Neutral Citation Number: [2024] EWHC 1172 (Admin)

Case No: AC-2022-LDS-000247

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Friday, 17th May 2024

Before:
FORDHAM J

- -

Between:

CHIEF CONSTABLE OF CLEVELAND POLICE	**Appellant**
- and -	
BARRY JEMMETT	**Respondent**

- -
- -

Olivia Checa-Dover (instructed by Cleveland Police) for the **Appellant**
The **Respondent** did not appear and was not represented

- -

Hearing date: 16.4.24
Draft judgment: 8.5.24

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

FORDHAM J

FORDHAM J:

Introduction

1. This case is about domestic violence protection orders ("DVPOs"), which magistrates' courts make on the application of the police, pursuant to s.28 of the Crime and Security Act 2010. Decisions about DVPOs involve an identified person "for whose protection the DVPO would be made" (s.28(4)(b)(i)), who I will call "the Protected Person". This case is about the legal relevance of a magistrates' court's conclusion that the Protected Person "does not want", and "would not take advantage of", the DVPO.

2. The case comes before me as an appeal by way of case stated, pursuant to s.111 of the Magistrates' Courts Act 1980. Under appeal is the decision of DJ Cousins ("the Judge") at Teesside Magistrates' Court on 25 May 2022, dismissing the application by Cleveland Police ("the Police") for a DVPO. The Judge's conclusions were that the Protected Person did not "want" the DVPO and "would not take advantage of" it. But the Judge decided to "state a case for the opinion of the High Court on the question[s] of law or jurisdiction involved" in her decision (s.111(1) of the 1980 Act), rightly recognising the importance of those questions and that – depending on the answers – her decision may have been wrong in law.

3. As to "does not want it", the Judge has explained in the Stated Case that she saw this as one of those cases about "whether a protective order should be made where the beneficiary of that order does not want it". She found that the Protected Person had "made no allegations of offending" and had told the Police she was "not willing to support a prosecution". The Judge "considered that" the Protected Person "did not want the protection of the order". This was a factual evaluation. As to "would not take advantage of" it, the Judge said – in brief oral reasons at the hearing – that the DVPO was "not necessary as" the Protected Person "won't access help or take it". The Judge has explained in the Stated Case that her view was: that the Protected Person "would not take advantage" of the "breathing space"; that she "would not" access support services; and that she "would not" facilitate the Respondent's compliance. This was a predictive evaluation.

Preliminaries

4. The Respondent, against whom the DVPO would have been issued, has not participated in this appeal. He was not required to do so. I am not being asked to remit this case to the magistrates. Ms Checa-Dover, who has made helpful written and oral submissions on behalf of the Police, does not press for a quashing order. If the Judge had made a DVPO it would necessarily have expired within 14-28 days (s.28(10)), in June 2022. When the Judge acceded to the Police's application to state a case, and then finalised the Stated Case (13.7.22), it was known and understood that the utility of this appeal would lie in having the High Court give its "opinion on the questions of law arising" (s.111(1) of the 1980 Act). That is what I will do.

5. I am conscious that this is a "one-sided case" (cf. Leeds City Council v Persons Unknown [2023] EWHC 1504 (Admin) [2024] RTR 2 §5). I have not heard contested argument, and I did not adjourn to invite an 'amicus'. I have been reliant on Counsel and the Court's resources. I am also conscious that DVPOs come before magistrates' courts urgently. In the present case, the Judge accessed case-law – or commentary

describing that case-law – on restraining orders. I have had the advantage of far more comprehensive sources and submissions, and far more time to reflect, than did the Judge. Ms Checa-Dover told me that the Police had given careful consideration to whether any anonymity and reporting restriction was justified as necessary and concluded – as I accept – that, in all the circumstances it was not.

6. When I give statutory references these are to the 2010 Act unless I say otherwise. References to the Statutory Guidance are to the guidance issued pursuant to s.31, in December 2016; and updated in February 2020 (with identical paragraph numbers and, for present purposes, identical relevant text). I will speak of DVPOs as giving Protected Persons a "further" short-term safe period, in the "immediate aftermath" of violent domestic abuse or a latest incident of violent domestic abuse. The DVPO is "short-term" because it is 14-28 days. It is "further" because a Domestic Violence Protection Notice ("DVPN") will already have been in place, for a very short time. I am using "immediate aftermath" in the same way as the Statutory Guidance (§10 below), albeit recognising that the initial and most immediate response is the DVPN. I acknowledge that, depending on the context, "survivor" and "complainant" could be better than "victim": Equal Treatment Bench Book (April 2023 Revision) at pp.175 and 195.

7. This is from the Equal Treatment Bench Book, in discussing Gender, in the context of domestic violence and abuse (p.178):

> ***64. There are a number of significant reasons why women do not leave dangerous partners. Survivors can be at a higher risk when they leave violent partners. There are other ties to homes, including identity, family, money and status which operate as strong motivators for staying in a violent relationship. There can be complex psychological reasons at play; an important factor is often the erosion of self-esteem and self-worth to the point of believing that the violent behaviour was justified, with the woman blaming herself for the violence that she has suffered. 65. Women with uncertain immigration status have no recourse to public funds so they are not eligible for the protection provided by refuges and may be forced to stay within an abusive relationship. 66. Religious, cultural and social factors may be relevant. For example: [i] In some communities a woman leaving her abusive husband may be at risk of reprisals or even of being killed by her own or her husband's family for bringing 'shame' onto the family or community. [ii] Someone who marries from within their extended family may be particularly vulnerable, lack family support and feel pressured to stay. Speaking little or no English means an abused person may struggle to access support. [iii] Concern about the impact upon children of moving away from their home, school or community or the loss of a support network for the woman or her children with disabilities or special needs may mean particular hardship, isolation and the possibility that similar support may never be found in the area she moves to.***

About DVPOs

8. The Protected Person must be an "associated person" (s.24(9)) – which includes a spouse, civil partner or cohabiting partner – of the person to whom the DVPO would be issued (the "Restrained Person"). Two statutory preconditions must be met, if a DVPO is to be made. The Judge called these "the two stage test". The first statutory precondition is that the magistrates' court must be "satisfied, on the balance of probabilities, that" the Restrained Person "has been violent towards, or has threatened violence towards" the Protected Person (s.28(2)). The Judge was satisfied that this was met. The second statutory precondition is that the magistrates' court "thinks that making the DVPO is necessary to protect" the Protected Person "from violence or a threat of violence from" the Restrained Person (s.28(3)). The Judge was not satisfied that the DVPO could be "necessary" for the purposes of the second statutory

precondition, if the Protected Person (a) "does not want" it and (b) "would not take advantage of" it.

