion was that the appellant fulfilled the criteria for a dangerous offender. She would need strict management when released back into the community. Dr Husain also expressed concern about her secretive behaviour displayed during the interim hospital order, leading to the discovery that she had been using the internet

suspiciously to contact a person whom she would not have been permitted to contact. Dr Husain's evidence was that her disorder could not excuse her actions towards the child. Those actions required careful planning. They were deliberate and intentional and required her to have taken measures to avoid detection. Nevertheless Dr Husain remained guardedly hopeful that treatment would assist the appellant, otherwise (as he put it) she would eventually come out of prison just as dangerous as when she went into prison.

22. The judge concluded that, taking into account all the circumstances of the case, all the reports placed before her, and Dr Husain's oral evidence, she was satisfied that the appellant was a dangerous offender in that she posed a significant risk of serious harm to others. She explained her reasoning in arriving at a custodial term of 5 years, after full discount for plea. There is no challenge to the length of the custodial term, nor could there be.
23. The judge was satisfied that the criteria for a hospital order were met but concluded that the appropriate disposal was a hybrid order with a direction that she be subject to the special restrictions set out in the section 41 of the Mental Health Act 1983 without limit of time. If and when it was no longer necessary for her to be detained in hospital she would be transferred to prison to serve out the custodial term of her extended sentence.
24. The judge turned finally to the question of a restraining order. She was sure there would be significant and restrictive conditions attached to the appellant's release; those conditions, she hoped and expected, would include restrictions preventing access to other children. Nevertheless, as it was not known what the licence conditions would be, or what conditions would be attached to the section 41 restriction order, it was appropriate that there should be a restraining order.
25. We have already set out the terms of the restraining order which the judge made. The order stated that it was made "to protect any child under 16 years old from conduct which amounts to harassment or will cause fear of violence."

Challenge to the extended sentence

26. On behalf of the appellant Ms Chidgey submits first and foremost that the judge was wrong to find that the appellant was dangerous: she was wrong to conclude that the appellant posed a significant risk of harm to others by the commission of further specified offences.
27. Ms Chidgey submits that the opportunity to commit the current offences arose only in circumstances where the appellant had the unsupervised care of her own children. Such is the manifestation of her psychiatric condition that any future offences against children would be committed only in the context of the closest of family relationships, for example mother and child. It is inconceivable that she will ever be permitted to have unsupervised contact with her own children or any other child. Her own children will never be returned to her care. The inevitable ongoing involvement of social services with the family will mean that any child subsequently born to her would immediately be taken into care. The submission therefore is that the risk the

appellant presents in terms of the commission of further specified offences is not a significant risk.

28. In the alternative Ms Chidgey submitted in her grounds of appeal that if the judge was entitled to find the appellant dangerous she was nevertheless wrong to impose an extended sentence because this was unnecessary in view of the restraining order. The terms of that order prohibit her from having any unsupervised contact with children under 16, meaning that the risk of further offences being committed is negligible.
29. In support of this ground of appeal Mrs Chidgey relies upon the decision of this court in *Terrell* [2007] EWCA Crim 3079; [2008] 2 Cr. App. (S.) 49, where the point was made that if apt and effective restrictions can be imposed through some other order, an indeterminate sentence based on a finding of dangerousness is not required. Ms Chidgey also relies upon the observations of this Court in *Woolley* [2015] EWCA Crim 545, at [31]:

“It seems to us that in so far as the real risk was to one man, it could and if necessary should be dealt with by a far more focused and less draconian sanction than an extended sentence. For example, there could be appropriate restraints or injunctions to prevent contact with [him] and his family if there was any concern that this may happen in the future...”

30. Ms Chidgey submitted that the risk posed by the appellant could be and, by reason of the restraining order, *was* dealt with, by that “more focused and less draconian sanction.”
31. Ms Chidgey recognised that if the restraining order is unlawful and has to be quashed, an important plank of her argument against the extended sentence disappears. Nevertheless, even in those circumstances, she submits that an extended sentence is unnecessary given that there would inevitably be conditions attached to her licence on release which would afford the same protection as the restraining order.
32. Mr Heptonstall on behalf of the Crown submits there was ample evidence on which the judge was entitled to conclude that the appellant was dangerous, notably the report of Dr Husain. His conclusion was that she will pose a considerable risk to any child, hers or anyone else’s, who may come into contact with her. Mr Heptonstall submits that an extended sentence was necessary to establish supervision over the appellant for a considerable period after her release from custody, in order to protect other children with whom she may come into contact.
33. We have considered these submissions carefully. We have no hesitation in agreeing with the single judge that the judge was fully entitled to conclude that the appellant fulfilled the criteria of a dangerous offender for whom an extended sentence was necessary. She poses and will continue to pose a risk to any child with whom she comes into contact, not just a child of her own or a close family member. The evidence of Dr Husain in this regard was particularly compelling. With or without a restraining order in the terms made by the judge, the purpose of any extended sentence is to ensure that there is a much longer than usual period of supervision

once she is released. In our view this is essential in the peculiar circumstances of this case for the protection of any children with whom she may come into contact.

