



Neutral Citation Number: [2021] EWCA Crim 901

Case No: 2020 02326 A1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT GREAT GRIMSBY**  
**HHJ KELSON QC**  
**T20100099**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/06/2021

**Before :**

**LORD JUSTICE HOLROYDE**

**MR JUSTICE HENSHAW**

and

**HIS HONOUR JUDGE ZEIDMAN QC, RECORDER OF REDBRIDGE**

**Sitting as a Judge of the Court of Appeal Criminal Division**

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**Between :**

**JACKSON (JOHN)**

Appellant

**- and -**

**REGINA**

Respondent

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**Stephen Robinson** (instructed by **Roy Foreman & Co Solicitors**) for the **Appellant**  
**Alex Young** (instructed by **Crown Prosecution Service**) appeared for the **Respondent**

Hearing date: 27 May 2021  
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## **JUDGMENT**

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed not before 10.30am on Tuesday 15 June 2021.

## Mr Justice Henshaw :

### Introduction

1. The issue raised in this case was whether the judge below was wrong to extend, by a further 10 years, a restraining order imposed following the Appellant's conviction in 2010, in circumstances where no breach of the order had occurred during the intervening period.
2. The Appellant, then aged 42, in July 2010 pleaded guilty to dangerous driving contrary to section 2 of the Road Traffic Act 1988. He was sentenced on 27 August 2010 in Great Grimsby Crown Court to 6 months' imprisonment, suspended for 2 years. The Appellant was disqualified from driving for 12 months and until an extended re-test was passed. In addition, the sentencing judge made a Restraining Order for a period of 10 years under section 5 of the Protection from Harassment Act 1997 (subsequently replaced by section 360 of the Sentencing Act 2020).
3. On 13 August 2020, the Appellant appeared before the court in relation to an application to extend the Restraining Order, which was due to expire shortly. The application was made by one of the two victims of the offence, to whom for convenience we shall refer as "*the complainant*". The application was granted and the Restraining Order extended for a further period of 10 years. The Appellant now appeals, pursuant to leave granted by Edis J, from that extension.

### Facts

4. The Appellant was the complainant's former partner (and, it appears, former husband). They separated in 2001 while the Appellant was serving a prison sentence. The separation was acrimonious and the complainant was continually harassed by the Appellant. According to the complainant's witness statement in support of her application to extend the order in 2020:

“For eight years, [the Appellant] terrorised us, vandalising cars, damaging property ... and attacking us in the street. He made death threats to me and my husband ..., threats to family members and employers, resulting in both of us losing our jobs. On two occasions, he attempted to run [the complainant's husband] over and threatened to kidnap my daughter. He even used my name as a billpayer for a house that was used to store/grow drugs.”
5. A number of incidents forming part of this pattern of conduct were reported to the police and resulted in prosecutions. The Appellant was convicted on 17 December 2003 of pursuing a course of conduct amounting to harassment, and intimidating a witness with intent to obstruct, prevent or interfere with justice; he received a 6 month custodial sentence, and a restraining order was made for 5 years. On 21 October 2004 the Appellant was convicted of criminal damage and harassment in breach of a restraining order, for which he was fined £200 and ordered to pay compensation of £50 and costs of £45. The Appellant also had some older, unrelated, convictions for offences committed during the period 1982 to 1985 and in 1998.