9. A DVPO is a civil order. It is preceded by a DVPN issued by the police (s.24), who must then make an application to the magistrates' court for a DVPO (s.27(1)), heard within 48 hours (s.27(3)). The two statutory preconditions (§8 above) apply, both to the DVPN (s.24(2)) and to the DVPO (s.28(2)(3)). A DVPO applies for a stated period (s.28(11) between 14 and 28 days (s.28(10)). It prohibits the Restrained Person from molesting – in general or by specified acts – the Protected Person (s.28(6)(7)). The word "molesting" is explained in the Statutory Guidance (§5.2.8) as "disturbing, annoying or tormenting someone with persistent behaviour and to pester in a hostile way", which "could also include using or threatening violence, intimidating and harassing". If the Restrained Person lives in the same premises as the Protected Person, the DVPO may (s.28(8)): (a) prohibit the Restrained Person from evicting or excluding the Protected Person from the premises; (b) prohibit them from entering the premises; (c) require them to leave; and (d) prohibit them from coming within a specified distance of the premises. The Restrained Person can be arrested on reasonable grounds for believing that they are in breach of the DVPN (s.25(1)(b)) or DVPO (s.28(9)) and breaches are dealt with by the magistrates (ss.26, 29) as a civil contempt (Statutory Guidance §4.11) pursuant to s.63 of the 1980 Act.

10. Here is a description from the Statutory Guidance (§§1.2, 2.2 and 2.3):

> ***(1.2) … DVPOs are a civil order that fills a "gap" in providing protection to victims by enabling the police and magistrates' courts to put in place protective measures in the immediate aftermath of a domestic violence incident where there is insufficient evidence to charge a perpetrator and provide protection to a victim via bail conditions … (2.2) A Domestic Violence Protection Notice and subsequent Order are aimed at perpetrators who present an on-going risk of violence to the victim with the objective of securing a co-ordinated approach across agencies for the protection of victims and the management of perpetrators. (2.3) The DVPN / DVPO process builds on existing procedures and bridges the current protective gap, providing immediate emergency protection for the victim and allowing them protected space to explore the options available to them and make informed decisions regarding their safety.***

Background

11. I turn to the present case. The Stated Case sets out relevant background, as follows:

> ***2. On 23 May 2022 a female, later identified as Samantha Williamson from her phone number and address, telephoned the emergency services asking for the police, and then she hung up. Ms Williamson is the long-term partner of Barry Jemmett. Officers were dispatched for a welfare check. Ms Williamson alleged that Mr Jemmett had bitten her and she had hit him. She also alleged that he had assaulted her the week before. She refused to make a complaint or allow photographs to be taken of the visible reddening. This was the ninth police incident of domestic violence involving the couple… A previous restraining order was repeatedly breached by Mr Jemmett. 3. Mr Jemmett was arrested. 4. Ms Williamson continued to refuse to engage with the police and Mr Jemmett was released without charge, having been served with a DVPO application and Notice of Hearing.***
>
> ***5. On 25 May 2022, the matter came before me. Mr Jemmett did not attend but was represented by Mr Bennett (DMA Law). The solicitor from Cleveland Police addressed me putting forward the information in the written pack. Ms Bennett, the Independent Domestic Violence Advisor [IDVA], also addressed me confirming her involvement, or lack of it, with Ms Williamson, and Ms Williamsons previous dealings with the support services. 6. The information included that***

> ***Ms Williamson had engaged with services whilst Mr Jemmett was in custody. The IDVA's experience, which was relayed to the court, was that Ms Williamson had done very well with support when Mr Jemmett was in custody, but since the end of the restraining order things had escalated again. The IDVA's view was that, absent a DVPO, agencies cannot reach Ms Williamson to provide support, 'which she is clearly trying to seek by contacting police and wanting to talk to the IDVA's.' 7. Ms Bennett read a case note which illustrated an example of Mr Jemmett taking the phone and dictating the narrative when the allocated IDVA had been trying to communicate with Ms Williamson. She also outlined that Mr Jemmett had contacted Ms Williamson even when he was remanded in custody. 8. Mr Jemmett's solicitor also addressed me.***

The Judge's Findings of Fact

12. The Judge sets out these findings of fact, to which the Police mounts no challenge:

> ***9. I found the following facts: (a) Ms Williamson contacted the police but made no allegations of offending. (b) Ms Williamson disclosed to a police officer that Mr Jemmett had bitten her, and 1 week previously had head-butted her. Ms Williamson refused to make a statement or allow photographs to be taken saying she was worried what her family would say, and did not like photographs being taken of her. (c) Ms Williamson had reddening to her arm and the remainder of bruising under her eye. (d) The Police attended Ms Williamson's home address later that day, on two occasions, but Ms Williamson was not at home/did not answer her door. (e) Further efforts were made to contact Ms Williamson by phone and messages left, without success. PC Clark remarks that "it is likely Ms Williamson is avoiding police as she has already expressed she is not willing to support a prosecution". (f) Mr Jemmett was released from custody, without charge, but received a DVPN, thus preventing contact with Ms Williamson. (g) Ms Williamson had been offered help on numerous occasions, had accessed support for short periods in the past, but always returned to Mr Jemmett, and had refused assistance just as often. A breathing space was provided when Mr Jemmett had been remanded in custody, but Ms Williamson had used the opportunity to apply to the Magistrates' Court for the Restraining Order, in place to protect her, and in the same terms as the proposed DVPO, to be discharged. The Restraining order was discharged in April 2022.***

The Judge's Analysis

13. As the Judge explains:

> ***10. I considered the relevant Articles of the Human Rights Act: Article 2, the right to life; Article 3, the right to be free from degrading treatment; Article 6, the right to a fair trial; and Article 8, the right to privacy and family life. I was particularly mindful of the Article 8 rights of both parties, who wanted to exercise those rights.***
>
> ***11. I was of the opinion that, on the balance of probabilities, given the words of Ms Williamson and the presence of physical evidence supporting those words, that Mr Jemmett had been violent towards Ms Williamson.***
>
> ***12. I then considered the question of whether the order was necessary to protect Ms Williamson from violence or the threat of violence. I bore in mind the stated purpose of a DVPO, as being "to allow the victim a degree of breathing space to consider their options with the help of a support agency." I considered that Ms Williamson did not want either the help, or to access the help, of the support agency. Ms Williamson had benefitted from a period of enforced separation, a breathing space, when Mr Jemmett was remanded in custody very recently, and also the protection of a Restraining Order, and had not availed herself of any help. She made an application to the Magistrates' Court to discharge the Restraining Order.***
>
> ***13. I reminded myself of the case law on the point of whether a protective order should be made where the beneficiary of that order does not want it, particularly in R v Brown [2012] EWCA Crim 1152 where the victim opposed the making of a restraining order and in quashing the order, the court said:***