34. Irrespective of the fate of the restraining order, we would remain of the view that there can be no criticism of the judge's decision to impose an extended sentence. It was neither wrong in principle nor manifestly excessive.

The restraining order

35. We turn to the restraining order itself. As we have explained, on the first occasion the case was listed the Court expressed its concern about the lawfulness of the restraining order, directed that the prosecution attend, and invited counsel's submissions in advance of the next hearing. The Court's concerns were communicated in a note from the Criminal Appeal Office in the following terms:

“The order states that it was made to protect ‘any child under 16 years old’...The Court has concerns about the lawfulness of the restraining order imposed in this case. On the face of it the wording in s.5(2) requires identification of the person or persons who are to be protected by the order. As was said in the case of *Smith* [2012] EWCA Crim 2566; [2013] 2 Cr App R (S) 28, at para 28:

‘The omission of the identification of a potential victim in the order made by the judge is not a mere formality. The need for identification of the person who is to be protected reflects the underlying purpose of the provision. It is for the protection of a particular vulnerable person or possibly an identifiable group of vulnerable persons. This order was for the protection of the world at large...’

The criteria for the imposition of an order under the Protection from Harassment Act differ from those required for the imposition of a Sexual Harm Prevention Order pursuant to the Sexual Offences Act 2003 which is specifically directed at the protection of the public or any particular members of the public. The question arises whether ‘all children under the age of 16 years’ is a sufficiently identifiable group of vulnerable persons such that an order under s.5 can be made for their protection.”

36. The case of *Smith* referred to in the note involved a restraining order made not under section 5 but under section 5A of the Act, following the appellant's acquittal. The defendant in that case had been acquitted by reason of insanity of offences of criminal damage and interfering with the crew of an aircraft in flight. The trial judge made a restraining order under section 5A prohibiting the defendant from travelling on any domestic or international commercial airline for a period of 3 years. This explains the reference in the passage quoted to its being an order being for the protection of the “world at large”. The full quotation from the judgment, at [28], continues:

“...or whoever might happen to be on any aircraft on which he might travel.”

37. In *Smith Toulson LJ*, giving the judgment of the court, emphasized that before a restraining order could be made the court had to be satisfied, on the balance of probabilities, that the defendant was likely to pursue a course of conduct which amounts to harassment within the meaning of section 1 of the Act. “Harassing” a person includes alarming the person or causing the person distress: see s. 7(2) of the Act.

38. Section 5A, which the court was considering in that case, provides:

“(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.”

39. By contrast section 5 of the Act, the provision under which the order in the present case was made, is in rather different terms:

“(1) A court sentencing or otherwise dealing with a person (“the defendant”) convicted of an offence... may... make an order under this section.

(2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order from conduct which

(a) amounts to harassment or

(b) will cause a fear of violence,

prohibit the defendant from doing anything described in the order.

40. It may be a distinction without a difference, but we note that under section 5A it is a prerequisite for the making of an order that the court considers it *necessary* to do so, whereas under section 5 the discretion is expressed more broadly in that the court may make such an order “*for the purpose of*” protecting the victim or any other person mentioned in the order from conduct amounting to harassment. On the authorities, however, it has generally been accepted that the twin tests are necessity and proportionality: see, e.g., *Richardson* [2013] EWCA Crim 1905; [2014] 2 Cr. App. R. (S.) 5.

41. On behalf of the appellant Ms Chidgey submits that “*any child under the age of 16*” is too wide a group for it to be possible to describe meaningfully those belonging to it as “identifiable” in the context intended by the legislation. She points out that under section 5(4) of the Act, which deals with the power to apply for a restraining order to be varied or discharged, such an application can be made by, amongst others, any person named in the order. Thus, she submits, an application to vary the order by “any child under the age of 16”, as mentioned in the order, would be entirely dependent on the prosecutor or defendant making such an application. There would be no power for a third party, such as Social Services, to intervene on behalf of a child to make such an application.