6. The offence giving rise to the Appellant's 2010 conviction took place on 4 October 2009. The complainant and her husband were walking down a street in Cleethorpes at lunchtime on a Sunday. They noticed a black 4x4 vehicle stop at the junction in front of them, and saw that the Appellant was the driver and sole occupant. They continued walking. The Appellant turned around in the road, drove back in their direction and stopped opposite them in the road.
7. The Appellant proceeded to demand, in an aggressive manner, that the complainant's husband get into the car and they would drive somewhere, seemingly for a fight. The husband responded that the Appellant should get out of the car and they would sort it out there.
8. The Appellant did not exit the vehicle. The complainant and her husband ignored him and carried on walking along the street. As they did, the Appellant reversed alongside them and continued to shout out of the window, asking them to get into the vehicle. They stopped walking, and the complainant's husband responded, "*why don't you get a fucking life*".
9. The Appellant then turned his vehicle around in the road. When it was facing in their direction, the Appellant proceeded to drive at speed towards the complainant and her husband, causing the complainant to run up the street. Her husband remained frozen in the path of the vehicle. The vehicle's front wheels hit the kerb and the car lurched forward towards him, coming to a stop with its front end overhanging the footpath less than a foot away from him. The husband put his hands out to protect himself, putting his hands on the car bonnet, then hitting the car bonnet with anger. He walked to the driver's side of the vehicle and punched the Appellant twice to the ribs through the open window.
10. The husband attended to the complainant, who was standing on the pavement. While this was happening, the Appellant turned his vehicle around again, and drove it towards them, hitting the kerb with the vehicle's wheels. The Appellant then reversed the vehicle, making the husband think the Appellant was going to drive the vehicle at them for a third time. He ran towards the passenger side of the car and sprayed the Appellant with Criminal Identification Spray through the passenger side window, staining his face red, then returned to the complainant, who was calling the police.
11. The Appellant pulled up next to the couple, got out, and advanced towards them saying "*I'm going to fucking kill you*". The complainant's husband stood in front of her with his fists raised, and the Appellant stopped. At this point, the Appellant got out his own phone and said he was contacting the police. At the same time, he made threatening gestures suggestive of shooting and slitting a throat. The Appellant covered the phone receiver and said that he was going to go round to the complainant and her husband's house. All three of them remained in the area until the police arrived.
12. The Appellant initially provided a fabricated account to the police. However, various onlookers supported the complainant and her husband's account, and the Applicant ultimately changed his plea to guilty of dangerous driving. The complainant's husband was cautioned for assault and criminal damage.
13. In his witness statement in December 2009, the complainant's husband said the incident, and previous encounters with the Appellant, had left him feeling depressed,

angry and always on edge, especially when he saw a black vehicle. He had seen the doctors due to depression. He stated that he worried about the safety of his home, his car and his family and that he did not go out much in case he saw the Appellant. He added that they were unable to tell people where they worked in case the Appellant found out. He was always looking over his shoulder, felt defensive and could not sleep properly.

14. The Restraining Order imposed following the Appellant's conviction in 2010 provided that he must not:
- i) contact by any means whatsoever the complainant, her husband, or any member of their immediate family, or have anyone do so on his behalf other than via the court;
  - ii) approach within 100 metres of the complainant or her husband; or
  - iii) at any time enter a particular street in Cleethorpes (being the street in which the complainant and her husband live).

#### The extension of the Restraining Order

15. By the time the complainant applied in 2020 for the Restraining Order to be extended, it was common ground that the Appellant had not breached it nor attempted to contact the complainant or any of her family. The complainant attributed this to the existence of the Restraining Order, and expressed her fears about what would happen were it to be allowed to expire. In her witness statement she said:

“There has been a restraining order against [the Appellant] which is due to expire in August 2020 which, for the past ten years, has successfully protected myself and my family.”

After setting out her summary of the events over the period 2001 to 2019, as quoted earlier, she continued:

“As the date of expiry gets closer, I feel anxious and fearful. I wake during the night, sometimes in quite a state, as it is becoming a strain on my mental health for fear of having to go through the whole experience again.

Our daughter, ... (mine and [my husband's] NOT [the Appellant's]), is now 16 and is becoming an independent young lady. The thought of him or any of his acquaintances approaching her panics me.

Since the order was placed on him, we have had no contact or altercations, so it seems to have worked, but as [the Appellant] is so unpredictable, I would not put anything past him with regards to him having free rein to cause us trouble all over again should it be allowed to expire.

I divorced [the Appellant] 19 years ago. We do not have any children together so he has no reason whatsoever to be in contact

with us. Therefore by granting this restraining order it should have no effect or intrusion on [the Appellant] other than to protect us from him.”