> > ***This young woman wishes to continue in a relationship with a man who has been repeatedly violent to her. That is a decision that she is entitled to make, however dispiriting it may be. There is no suggestion that she lacks capacity, or that she has been forced to do this, or that she is in fear of the applicant. She genuinely wishes to pursue her relationship. In those circumstances the restraining order should not have been imposed.***
>
> ***The final decision to make a restraining order is one for the court, having heard representations from the defence and the prosecution.***
>
> ***14. This view was further clarified in the case of R v Herrington [2017] EWCA Crim 889 [2017] 2 Cr App R (S) 38 where the court was very clear that the law does not permit a criminal court to prevent individuals from living together even where there is a clear history of domestic abuse.***
>
> ***15. I considered that Ms Williamson did not want the protection of the order, would not take advantage of the breathing space it was expected to offer, would not access support services, and would not facilitate the compliance of Mr Jemmett with the DVPO.***
>
> ***16. Consequently, I did not find a DVPO to be necessary and refused the application.***

The Judge's Questions

14. The Judge has asked the High Court to answer these Questions (my answers are at §48 below):

> ***(Q1) Applying the two-stage test required when exercising my judgement on an application for a DVPO, and having been satisfied on the first limb, that, on the balance of probabilities, the person against whom the order is sought, has been violent or threatened violence towards to person to be protected, to what extent should I: (a) consider the views of the person to be protected, and her lack of intention to engage with other agencies, as a factor in deciding that the order is necessary; and (b) consider the express statutory ability under s.28(5) of the Crime and Security Act 2010 to make a DVPO where the complainant does not consent to the same?***
>
> ***(Q2) Is there a material difference between the nature and purpose of (i) civil DVPOs and (ii) criminal restraining orders? If so, to what extent is the case law relating to retraining orders applicable and/or of assistance when the court is exercising its civil powers by considering whether or not a DVPO is necessary?***
>
> ***(3) In all the circumstances, was the decision to refuse the application permissible and/or reasonably open to the court?***

"Does not want it": The Brown Cases

15. I think this is the best place to start. In (Q2) the Judge asks about the applicability of, and the assistance derived from, the case law relating to criminal restraining orders. At the heart of her analysis (§13 above) were Brown and Herrington. These were the cases about – as the Judge put it – whether "a protective order should be made where the beneficiary of that order does not want it". The Judge thought these cases did assist her, and that they were applicable. She has asked this Court whether that was right. I am using "the Brown Cases" to describe this line of case-law.

16. The Brown Cases started with R v Picken [2006] EWCA Crim 2194. Picken was later applied in Brown (§§11-12); and Picken and Brown were then applied in Herrington (§6). In all three cases, sentencing judges in criminal courts had imposed prison sentences for violent offences of domestic abuse against a cohabitee, to which the

sentencing judge had added a restraining order preventing the defendant from any ongoing contact with the victim, during their prison sentence and then after release from prison. In all three cases, these restraining orders were held by the Court of Appeal to have been wrongly imposed. That was because they would prevent the continuation of a relationship against the victim's expressed wishes.

17. In Picken, the sentencing judge (on 12.6.06) imposed a 2-year prison sentence on the defendant for violent offending (dating back to 4.2.06 and 7.2.06), making a 5 year restraining order preventing the defendant from making contact with the victim ("Miss W"). The judge was told, by the defendant's advocate, that Miss W "had visited the [defendant] in prison shortly before his appearance for sentence and had told him that she was willing for him to move back into their home on his release". The judge said (§17):

> ***It is no answer to the making of such an order that she may not want it to be made. Indeed, in my judgment it is a reason for making the order.***

The Court of Appeal set aside the restraining order. They concluded that the judge "should not have made an order without finding out what Miss W's position was" and "should have adjourned the question of the restraining order so that the police could speak to Miss W" (§17). The Court said this about the position, once Miss W had been spoken to by police (§17):

> ***If [the judge] had been satisfied that she wished to continue relations with the applicant, then it would have been inappropriate for him to have made the restraining order. It was not for him to decide that she should not do so.***

18. The importance of an enquiry – at the heart of Picken – finding out the views of the person who would be protected by the restraining order has been taken up in subsequent caselaw and commentary. This is from Blackstone's Criminal Practice 2024, discussing sentencing and restraint orders (at §E21.32):

> ***Restraining orders are commonly imposed following conviction for assault in a domestic context. In that context the Court of Appeal in Khellaf [2016] EWCA Crim 1297 summarised the principles which should be taken into account when deciding whether to impose a restraining order: (1) A court should take into account the views of the person to be protected by such an order. While there might occasionally be a case when an order can properly be made although the subject of the order does not seek one, the views of the victim will be relevant. If the court does not have direct evidence it may be able to draw a proper inference as to those views. In normal circumstances the views of the victim should be obtained, and it is the responsibility of the prosecution to ensure that the necessary inquiries are made…***

Archbold Magistrates' Courts Criminal Practice 2024 has an equivalent passage (at §16-632). Both textbook commentaries go on to discuss Herrington; and Blackstone's also cites Brown.