42. We are unimpressed by this last point. In the unlikely event of a child under 16 wishing to have contact with the appellant at the appellant's request the obvious course would be for the appellant herself, or the prosecutor, to make such application.
43. Ms Chidgey further relies upon dicta in the decision of this court in *R (AJ)* [2013] EWCA Crim 591 in which a restraining order was made under section 5A of the Act following the defendant's acquittal of attempted murder by reason of insanity. The order was quashed by this court on the ground that the court could not be satisfied that the defendant was likely to pursue a "course of conduct" amounting to harassment. In the circumstances of that case it could not be said that any repetition of the single act which led to his prosecution was likely. The court concluded, at [27], that on the facts of that case the concerns over the welfare of the defendant's children, who were the persons the order was intended to protect, "would be more properly addressed either by suitable agreement between the mother and the local authority or, in default of agreement, by the family courts in exercise of their jurisdiction under the Children Act 1989..."
44. Ms Chidgey submits that, by analogy, having regard to the section 45A hybrid order and the involvement of Social Services with the appellant's family, a restraining order was not necessary in the circumstances of the present case. She submits that the order in any event was too wide and therefore unlawful.
45. In reply, Mr Heptonstall submits that although it is unusual, the wording of the order in this case is sufficiently well defined to allow identification of those who would need to be protected: children within a certain age limit. It is a sufficiently identifiable group of potentially vulnerable people, within the scope of the test suggested in *Smith* at [28].
46. It is submitted that one practical and foreseeable example of a situation justifying the need for a restraining order in these terms would arise if the appellant offered to babysit for a child where the child's carer had no knowledge of the applicant's offending and mental health issues.
47. Mr Heptonstall also relies upon the decision of this court in *Buxton* [2010] EWCA Crim 2923; [2011] 2 Cr. App. R. (S.) 23 where it was held, in the context of employees of a large company, that there could be no objection to groups of persons being the beneficiaries of a restraining order "provided those groups are sufficiently clearly defined for them to know who they are and for the person against whom the order is made to know who they are, so that everyone will be clear what persons are included in the order and what persons are not."
48. We have considered all these submissions carefully. We are mindful of the concerns over the lawfulness of the order expressed by Fulford LJ when the renewed application for leave was first listed, and in particular the distinction between the way the restraining order provisions are framed and the equivalent provisions in the Sexual Offences Act 2003 relating to sexual harm prevention orders (SHPOs).
49. Section 103A of the 2003 Act gives the court power to make a SHPO where the court is satisfied that it is necessary to make such an order for the purpose of:

- (i) protecting the public or any particular member of the public from sexual harm from the defendant,
- (ii) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the United Kingdom.

Thus, the Act specifically permits the order to be made in broad terms to protect a wide class of persons. This explains why SHPOs commonly include a restriction on contact with any child under 16 save in specified circumstances.

50. By contrast, section 5 of the 1997 Act is specifically aimed at the protection of “the victim or victims of the offence”, that is to say the particular offence of harassment which the defendant has committed and for which he is being sentenced, or “any other person mentioned in the order”. As Toulson LJ explained in *Smith*, at [28] in the passage already quoted, the need for identification of the person who is to be protected reflects the underlying purpose of the provision. It is for the protection of a particular vulnerable person, or possibly an identifiable group of vulnerable persons. On the facts of that case, which we repeat was a s.5A case, the Court regarded the order made by the judge as too wide; this was in part because no-one was named in the order as the person or group of persons for whom protection was required, but more fundamentally because the order was “for the protection of the world at large, or whoever might happen to be on any aircraft on which Mr Smith might travel.”
51. In the present case, the order identifies, as persons “mentioned in the order” an even wider group of unknown persons, namely “any child under 16 years old”. Even if this is construed as “any child under 16 years old with whom she may come into contact” (which would itself be circular) it is no different in reality from the category defined as “any person on an aircraft on which the defendant may be travelling” which was said in *Smith* to be so wide as to be unlawful. Indeed it is far wider even than that category.
52. In *Buxton* which was decided before *Smith*, the Court was prepared to countenance as a group “sufficiently clearly defined” to be afforded the protection of a restraining order, the employees of a company. In arriving at that decision the Court differed from the conclusion of the Divisional Court in *R v Dziurzynski* [2002] EWHC 1380, where Rose LJ was not prepared to hold that 60 employees of a particular company could properly be characterised as “members of a close knit definable group” which was said then to be the test to be applied.
53. We note that in the present case Judge Norton did not have the advantage we have had of considering and being addressed upon these authorities, and in particular *Smith*. The application for a restraining order was something of an afterthought. We strongly suspect that, with her wide experience of making SHPOs in similar terms, the judge was prepared to transpose the customary terms of such an order into a restraining order without considering or being addressed on the different aims and context of the provisions.
54. We wish to make it clear that, however well intended, a restraining order should not be used as a means of imposing, in the context of non-sexual offending, wide restrictions specifically permitted and sanctioned by the SHPO provisions.