16. For the hearing of the complainant’s application, the prosecution assisted the court by providing a case summary neutrally setting out the facts and the law. The prosecution instructed counsel to appear at the hearing in order to advise and assist the complainant and the court where necessary. The Appellant was represented by counsel, who provided written and oral submissions.
17. The Appellant by this stage had one further, now fairly old, conviction. He had been convicted in September 2011 of two offences relating to production of cannabis, for which he had received a 33-month custodial sentence. The date of commission of the offence was not available. However, counsel informed us during the hearing that this offence had been committed while the Appellant was on bail, and we therefore think it likely that the offence pre-dated the grant of the Restraining Order in August 2010.
18. The judge, after referring to the law and the evidence, said:

“In this case, [counsel for the prosecution] has dwelled upon the history of harassment which occurred in this case, culminating in the 2010 conviction. It was eight years of what is described by [the complainant] as “terrorising”, culminating in a very serious offence. The Recorder dealing with the case back in 2010 deemed a ten-year order appropriate at that time and that was a long order imposed, no doubt, to reflect the seriousness of the offending and the history of offending that the Recorder was then dealing with. Whether it was the existence of the order or the defendant’s change in lifestyle which has given rise to the offending against the complainant desisting, I cannot say. There has been no further offending. Why there has been no further offending, I do not know but I am satisfied, despite the absence of offending, that it is necessary to extend this restraining order. It is no answer to necessity to point out that there has been no offending when, on the facts of this case, there was such a terrible history of offending which has left this lady plainly scarred and the necessity arises out of the fact of the success, on one analysis, of the existence of the order.

The order was made and the offending ceased and I am satisfied that it is necessary to extend the order but overlapping with that consideration very much was ... that the terms of the order should be proportionate to the harm that it is sought to prevent. That is highly significant in my considerations. It is almost difficult to disentangle necessity with proportionality.”

After explaining that the extension of the order would not in practice affect the Appellant’s life at all, the judge continued:

“I expressly state that there is nothing in his conduct over the last ten years that of itself gives rise to this order at all. This order,

this extension of this order, is only occurring because of what happened in the eight years before that and, therefore, the reality is that the making or extending of this order for a further period of ten years would plainly greatly enhance [the complainant]’s mental health, will give her a sense of wellbeing which the offending in 2010 was so severe it has apparently permanently damaged.”

19. The judge added that he would prefer the Appellant, if possible, to imagine that the order had been imposed for 20 years at the outset, rather than the matter having been ‘dredged up’ again 10 years later.

### The law

20. A restraining order is a civil order, albeit one whose breach carries a criminal penalty, and the civil standard of proof applies when considering whether to grant one (*R v Major* [2010] EWCA Crim 3016).
21. Section 5 of the Protection from Harassment Act 1997 dealt with restraining orders on conviction, with section 5A dealing with restraining orders on acquittal. Subsections (1)-(4A) provided, so far as relevant:

“(1) A court sentencing or otherwise dealing with a person (“the defendant”) convicted of an offence may (as well as sentencing him or dealing with him in any other way) 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.

(3) The order may have effect for a specified period or until further order.

...

(4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.

(4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).”

Subsections (5) and (6) provided for penalties for breach of a restraining order. Subsection (7) provided that “A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order”.

22. This court in *R v K (Bilal)* [2016] EWCA Crim 1297 set out the following considerations applicable when determining whether to grant a restraining order:

“(1) A court should take into account the views of the person to be protected by such an order as to whether an order should be made. We do not say that there will never be a case where it would be inappropriate to make a restraining order, even though the subject of the order does not seek one, but the views of the victim will clearly be relevant. Nor do we say that a court must have direct evidence of the views of the victim. That may prove impossible. The court may be able to draw a proper inference as to those views, or may conclude that a restraining order should be made whatever the views of the victim, although clearly if a victim does not want an order to be made because she wants to have contact, that may make such an order impractical. But we accept that in normal circumstances the views of the victim should be obtained. It is the responsibility of the prosecution to ensure that the necessary enquiries are made.