19. In Brown, the sentencing judge (on 13.9.11) imposed 21 months custody on the defendant for violent offending (dating back to 26.5.11), making a 5 year restraining order preventing the defendant from making contact with the victim ("the partner"). The Judge was told, by the prosecution, that the partner "did not wish a restraining order to be in place because she wanted the relationship to continue" (§10). Subsequently, she had "visited the [defendant] in prison on a number of occasions before she was told that was not acceptable", and she had supported an unsuccessful

application to the judge to discharge the order (2.3.12) (§§2, 10). Citing the passage which I have quoted from Picken, the Court of Appeal held that the restraining order "should not have been imposed" (§12). In the passage which the Judge quoted, and which I will repeat, the Court of Appeal in Brown said this (at §12):

> ***The same is true, in our judgment, in this case. This young woman wishes to continue in a relationship with a man who has been repeatedly violent to her. That is a decision that she is entitled to make, however dispiriting it may be. There is no suggestion that she lacks capacity, or that she has been forced to do this, or that she is in fear of the applicant. She genuinely wishes to pursue her relationship. In those circumstances the restraining order should not have been imposed.***

20. In Herrington, the sentencing judge (on 1.3.17) imposed 12 months custody on the defendant for violent offending (dating back to 6.2.17), making a 3 year restraining order preventing the defendant from making contact with the victim ("Ms Jones"). The judge was told, by the prosecution, that Ms Jones "had refused to make a statement and was indeed in court supporting the [defendant]" (§5). The Court of Appeal quashed the restraining order. It quoted (at §6) the above passage from Brown. It then continued (at §§7-8):

> ***7. This is not a jurisdiction which can be used to prevent an adult from deciding who she wants to live with. Although any person considering this case would consider that [Ms] Jones is at serious risk of violence from the appellant, she has the right to live with him if she chooses. It is to be hoped that she is genuinely aware of the risk she is running in doing that, but ultimately she is an adult and free to take those decisions for herself. The law does not presently permit the criminal court to act to protect victims of domestic violence against the consequences of decisions of this kind which they freely make. Because of our level of concern for her safety, we caused the police to contact her very recently before this case was heard so that her wishes could be ascertained. She told them unambiguously that she wants this order revoked. 8. That degree of autonomy is the case for an adult who has the freedom to make her own decisions…***

The Court concluded (at §12):

> ***For the reasons we have explained, the order which was undoubtedly made by the judge with the best of intentions and firmly based on a well-founded fear of harm in its absence, ought not to have been made and must be quashed. This case demonstrates a concerning level of domestic violence but the ability of this court to address that is unhappily limited.***

Key Features of the Brown Cases

21. For the purposes of analysing the issues in the present case, it is in my judgment important to identify these as among the key features of the Brown Cases. They contrast with the Kerr case, of which the Judge was unaware and to which I will come (§41 below).

    (1) First, the Brown Cases are decisions of criminal courts. The criminal court has statutory power to make a restraining order when sentencing or otherwise dealing with a person convicted of an offence (see Sentencing Act 2020 s.359) and, in certain circumstances, where a person has been acquitted (see Protection from Harassment Act 1997 s.5A). In Herrington, the Court of Appeal was careful to say that the law did not presently permit "the criminal court" to act, to protect victims of domestic violence against the consequences of decisions freely made. The Court also added that this meant the criminal court's powers were "unhappily limited".

(2) Secondly, the Brown Cases are not dealing with the immediate aftermath – a short-term order imposed within 48 hours – of violent domestic abuse or a latest violent incident of domestic abuse against the victim; they are cases dealing with the position after a passage of time (months or weeks). I have included dates in my summaries. In Picken and Brown it was more than 4 months. In Herrington it was 3 weeks. These were sentencing courts, with the function of making informed decisions – which is what criminal courts always take time to do if necessary – after a period of time for the victim to be seen as having arrived at a considered decision. The focus was on the current position of the victim, after that period of time has passed. It was not a focus on what the victim had said in the immediate aftermath, or within 48 hours. It was, moreover, recognised in the Brown Cases that further time might be necessary. Indeed, the error in Picken was not to adjourn the case, to find out from the victim what her position now was. The Court of Appeal in Herrington even itself required an enquiry, so that the victim's current wishes could be ascertained.

(3) Thirdly, the Brown Cases recognise that there will be concerns – needing to be addressed – about whether a victim, in saying that they do not want the court to make the order restraining the defendant, are being "forced", or are "in fear", and whether the choice is being "freely" made. I will return to this (§§22-24 below). In the Brown Cases, the Court of Appeal felt able to identify a sufficient confidence – at the time of sentencing – about decisions "freely" made. But, even then, there were evident misgivings. Thus, the court's powers were seen as "unhappily limited".

(4) Fourthly, a central theme in the Brown Cases – in a context necessarily engaging private and family life – was about promoting and respecting the autonomous decision-making of the victim, regarding an ongoing relationship with which the restraining order could constitute a serious ongoing intrusion. The Brown Cases are, in the end, all about what is seen by the Court of Appeal as the autonomy of a victim's ultimate decision-making about their private life and family life.

(5) Fifthly, the Brown Cases arise in a context where, absent from any applicable statutory scheme, was any express statutory provision (cf. §§36-38 below) providing that a restraining order can be made, even where it is known to the court that the victim has expressed positive disagreement. The current Overarching Domestic Abuse Sentencing Guideline says this about restraining orders (§20): "Orders can be made on the initiative of the court; the views of the victim should be sought, but their consent is not required". This took effect from 24 May 2018. It postdates Picken, Brown and Herrington. I have seen and found no case or commentary which discusses the Brown Cases in the light of this stated position or any equivalent prior statement. The language in the Sentencing Guideline that "consent is not required" clearly includes the idea that positive consent is not a prerequisite. The victim may have said nothing; or may have said something equivocal. I am not making any decision or expressing any view about how this part of the Sentencing Guideline might interrelate with the Brown Cases. The Brown Cases say that a clear and autonomous choice to continue the relationship, freely made after a passage of time, is to be respected.

(6) Sixthly, the Brown Cases did not, evidently, need to grapple with the situation where the public authorities of the state may owe a positive obligation in terms of

ECHR Article 3 – or even Article 2 – as statutory human rights, scheduled to the Human Rights Act 1998. I will return to this: see §25 below. The reasoning was about a situation where the relevant human right was the victim's Article 8 rights, having freely made an autonomous decision after an appropriate passage of time.

(7) Seventhly, the Brown Cases do not discuss the possible 'middle way', described in the Sentencing Guideline (§22), where: "If the parties are to continue or resume a relationship, courts may consider a prohibition within the restraining order not to molest the victim (as opposed to a prohibition on contacting the victim)."

Domestic Abuse: Decisions "Freely" Made

22. The idea of "expressed wishes" of a victim of domestic abuse – including violent incidents of domestic abuse – calls for very great caution on the part of any court. There is a recognised link between violent incidents of domestic abuse and other domestic abuse. Courts do not think or speak in terms of "domestic violence", but about "domestic abuse" In the context of DVPOs, Parliament has focused on "domestic violence", which I am describing as violent incidents of domestic abuse. The concept of "domestic abuse" is described in the Sentencing Guideline (at §1) as "a range of violent and/or controlling or coercive behaviour". Controlling behaviour (§5) is "a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour". Coercive behaviour (§6) is "an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim."