55. With some hesitation, therefore, we have reached the conclusion that the restraining order made in this case was unlawful and must be quashed. It is to be hoped that, at least during the eight year period of her extended sentence, there will be licence conditions imposed which achieve the same objective in protecting any children under 16 with whom she may come into contact.

Substitution of a Criminal Behaviour Order

56. There is, however, an alternative to a restraining order which Mr Heptonstall frankly accepts would have been the preferable way of affording the same protection. The prosecution could have applied for a Criminal Behaviour Order (“CBO”) in the same or similar terms. We invited counsel’s written submissions on the possibility and propriety of:
- (a) remitting the case to the Crown Court with a view to such a CBO being made in substitution; or
 - (b) this Court substituting such a CBO, and whether to do so would infringe s.11(3) Criminal Appeal Act 1968.

We are grateful for counsel’s detailed written submissions on these issues.

57. It is common ground that this Court has no power to remit the matter to the Crown Court for consideration of making a CBO. We agree. There is no such power, express or implied. This is in contrast (for example) to the specific power of the Court of Appeal, pursuant to s.5A(3) Protection from Harassment Act 1977, to remit to the Crown Court consideration of making a further restraining order where the conviction giving rise to the making of the original restraining order has been quashed on appeal.
58. The power to make a CBO is contained in s.22 of the Anti-social Behaviour, Crime and Policing Act 2014 which provides (so far as is relevant):
- 22. Power to make orders***
- (1) This section applies where a person (“the offender”) is convicted of an offence.
 - (2) The court may make a criminal behaviour order against the offender if two conditions are met.
 - (3) The first condition is that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.
 - (4) The second condition is that the court considers that making the order will help in preventing the offender from engaging in such behaviour.
 - (5) A criminal behaviour order is an order which, for the purpose of preventing the offender from engaging in such behaviour—
 - (a) prohibits the offender from doing anything described in the order;

- (b) requires the offender to do anything described in the order.
- (6) The court may make a criminal behaviour order against the offender only if it is made in addition to—
 - (a) a sentence imposed in respect of the offence, or
 - (b) an order discharging the offender conditionally.
- (7) The court may make a criminal behaviour order against the offender only on the application of the prosecution.
- (8)
- (9) Prohibitions and requirements in a criminal behaviour order must, so far as practicable, be such as to avoid—
 - (a) any interference with the times, if any, at which the offender normally works or attends school or any other educational establishment;
 - (b) any conflict with the requirements of any other court order or injunction to which the offender may be subject.
- (10) ...

59. The procedure for making a CBO is set out in s.23 of the Act which provides (so far as is relevant):

23 *Proceedings on an application for an order*

- (1) For the purpose of deciding whether to make a criminal behaviour order the court may consider evidence led by the prosecution and evidence led by the offender.
- (2) It does not matter whether the evidence would have been admissible in the proceedings in which the offender was convicted.
- (3) The court may adjourn any proceedings on an application for a criminal behaviour order even after sentencing the offender.
- (4) If the offender does not appear for any adjourned proceedings the court may—
 - (a) further adjourn the proceedings,
 - (b) issue a warrant for the offender's arrest, or
 - (c) hear the proceedings in the offender's absence.
- (5) The court may not act under paragraph (b) of subsection (4) unless it is satisfied that the offender has had adequate notice of the time and place of the adjourned proceedings.
- (6) The court may not act under paragraph (c) of subsection (4) unless it is satisfied that the offender—
 - (a) has had adequate notice of the time and place of the adjourned proceedings, and
 - (b) has been informed that if the offender does not appear for those proceedings the court may hear the proceedings in his or her absence.
- (7) ...
- (8) ...

60. It is to be noted that a CBO may contain “prohibitions” and/or “requirements”. In the present case only “prohibitions” are appropriate, reflecting the terms of the

prohibitions in the restraining order. The order need not also contain any “requirement”.