(2) An order should not be made unless the judge concludes that it is necessary to make an order in order to protect the victim.

(3) The terms of the order should be proportionate to the harm that it is sought to prevent.

(4) Particular care should be taken when children are involved to ensure that the order does not make it impossible for contact to take place between a parent and child if that is otherwise inappropriate.” (§ 14)

23. Rule 31.5 of the Criminal Procedure Rules 2020 applies to applications to vary or revoke “*behaviour orders*”, which include restraining orders. It includes the following provision:

“(2) A person applying under this rule must—

(a) apply in writing as soon as practicable after becoming aware of the grounds for doing so, explaining—

(i) what material circumstances have changed since the order was made, and

(ii) why the order should be varied or revoked as a result; and

...”

24. As the prosecution pointed out to the judge below, section 5(4) itself contains no express requirement to satisfy the court that there has been a material change in

circumstances since the making of the order. However, the circumstances in which a restraining order may be varied have been the subject of some discussion in previous cases.

25. *Shaw v DPP* [2005] EWHC 1215 provided guidance on the considerations that apply when asked to discharge a restraining order. The order in that case restrained the appellant from contacting his wife by letter or telephone until further order. Laws LJ said:

“8. The right to apply for the discharge of a restraining order is given by section 5(4) of the 1997 Act, which contains no express requirement to satisfy the court that there has been a material change in circumstances since the making of the restraining order or the dismissal of any earlier application for a discharge. Section 5(3) provides that a restraining order may be made for a specified period or until further order. As I have said, the order in this case was made until further order.

...

13. Counsel accepts that on an application to discharge, as opposed to a statutory appeal, an applicant may not challenge the validity of the original order, including the validity of any provision that it be made until further order, but he submits that, at least in a case where the order has so far been obeyed and respected, the court must consider every application to discharge, including successive applications, on their merits and must hear evidence in order to do so.

14. It is common ground that, absent an appeal, a restraining order remains good and valid according to its terms, including a term which extends it until further order. It seems to me that it follows that on an application or further application to discharge the applicant must show that something has changed so that the continuance of the order is no longer necessary or appropriate. Unless that is so, the applicant would be entitled to have the merits of an earlier decision or decisions re-determined anew without having appealed them; through Mr Gibson disavows any such consequence. It would in any case be contrary to the principle of finality in litigation, potentially wasteful of scarce judicial resources and accordingly contrary to the public interest. In fact, Mr Gibson was disposed to accept this morning that some change of circumstances has to be shown, but he persisted in the submission that the court must conduct a full hearing on the merits on evidence every time.

15. It seems to me that the only question upon a subsequent application such as was made here is whether events have happened which, in contrast to the position which previously obtained, now mean that the order is as I have said no longer necessary or appropriate.”



David Steel J added:

“19. It strikes me that to permit an appellant in the circumstances in which he finds himself to submit further applications for an order to be discharged without showing any change of circumstance would simply amount to an encouragement to the abuse of the process of the court.”

26. The possibility of extending the length of a restraining order made after conviction was considered in *DPP v Hall* [2005] EWHC 2612. After quoting § 14 of *Shaw*, Scott Baker LJ, with whom Rafferty J agreed, said:

“8. In my judgment precisely the same consideration applies when it is a question of extending the duration of the order. It seems to me that the duration of the order, whether it be for a specified period or without limit of time, is just as much a term of the order as any specific provision for example, restraining the defendant from going within a specified distance of any particular place. The purpose of this provision is to protect a victim, or potential victim, from harassment. In my judgment, the subsection should be construed so as to enable the court to do that in the most simple and expeditious way possible.

9. In the present case, the restraining order was made for a period of 12 months. The respondent broke the order on two occasions and it seems to me that in these circumstances nothing could be clearer than that the order needed to be extended for a further period in order to protect the victim. Whether that further period is one of specific duration or without limit of time seems to me to be a matter for the court imposing the order. The difference between the two kinds of order is that if the order is without limit of time it places the burden upon the respondent to come back when he contends that there is a change of circumstances sufficient to justify the order being discharged. On the other hand, if the court thinks that the problem is likely to be overcome within a specified period, then a determinate order can be made and the onus is on the victim or the Crown Prosecution Service to apply for the order to be extended if the circumstances appear to have changed. ...”