23. This is from the Sentencing Guideline at §12:

> ***A sentence imposed for an offence committed within a domestic context should be determined by the seriousness of the offence, not by any expressed wishes of the victim. There are a number of reasons why it may be particularly important that this principle is observed within this context: [i] The court is sentencing on behalf of the wider public [ii] No victim is responsible for the sentence imposed. [iii] There is a risk that a plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender. [iv] The risk of such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim.***

24. So, among the "various reasons" why – whenever imposing a sentence for an offence – the criminal court will determine the domestic context by offence seriousness and "not by any expressed wishes of the victim" (§12) are reasons relating to the wider "risk", which may not be visible to a sentencing court. There is the risk that "a plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender". There is the "risk" that "such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim". By contrast, restraining orders as in the Brown Cases are not sentences imposed on behalf of the wider public; they are orders made by a criminal court to protect the victim (Sentencing Guideline §§19-24). But a key point is that there are serious concerns about a victim's "expressed wishes" and even a criminal sentencing court may not have good visibility on what does or may lie behind these. There is also a linked point of wider legal policy, to which I will return (§39 below).

Domestic Abuse: Article 3 and Article 8

25. Domestic abuse can, in principle, trigger a positive obligation of active state involvement in the protection of the victim: see Volodina v Russia (App.No.41261/17, ECtHR 9.7.19) at §§71-76. There can be an obligation to take reasonable measures to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known (Volodina §§76(b), 91). These obligations will apply, as domestic statutory duties, under the Human Rights Act 1998. The public authorities of the state, including the courts, may therefore need to "strive for an outcome which takes account of and achieves a reasonable accommodation" between "competing" Article 3 and Article 8 rights, even in the context of a competent individual's "stated wishes and feelings": cf. Re K (Forced Marriage: Passport Order) [2020] EWCA Civ 190 §§36-37.

The Brown Cases are Inapplicable: DVPOs are Materially Different

26. The Judge rightly saw, in the Brown Cases – Picken, Brown and Herrington – a point about a "protective order where the beneficiary does not want it". She saw protective orders, overturned as wrong in principle by the Court of Appeal in the Brown Cases, and she relied on those cases in declining to make one in the present case. She has asked this Court – in (Q2) – to address whether those authorities were applicable or of assistance, or whether there is a material difference between the restraining orders in those cases and DVPOs. The answer, in my judgment, is this. The Brown Cases were not applicable. They were not of assistance. Except, that is, by illustrating material differences with DVPOs and because of the possibility of a principled reconciliation (§43 below). Here is why the Brown Cases are inapplicable and do not assist, and why the position in relation to DVPOs is materially different.

27. First, DVPOs are special civil measures which, by nature and design, are for immediacy. Where the DVPN has been issued, the application for a DVPO must come before the magistrates' court within 48 hours. These are responsive civil measures, which can be made only if a court is satisfied on the balance of probabilities that the Restrained Person has been violent towards, or has threatened violence towards, the Protected Person as an associated person. By design, the DVPN and DVPO are able to address the "immediate aftermath" of a violent incident of domestic abuse. That is described in the Statutory Guidance at §1.2 (see §10 above).

28. Secondly, DVPOs are special civil measures which, by design, are short-term restrictions. They are, in and of their nature, a further short-term intervention after the initial DVPN. The DVPN never stands alone. It is necessarily followed by the application, heard within 48 hours, for the DVPO. There is a statutory maximum duration of 28 days. The way in which a DVPO can constitute an ongoing interference with a relationship is temporally restricted. They are designed to achieve things for the Protected Person and their interests, achievable by protection during a short-term intervention.

29. Thirdly, this necessarily short-term intervention – in the immediate aftermath of a violent incident or latest violent incident of domestic abuse – is, by design, a protection of the victim where one distinct protective value is about the court securing a period of protected space for decision-making. This is described in the Statutory Guidance at §2.3 as "protected space to explore the options available to them and make informed decisions regarding their safety" (§10 above). This allows the victim a degree of

breathing space "to consider their options with the help of a support agency" (Statutory Guidance §1.3). The Government 2010 Strategy: Together We Can End Violence Against Women and Girls had said that the new DVPO would create protection "while further support is offered to the victim to decide on next steps" (p.76). The Consultation Paper: Together We Can End Violence Against Women and Girls (March 2009) was the work which lay behind the new DVPO (see the Explanatory Notes to the 2010 Act at §6).

30. Fourthly, this value of a DVPO to provide a protected period of protected space for decision-making involves no incompatibility with the idea (see §21(4) above) of protecting and respecting the autonomous decision-making of the victim regarding an ongoing relationship (with which – were the relationship to resume – the DVPO would have involved a short-term interruption). On the contrary, there is a clear consonance (see §43 below) between insisting on a protective, safe period for autonomous decision-making and promoting and respecting autonomous decision-making. This is still all about (§21(4) above) promoting and respecting autonomy. It is really about ensuring a passage of time (§21(2) above) with a safe space. In family law cases involving the inherent jurisdiction, there is a not dissimilar idea about an intervention to "facilitate" a "process of unencumbered decision-making", which is "facilitative, rather than dictatorial" for "the individual's autonomy of decision-making"; and "in a manner which enhances, rather than breaches, their EHCR Article 8 rights": see DL v A Local Authority [2012] EWCA Civ 253 at §§33, 67. Whatever the victim's decision, the virtue and purpose is about it being arrived at after a protected safe period.

31. Fifthly, there is a second and freestanding protective value: simply to protect the victim from harm for a short period. The short-term intervention – in the immediate aftermath of a violent incident or the latest violent incident of domestic abuse – can simply be "providing immediate emergency protection for the victim" (Statutory Guidance §2.3: §10 above). That is distinct and freestanding from "protected space to explore the options available to them and make informed decisions regarding their safety". The Strategy: Together We Can had said that the new DVPO would create "protection for the victim in the immediate aftermath of a domestic violence incident" (p.75). The Statutory Guidance (§5.1.3) speaks of DVPNs and DVPOs as interventions ensuring "the decision-making of the victim" is free from suspicion of coercive and controlling behaviour; but it also speaks of this as intervention which "may simply be necessary to protect the victim (§37 below). The important word here is "simply". This fits with the statute. It is, in and of itself, protection from violence or a threat of violence from the Restrained Person (s.28(3)). That, after all, is the second statutory precondition. It can be justified as necessary. In its own right. Without more.