61. We are satisfied that the appellant has “engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person”: s.22(3). She deliberately poisoned her child, thereby subjecting him to the distress of serious illness.
62. We consider that a CBO will help in preventing the appellant from engaging in such behaviour in future: s. 22(4). She will be prevented from having contact with any children under 16 years of age.
63. The breadth of the restriction which rendered the restraining order in this case unlawful does not, in our view, inhibit the court from making a CBO in similar terms.
64. Mr Heptonstall has helpfully provided us with examples from the authorities of restrictions which have been imposed, in widely varied situations, in CBOs or in anti-social behaviour orders (“ASBOs”) under the previous regime which CBOs have replaced. Restrictions on entering particular geographical areas have been commonly made, as have restrictions on the offender associating with named persons. An example of an ASBO with a prohibition similar in breadth to the present case is to be found in *Harris* [2006] EWCA Crim 1864; [2007] 1 Cr. App. R. (S.) 64. The defendant in that case had been convicted of offences of engaging in sexual activity with 12 year old girls in Birmingham city centre, and an offence of breaching an ASBO which included a condition “not to associate with any female under the age of 16”. A further ASBO was made for a longer period. The appeal was only against the custodial sentence but the Court described the ASBO as “wholly appropriate”.
65. We are satisfied that, if this Court is permitted by the terms of s.11(3) Criminal Appeal Act 1968 to do so, it is entirely appropriate that we should make a CBO in this case in terms similar to the restraining order which we have quashed. The s.11(3) issue apart, Ms Chidgey has not sought to oppose the making of a CBO in such terms. She had not, of course, opposed or challenged the making of the original restraining order until its potential unlawfulness was raised by Fulford LJ prior to the initial listing of the appeal.
66. Such an order is necessary not least because after the eight year period of her extended sentence she will no longer be on licence and no longer subject to the supervision of the probation service. Consequently there will be no sufficient protection afforded to children under 16 with whom she may come into contact. If, for example, she were to move to another part of the country and befriend parents of children she could gain unsupervised access to children, for example by babysitting, without any effective restriction.
67. For completeness we record that we have considered whether the restrictions in the proposed CBO would duplicate or conflict with the prohibitions to which the appellant is already subject by virtue of the barring provisions of the Safeguarding Vulnerable Groups Act 2006. A person is barred from “regulated activity” relating to children if he or she is included in the children’s barred list: see s. 3(2). The appellant is automatically included in the child barred list because she has been convicted of child cruelty, an offence in List 2 of the schedule. Regulated activity relating to

children is to be construed in accordance with Part 1 of Schedule 4 to the Act : see s.5(1).

68. The 2006 Act does not apply to any activity in the course of a family relationship (see s. 58(1)) or activity for no commercial consideration in the course of a “personal relationship”, i.e. a relationship “between or among friends” (see s. 58(2) and (4)). We agree with Mr Heptonstall’s analysis that these “personal relationship” exemptions would probably cover babysitting for a friend, which is just the sort of activity which the appellant must be prevented from engaging in.
69. Accordingly we are satisfied that the proposed CBO is necessary and appropriate to afford full protection.
70. We also agree that the terms of the CBO should be modified from those of the original restraining order so as to provide some appropriate qualification of their stringency, and to a form closer to those often imposed in a SHPO. We think the terms should restrict the appellant from having any unsupervised contact with any child under 16 other than :
- (i) such as is inadvertent and not reasonably avoidable in the course of daily life; or
 - (ii) with the consent of the child’s parent or guardian, who has knowledge of the appellant’s convictions; or
 - (iii) with the express approval of the Social Services for the area;
- or
- (iv) is permitted pursuant to an order of the Family Court.
71. We turn finally to the issue of whether this Court has the power to substitute a CBO for the restraining order we have quashed, or whether such a course is precluded by s.11(3) of the Criminal Appeal Act 1968. Again, we are grateful to counsel for their detailed written submissions on this issue.
72. Section 11 (3) provides as follows:
- “On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—
- (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.”
73. On behalf of the appellant Ms Chidgey submits that this Court cannot make a CBO because the court below, that is to say the Crown Court, did not have power to make

such an order when dealing with the appellant for these offences. Her submission relies upon s.22(7) of the 2014 Act which provides that:

“The court may make a criminal behaviour order against offender only on the application of the prosecution.”

There was no such application made in the court below, therefore it is argued that the Crown Court could not have made such an order, and this Court is confined to the powers of the court below.