### The appeal

27. Mr Stephen Robinson, counsel for the Appellant, who provided helpful written and oral submissions, submits first that an appeal lies to this court from the decision to extend the Restraining Order. Section 9(1) of the Criminal Appeal Act 1968 provides for a person convicted of an offence on indictment to be able to appeal to this court against any sentence passed on him for the offence, whether passed on his conviction or in subsequent proceedings. A sentence includes any order made by a court when dealing with an offender (section 50(1)). The view has previously been expressed, *obiter*, that where a Crown Court varied an anti-social behaviour order made on conviction, an appeal would lie to this court on the basis that the variation would be an “*order made*

by a court when dealing with an offender” (*R (Langley) v Crown Court at Preston* [2008] EWHC (Admin) § 21; see Archbold, *Criminal Practice 2020*, § 7-121). We accept that submission.

28. As to the substance, Mr Robinson does not take issue with the terms of the extended order as imposed, in the event that it was correct to extend the order. However, he submits that it was completely unnecessary to do so. There have been no issues for some ten years. The Appellant has not been in any trouble of any sort for several years, so it cannot be said that it was merely the order enforcing behaviour: the Appellant has not, for example, committed other offences not targeting the complainant and her husband. The original order was made for a significant, but determinate, period of time. The statements from *Hall* quoted above emphasise that the onus is on the Crown or application to demonstrate that circumstances appear to have changed. This might be the case where the order has been breached in the past and future specific protection is required. Here, however, there have been no breaches of the order and no other criminal behaviour by the Appellant since 2011.
29. The single judge when granting permission to appeal indicated that he considered the conclusion reached by the judge to be properly open to him, for the reasons he gave, but that it appeared a contrary argument exists by reference to the *dicta* of Scott Baker LJ in *Hall*.
30. While considering the papers in advance of the hearing, we concluded that as this case might have implications for other cases, it would be desirable to give the Crown Prosecution Service a specific opportunity to consider whether to be represented at the hearing. In the event, Mr Alex Young of counsel stepped in and provided at very short notice admirable written and oral submissions which we have found most helpful in approaching this appeal. In summary, Mr Young submits as follows:
  - i) The views of the person(s) whom a restraining order is designed to protect are sought as a matter of practice when an order is first in contemplation, and the court has emphasised the importance of this (see *R v K (Bilal)* § 14).
  - ii) However, unlike the Crown and the defendant, they have no statutory right to make submissions to the sentencing court. Thus they cannot, for example, make their own representations about the precise terms of the order or how long it should last.
  - iii) Nor do the persons whom a restraining order is designed to protect have a right of appeal in relation to the duration or other terms of the order.
  - iv) By contrast, once a restraining order has been made, section 5(4) and (4A) of the Act confer on them a right to apply to the court to vary the order, and to be heard on that application. The complainant in the present case has exercised that right.
  - v) Because such a complainant will have had no right to make representations or to appeal at the outset, they should not be required to show a chance of circumstances when seeking a variation of the restraining order, at least when doing so for the first time. Instead, the court should consider afresh the necessity for and proportionality of the varied order sought.

- vi) The court should have regard to all relevant circumstances, including not only the facts before the original sentencing court, but also any other submissions or evidence adduced by the complainant, as well as the prevalence (or absence) of any breaches or other offending behaviour since the order was first made.
- vii) This approach is consistent with the purpose of section 5(4), which is to protect victims or potential victims from harassment (see *R v Hall* § 8).
- viii) A complainant's right to apply to vary a restraining order has been retained in section 361 of the Sentencing Act. It is an important right for victims of harassment, and to require them to demonstrate a change of circumstances would be an undue and serious fetter on it.