32. Sixthly, Parliament has made a statutory provision about the views and wishes of the Protected Person (see §§34-38 below), which makes clear that a DVPO (like a DVPN) can be issued even where the Protected Person's stated opinion expresses disagreement with the making of the order. This is no surprise. It is also no accident. The Consultation Paper: Together We Can (§29 above) had described "Go" orders under Austrian, Swiss, German and Polish legislation which allow police to exclude perpetrators of domestic violence from the home, where the legislation "differs between these countries in terms of the length of the exclusion order, and the extent to which the state allows victims to influence the interventions that occur" (p.19). The Austrian 10 day exclusion order involved a 10 day stage controlled by the police whose imposition

"the victim cannot influence". These measures were considered (see Consultation Paper: Together We Can p.19) in an ACPO Review for the Home Secretary, Tacking Perpetrators of Violence Against Women and Girls (September 2009) which recommended 14 day DVPOs issued by the police (pp.12, 48-53). It is unsurprising to find express statutory provisions relating to (a) whether the view and wishes of the Protected Person should be considered and (b) whether the Protected Person's express disagreement precludes a DVPO being made. The answer is (a) yes and (b) no: see §§34-38 below.

33. Seventhly, there is a wider point of legal policy: the court's decision to make or decline to make this species of protection order is not a function of – and should in principle not be attributed to – the position taken by a victim. See §39 below.

Statutory Provision about the Protected Person's Stated Views and Wishes

34. I have said that, in the context of DVPOs, Parliament has made a statutory provision about the stated views and wishes of the Protected Person. The position is as follows: (1) First, Parliament has required at the DVPN stage that the police must take reasonable steps to discover the opinion of the Protected Person as to the issuing of the DVPN (s.24(4) and (3)(b)). (2) Secondly, Parliament has required at the DVPN stage that the authorising police officer must consider any opinion of the Protected Person (s.24(3)(b)). (3) Thirdly, Parliament has expressly provided that the police's authorising officer "may issue a DVPN in circumstances where the [Protected Person] does not consent to the issuing of the DVPN" (s.24(5)). (4) Fourthly, Parliament has required at the DVPO stage that the magistrates' court must consider "any opinion of which the court is made aware" of the Protected Person (s.28(4)(b)(i)). (5) Fifthly, Parliament has expressly provided that the magistrates' court "may issue a DVPO in circumstances where the [Protected Person] does not consent to the issuing of the DVPO" (s.28(5)).

35. In deciding whether or not to issue a DVPN, the police must adopt a legally correct appreciation of its statutory function. That requires that points (1), (2) and (3) above are understood. In deciding whether to make or decline to make a DVPO, the magistrates' court must adopt a legally correct appreciation of its statutory function. That requires that points (4) and (5) above are understood. This answers much of the Judge's (Q1): see §48 below.

Section 28(5) and Positive Disagreement

36. It follows from s.28(5), so far as the Protected Person's "opinion" is concerned, that Parliament has provided that the making by the magistrates' court of a DVPO is not precluded: (a) by the absence of a positive statement of consent (agreement); but nor (b) by the presence of a positive statement of non-consent (disagreement). Both the absence of express agreement and the presence of express disagreement fall squarely within the wording, and the discernible purpose, of s.28(4)(b)(i) and (5). Here are those provisions:

> ***(4) Before making a DVPO, the court must, in particular, consider – … (b) any opinion of which the court is made aware – (i) of the person for whose protection the DVPO would be made … (5) But the court may make a DVPO in circumstances where the person for whose protection it is made does not consent to the making of the DVPO.***

37. Here is what is said in the Statutory Guidance (§5.1.3):

> ***A DVPN / DVPO does not require the consent of the victim and therefore all other evidence / information available should be passed to the Superintendent and also the relevant magistrates' court. It may be necessary and proportionate to issue a DVPN even though a victim does not wish it because there may be suspicion of the presence of coercive and controlling behaviour affecting the decision-making of the victim or it may simply be necessary to protect the victim. Officers should consider carefully whether the issue of a DVPN is necessary and proportionate to protect the victim.***

This reflects that the DVPO can be made "even though [the] victim does not wish it". That includes the presence of positive disagreement. The Explanatory Notes to the 2010 Act say (§106) that s.28(5) specifies that a court may issue a DVPO "regardless of whether or not" the Protected Person consents. The Statutory Guidance (§5.1.3) recognises underlying concerns about coercive and controlling behaviour, which may not be visible (§37 above). It recognises that one protective value is the freestanding value that it may "simply be necessary to protect the victim", while another is about a protection directed to autonomous "decision-making of the victim" (the latter is used as the "example" later at §5.2.4).

38. There are several good reasons for a magistrates' court deciding that it is "necessary" to make a DVPO to protect the Protected Person from violence or a threat of violence (s.28(3)) from the person who has been violent or threatened violence (s.28(2)), even if the "opinion" of the Protected Person (s.28(4)(b)(i)) is to disagree with the making of the order. Suppose the Protected Person says: "I do not agree with the making of an order" and "this is just an unwanted interruption" in a relationship which "I wish to continue", unrestrained by any court. As Parliament recognised, the magistrates' court could – the word is "may" and not "shall" – make the DVPO. (1) It is a short-term intervention, in the immediate aftermath of a violent incident or latest violent incident of domestic abuse. (2) There are reasons, or risks of reasons – including those invisible to the court and not capable or appropriate for immediate enquiry – about the Protected Person's disagreement and whether it is a choice "freely" made. (3) A different choice could emerge from a protected period of safety to promote autonomous decision-making. (4) Even if the choice remains the same, the value of the protected period of safety for autonomous decision-making is that the choice has been made under that protection and after that period. (5) There is, in any event, a freestanding value in securing safety, even if only for a further short-period, consistently with the second statutory precondition.