74. On behalf of the Crown, Mr Heptonstall submits that this is too narrow an interpretation of the statutory provisions; a distinction has to be drawn between sentences or orders which are outwith the armoury of the Crown Court altogether, and sentences or orders which the Crown Court has power to make but subject to certain procedural requirements. Here the Crown Court had the general power to make a CBO. By contrast, certain sentences are not available to the Crown Court, e.g. a referral order, which may only be made by the Youth Court.

75. To illustrate the distinction Mr Heptonstall relies upon part of the analysis by this Court in *Reynolds* [2007] EWCA Crim 538; [2007] 2 Cr. App. R. (S.) 87. There, in a somewhat different context, it was observed, at [23], that a detention and training order for three years would be “beyond the powers of the court” (two years being the maximum) whereas the making of an extended sentence rather than a mandatory indeterminate sentence would not be unlawful.

76. Mr Heptonstall also relies upon the guidance this Court provided on the proper approach to procedural failures in *Ashton* [2006] EWCA Crim 794; [2006] 2 Cr. App. R. 15. At [9] the Court said:

“...absent a clear indication that Parliament intended jurisdiction automatically to be removed following procedural failure, the decision of the court should be based on a wide assessment of the interests of justice, with particular focus on whether there was a real possibility that the prosecution or the defendant may suffer prejudice.....”

Mr Heptonstall submits that there could be no prejudice to the appellant here from the substitution of a CBO for the restraining order.

77. We have considered these arguments carefully. We have reached the firm conclusion that we are not precluded by s.11(3) from making a CBO. The Crown Court had the general power to make such an order as part of the appellant’s sentence. The fact that for purely procedural reasons that option would not have been open to the Crown Court does not limit the power of this Court on appeal. It is no different in principle from the common situation where this Court takes the view on appeal that fresh material, such as psychiatric reports, may open up the sentencing option of a hospital order which, for the practical reason that there was no evidence to support it, made such an order unavailable in the court below: see *Bennett* (1968) 52 Cr. App R. 514.

78. We do not ignore the fact that very specific procedural provisions are set out in CPR 31 in respect of applications for “behaviour orders”. On a narrow view, before we exercise our power to make a CBO we could require the prosecution to serve a formal written application for a CBO. However, we take the view that this would be pointless in the circumstances. CPR 31.11 states that:

“Unless other legislation otherwise provides, the court may-

- (a) shorten a time limit or extend it (even after it has expired);
- (b) allow a notice or application to be given in a different form, or presented orally.”

We are satisfied that the prosecution have sufficiently complied with the spirit if not the letter of the relevant procedural rules in their very detailed and thorough written submissions supplementing the oral application for a CBO indicated at the hearing of the appeal on 10th May 2019. In the circumstances we treat that as a sufficient application for a CBO.

79. The final procedural issue which has been raised is the proper venue for any future application to discharge or vary the CBO should that be necessary. Section 27 of the 2014 Act provides:

“ 27 Variation or discharge of orders

(1) A criminal behaviour order may be varied or discharged by the court which made it on the application of—

- (a) the offender, or
- (b) the prosecution.”

80. Ms Chidgey submits that this means what it says; if this Court now makes a CBO, only this Court has power to vary or discharge the order in future; that is a further reason why this Court should not make a CBO. She relied on *Potter* [2019] EWCA Crim 461; [2019] 2 Cr. App. R. (S.) 5, where it was held that the Crown Court had no power to vary a CBO made by the magistrates’ court when sentencing for a breach of the original CBO.

81. We are satisfied that the situation in *Potter* is plainly distinguishable. The proposed CBO made by this Court on appeal would be treated as an order of the Crown Court from which the appeal was brought. The new CBO will be entered in the record of the Crown Court. This reflects the practice of this Court: see *Yasain* [2015] EWCA Crim 1277; [2015] 2 Cr. App. R. (S.) 28, at [19]–[23].

82. We therefore direct that the CBO we make shall be entered into the record of Canterbury Crown Court as an order made by that court. Any application to vary or discharge the CBO should be made to that court.

Conclusion

83. Accordingly we dismiss the appeal in so far as it relates to the imposition of an extended sentence of imprisonment. We allow the appeal against the restraining order. We quash the restraining order, and we substitute a Criminal Behaviour Order in the following terms, the duration of which will be indefinite, that is to say until further order:

“The appellant is prohibited from having any unsupervised contact with any child under 16 other than:

- (i) such as is inadvertent and not reasonably avoidable in the course of daily life; or
- (ii) with the consent of the child’s parent or guardian, who has knowledge of the appellant’s convictions; or
- (iii) with the express approval of the Social Services for the area; or
- (iv) is permitted pursuant to an order of the Family Court.”