### Discussion

- 31. We have not found this case easy to determine, but ultimately came to the conclusion that the appeal should be allowed. We indicated at the end of the hearing that the appeal would be allowed, and that we would give our reasons in writing, which we now do.
- 32. We note, first, that although Criminal Procedure Rule 31.5(2) envisages that an application to vary or discharge a behaviour order will arise from a change in circumstances, the Act itself contains no such requirement.
- 33. Unlike a typical criminal penalty, a restraining order is a measure put in place specifically for the protection of the victim or others, and provision is expressly made in the legislation for it to be subject to variation (which the court has held to include extension) should the need arise.
- 34. Moreover, a right to apply to vary a restraining order is expressly conferred on a person whom it is intended to protect. As the Crown notes, an application to vary represents such a person's first opportunity to adduce evidence and make representations on their own behalf, as opposed to having their views made known to the court in the sense envisaged by *R v K (Bilal)* § 14(1).
- 35. In these circumstances, at least in the case of a complainant making a first application to vary, we do not consider there to be a hard-edged requirement to prove a change of circumstances since the order was first made. In principle it should remain open for a complainant who considers, for example, that at the sentencing stage the court has simply under-estimated the necessary duration or other terms of a restraining order, to have an opportunity to ask the court to revisit the matter. That said, the view taken by the sentencing judge is bound to be at least a highly relevant starting point, and we would anticipate that most successful applications to extend or tighten a restraining order will be based on material which was not before the sentencing court and which justifies a change of approach. The paradigm example will be cases where the defendant has breached the order, threatened to do so, or behaved in some other way which leads the court to consider a longer or more restrictive order necessary.
- 36. Turning to the present case, we note first that any restraining order (and, equally, any extension to a restraining order) can be made only for the purpose of protecting the complainant from future conduct involving one or both of the harms referred to in section 5(2) of the Act. An order cannot be made merely to assuage the consequences

of past conduct. That does not mean that the consequences for the complainant of the past conduct, and the likely consequences of any future conduct, are irrelevant. The degree of harassment that has occurred, and the level of fear and distress it has caused, are relevant when determining whether or not to grant or vary a restraining order and, if so, on what terms. These considerations are in principle relevant to the question of whether an order (or a variation of an order, including by extending it) is “*necessary*”.

37. If, however, a restraining order (or its extension) is not necessary, then the question of the proportionality of the restrictions it would impose does not arise: an order cannot be justified on the basis that it would have little impact on the defendant’s daily life.
38. The complainant’s evidence in the present case underlines the severity of the harassment which she and her husband suffered in the period 2001 to 2009, and it is unsurprising that the sentencing judge felt it appropriate to grant a 10-year restraining order against the Appellant on the terms he did. The complainant goes on to express her current fears about what might happen following the expiry of the restraining order. That part of her evidence in a sense underlines the seriousness of the original harassment, but not in our view to such a degree as to make (in effect) a 20-year restraining order appropriate. Further, the mere fact that a complainant is understandably concerned, or very concerned, at the prospect of a restraining order expiring does not in itself alter either the objective risk of future harassment occurring, or the seriousness of the past or anticipated harassment. A complainant’s subjective fear of future harassment after the expiry of a restraining order is not in itself a harm falling within section 5(2) against which the court has the power to protect the complainant by means of an extension to the order. Clearly, if harassment does in fact resume (contrary to the court’s expectations) following the expiry of a restraining order, then the defendant may well again become liable to prosecution, and the victim may also have grounds to obtain an injunction.
39. We recognise that the pattern of harassment leading to the original Restraining Order in this case was particularly prolonged and severe, involving two convictions along the way, and (it appears) the loss of both the complainant’s and her husband’s jobs; and it culminated in the very serious offence summarised earlier. However, the Appellant has now complied with the Restraining Order over a ten year period, has not re-offended in other respects, and appears to have moved on with his life. We cannot be sure to what extent that was a result of the existence of the Restraining Order. However, bearing those factors in mind and the circumstances as a whole, we do not consider that the judge below had sufficient basis to conclude that the extension of the Restraining Order was necessary.
40. For these reasons we allowed the appeal and quashed the Restraining Order.