The Court's Decision is not Attributable to the Victim

39. I have mentioned (§§24 and 33 above) that there is a wider point of legal policy. It is that the court's DVPO decision is not a function of – and should in principle not be attributed to – the expressed views of the victim. In the context of sentencing generally, the Sentencing Guideline speaks (§23 above) of risks to victims in terms of what "is generally believed" about the court's decisions. It speaks of the "risk" that "threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim". The point about what "is generally believed" is that the signals which courts give, about the basis of their orders – including protective orders – really matter. This is a 'big picture' point. In the express design of the statutory scheme for DVPNs and DVPOs, Parliament has recognised that it would be inappropriate for victims to be "responsible for" the making, or not making, of the order which protects them in the immediate aftermath of a violent incident – or latest violent incident – of domestic abuse. The domestic abuse may include controlling behaviour or coercive

behaviour. There may be visibility gaps. There is a policy picture, beyond the individual case. If victims were to bear the responsibility, or it perceived as bearing the responsibility, that is a burden. It comes at an especially inappropriate time, in the immediate aftermath of a violent incident or latest violent incident of domestic abuse. It can introduce additional actual, potential or perceived pressure; or leverage; or fear; or recrimination; or the risks of these things. All of this, and the idea that the court clearly 'owns' the decision, is recognisable in sentencing, as has been seen: Sentencing Guideline §12: §23 above. The response is not 'down to the victim'. This is an idea which also belongs in relation to urgent protective orders, which may remove a perpetrator of a violent incident or incidents of domestic abuse from the home and impose significant constraints. That is what Parliament was recognising.

40. The design of the DVPO statutory scheme involves the victim being listened to, but the DVPN being issued and the DVPO made even where the victim's expressed opinion involves disagreement with the intervention. This is itself protective, in broader legal policy terms. The responsibility remains on the police and the magistrates' court, and it cannot be "generally believed" that the decisions are the responsibility of, a function of, or attributable to, the Protected Person. The police and magistrates' court will take responsibility for assessing for themselves whether the intervention is necessary to protect the victim, even if the victim says they "do not need" it – or "will not take advantage of" it – and this is clear to everyone, including the Restrained Person.

The Kerr Case

41. In Kerr v Surrey Chief Constable [2017] EWHC 2936 (Admin) there was a violent incident of domestic abuse (17.4.17), in whose immediate aftermath the police issued a DVPN. When, within the prescribed 48 hours, the case came before the magistrates (19.4.17) the victim – the partner – had "sent an email via the police which stated that she did not wish for an order to be made" (§16). This Court (Deputy High Court Judge Andrew Thomas QC) referred to the statutory purpose in terms of "immediate emergency protection to victims of domestic abuse" and "breathing space for the victims to make informed decisions" (§13). He drew attention to s.24(5) (§14). He saw nothing arguably erroneous about the DVPO, which he described as "entirely in accordance with the statutory purpose of such Orders" (§26). Referring to the partner's email, he said the magistrates were (at §24):

> ***entitled to treat with caution other statements made by an alleged victim of domestic violence. It is not just a matter of whether or not there had been an immediate interference with the complainant; it is well recognised by the courts, and would be well within the experience of a Magistrates' Court, that victims of domestic violence can be equivocal in their views. There are many reasons why at any given point in time they may express some reluctance to seek to exclude the partner. As [Counsel] correctly observes, that is precisely the danger that this legislation addresses by allowing a short-term emergency order to be made for the protection of a victim of domestic violence, even in circumstances where the victim is not seeking such an order.***

I agree with this analysis of s.24(5) and the purposes of the statutory scheme for DVPOs. Picken, Brown and Herrington were not cited or discussed. But they do not undermine the analysis, for the reasons which I have explained.

Kerr: Citing a Permission Decision

42. I acknowledge that Kerr is a permission-stage decision. It does not contain an express statement that it establishes a principle or extends the law (Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 at §6.1). But Ms Checa-Dover was right to include Kerr in her authorities' bundle in the present case. Looking purposively, Kerr does not "only decide that the application is arguable" (Practice Direction at §6.2). It decided the legal position as being clear, beyond argument. It was also an analysis of the statutory scheme and purpose. Kerr is cited in Archbold Magistrates' Courts Criminal Practice 2024 (at §22-258), as authoritative assistance in identifying the purpose of the statutory scheme. Kerr would have assisted the Judge, had it been cited to her. Nobody is treating what DHCJ Thomas QC said in Kerr as binding. But if similar observations had been made in a journal or textbook commentary, or if the question he addressed had been considered there, that could have been cited. It is important not to take an overly technical approach, and not to exclude being able to read and think about sources which can help.

Autonomous Decision-Making: a Principled Reconciliation

43. For the reasons which I have given, it is possible to see a principled reconciliation between the legal policy which lies behind the Brown Cases and the legal policy applicable to the distinct protection of DVPOs. The Brown Cases are about courts which act after a period of time during which the victim is seen "freely" to have come to an autonomous decision about their ongoing private and family life. The position with DVPOs – and s.28(5) – is about the courts securing a period of time during which the victim is best able to now come to an autonomous decision about their ongoing private and family life. There is no conflict of legal policy, principle or philosophy. The magistrates' court has a special power. It can serve to promote that a victim of recent violent incidents of domestic abuse can arrive at their best autonomous decision-making. It allows a short-period of safety, which is a relevant protection and a limited intrusion. After that, the DVPO falls away.

"Would not take advantage of" the DVPO

44. I need now to focus in on the idea of the victim who "would not take advantage of" the DVPO. This appears within the Judge's (Q1), where it is expressed as "lack of intention to engage with other agencies". The Judge's analysis was predictive evaluation, about three things which the Judge considered that the Protected Person "would not" do. The Judge said:

> ***I considered that Ms Williamson … would not take advantage of the breathing space it was expected to offer, would not access support services, and would not facilitate the compliance of Mr Jemmett with the DVPO.***

This view arose in the context of the background, findings of fact and analysis as a whole. But in particular there was this (§13 above):

> ***I considered that Ms Williamson did not want either the help, or to access the help, of the support agency. Ms Williamson had benefitted from a period of enforced separation, a breathing space, when Mr Jemmett was remanded in custody very recently, and also the protection of a Restraining Order, and had not availed herself of any help. She made an application to the Magistrates' Court to discharge the Restraining Order.***

45. In my judgment, there are these reasons which militate against relying on a predictive evaluation of this kind, about what the Protected Person "would" or "would not" do if the DVPO were made.

    (1) First, there is a clear link to the idea – based on the Brown Cases – that DVPOs are protective orders which should not be made where the beneficiary of the order "does not want it". I have explained why there is no such governing principle. I have identified key points to inform the magistrates' court's approach. These points overlap with ideas about a Protected Person who "would not take advantage of" the DVPO.

    (2) Secondly, the statutory precondition (s.28(3)) is whether the magistrates' court thinks the DVPO is necessary to protect the Protected Person from violence or a threat of violence by the Restrained Person. Parliament did not impose a criterion, or further criterion, of whether the magistrates' court thinks the DVPO will have the effect, after it as expired, that the person will remain protected from violence or a threat of violence.

    (3) Thirdly, the Judge's clear premise is that "the" purpose of a DVPO involves the single protective value about the court securing a period of protected space for decision-making. But there is the further and freestanding protective value. Reflecting part of the Statutory Guidance (§1.3), the Judge recorded that she "bore in mind the stated purpose of a DVPO, as being 'to allow the victim a degree of breathing space to consider their options with the help of a support agency.'" But this is not "the" statutory purpose. There is the freestanding value of a short-term period of protection from violence and the threat of violence, which can justify a DVPO independently of "decision-making": see §31 above.

    (4) Fourthly, the protective value about the court securing a period of protected space for decision-making – which the Judge identified – allows the "chance" of engagement, support and safe reflection, with the "chance" a different post-expiry or longer-term outcome. Protective choices or decisions could be made, which would not otherwise be made. The DVPO allows the chance for this to happen. It is often notoriously difficult to quantify a chance. A predictive evaluation of likely outcome is not the same as recognition of the value of a chance. And the principled answer can simply be to ensure that there is the chance. This is especially important in the context of what Ms Checa-Dover calls a "cycle of abuse". It can be very difficult to see, prospectively, the prospects of the chance presented by intervention, at any point in that "cycle". This can be tested by supposing that a victim, ultimately, is in a situation of long-term safety and protection. In which stages of an earlier "cycle" would it have been possible to say – prospectively – that this was now likely? Past events, together with the presently stated position of the victim, may – in the language which the Judge quoted from Brown – seem especially "dispiriting". All courts will avoid stereotypical assumptions regarding domestic abuse. A past pattern does not of itself indicate futility. The principled answer can simply be to ensure that there is the chance.

    (5) Fifthly, whatever happens at the end of the DVPO, there is still the principled value of the protected period of safety for autonomous decision-making, in a safe space. It secures that what happens is under that protection and after that period.

That is still an "advantage" of the DVPO, whether or not there has been engagement with support services and authorities.

(6) Sixthly, once the magistrates' court decides to undertake an exercise – not prescribed by the statute nor described in the Statutory Guidance – of assessing utility in terms of predictive evaluation of the outcome, there are questions about how this difficult function is to be discharged. Is it susceptible to evidence from support services or authorities, or others with expertise, about what can and does happen in these cases? What test should the court apply? Is it: the likely probabilities; or a high degree of confidence of prediction; or certainty and inevitability?

46. For these reasons it is in my judgment an error of law, in deciding whether the order is necessary, for the court to rely on a predictive assessment of the extent to which the Protected Person will engage with relevant agencies. That is the answer to the remaining aspect of the Judge's (Q1(a)).

"Does not want" and "would not take advantage": The Key Points

47. In my judgment, the legally correct position is as follows. The second statutory precondition is whether the court thinks the making of a DVPO is necessary to protect the Protected Person from violence or a threat of violence by the Restrained Person (s.28(3)). In considering the second statutory precondition, and in approaching the power to make a DVPO (s.28(1)), the following key points should inform the magistrates' court's approach to the ideas that the Protected Person "does not want" or "would not take advantage of" the DVPO:

(1) First, the court must always consider any opinion of the Protected Person, of which the court is made aware (s.28(4)(b)).

(2) Secondly, and importantly, Parliament has empowered the making of a DVPO, even where (s.28(5)) the Protected Person (a) does not express positive agreement or (b) expresses positive disagreement.

(3) Thirdly, DVPOs are designed to provide a safe further short-term period in the immediate aftermath of violent domestic abuse or a latest violent incident of domestic abuse.

(4) Fourthly, one distinct purpose of this safe further short-term period is about promoting and protecting the Protected Person's autonomous decision-making. The DVPO secures a safe further short-term period in which that can take place. There is the chance of the Protected Person securing longer-term safety. But the purpose is not a function of what any decision may be, or how it may be approached. It is a function of the autonomy, in the protected space. This purpose – and "advantage" – is therefore applicable, even if the court would predict that the Protected Person (a) would not engage with relevant agencies and/or (b) would resume a cohabiting relationship with the Restrained Person.

(5) Fifthly, another and freestanding purpose is simply about securing a safe further short-term period. This, in itself, is protection of the Protected Person from violence or a threat of violence by the Restrained Person. This purpose – and

"advantage" – is independent of any decision-making and of any engagement or non-engagement with relevant agencies. It is therefore applicable, even if the court would predict that the Protected Person (a) would not engage with relevant agencies and/or (b) would resume a cohabiting relationship with the Restrained Person.

(6) Sixthly, the court's decision to make – or not to make – a DVPO should not be based on or informed by a prediction of what the Protected Person would do or decide.

(7) Seventhly, the court's decision to make – or not to make – a DVPO should not be attributable to or the responsibility of the Protected Person, or communicated as being attributable to them or their responsibility.

The Judge's Questions Answered

48. In the light of my analysis, here are the Judge's Questions again, with my answers:

(Q1) Applying the two-stage test required when exercising my judgement on an application for a DVPO, and having been satisfied on the first limb, that, on the balance of probabilities, the person against whom the order is sought, has been violent or threatened violence towards to person to be protected, to what extent should I: (a) consider the views of the person to be protected, and her lack of intention to engage with other agencies, as a factor in deciding that the order is necessary; and (b) consider the express statutory ability under s.28(5) of the Crime and Security Act 2010 to make a DVPO where the complainant does not consent to the same?

(A1) In exercising this statutory function: (a) you must consider any opinion of the Protected Person of which your court has been made aware (s.28(4)(b)(i)); but (b) you must recognise that your power to issue a DVPO arises even where that opinion involves an absence of consent from the Protected Person or their positive disagreement (s.28(5)). As to future engagement with other agencies, you should not base your decision on such a prediction. The key points are at §47 above.

(Q2) Is there a material difference between the nature and purpose of (i) civil DVPOs and (ii) criminal restraining orders? If so, to what extent is the case law relating to retraining orders applicable and/or of assistance when the court is exercising its civil powers by considering whether or not a DVPO is necessary?

(A2) Yes, there is a material difference; and no, this case law is inapplicable and does not assist. I have explained why at §§21, 26-43 above.

(Q3) In all the circumstances, was the decision to refuse the application permissible and/or reasonably open to the court?

(A3) No, it was not legally permissible, because of errors of law – rather than an unreasonable judgment or discretion – which relate to the points which you have raised: see (A1) and (A2).

Disposal

49. In these circumstances, and for these reasons, I will allow the appeal. No further order is necessary or appropriate.