Knife Crime Prevention Orders

A Review of Associated Practical Issues

SENTENCING ACADEMY

Georgia-Mae Chung

Sentencing Academy / Kalisher Trust Intern

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Introduction

Knife crime is a high-profile issue in England and Wales, and it has increased in prevalence over the last decade. The Office for National Statistics records that the number of serious violent offences involving a knife or a sharp object in the year ending March 2022 was 34% higher than that ending March 2011 (Allen and Burton 2023). In the last recorded year alone, there has been a 10% increase (Office for National Statistics, 2022). Moreover, there seemed to be a rise in the involvement of young people in knife crime prior to 2019 (Kinsey 2019, p. 4).[1]

In response, the Government initiated a 'Serious Violence Strategy' in 2018, which aimed to 'take action to address serious violence and in particular the recent increases in knife crime, gun crime and homicide' (HM Government 2018). One solution proposed was Knife Crime Prevention Orders (KCPOs), which were subsequently established in the Offensive Weapons Act 2019. They were introduced on a trial basis in London, with the pilot commencing on 5 July 2021. This was originally scheduled to last for fourteen months and to conclude in September 2022 (HM Government 2021). In July 2022, the pilot was extended until 31 March 2023.[2]

This paper will outline the relevant law governing KCPOs and the process for applying for them. It will then examine four key issues that have arisen from the practical implementation of KCPOs.

I. The Law of the Test and Process for KCPOs

KCPOs are civil in nature, but they carry criminal consequences if breached. They can contain either prohibitions or positive requirements, or a mixture of the two.[3] Examples of prohibitions are subjecting an individual to a curfew or excluding them from certain activities. Positive requirements can include mediation, counselling, and mentoring (Home Office 2022). Different prohibitions and requirements can last for different periods. For instance, they can follow on from each other as the order progresses or, if the court is aware of an upcoming change in the defendant's circumstances, this can be built into the order, avoiding the need for an application to vary (Justices' Clerks' Society, March 2020, Revised July 2021).

The orders can be made against individuals aged 12 or over.[4] They can be applied for either by the Crown Prosecution Service on conviction or through a standalone application made

[1] The amount of knife and offensive weapon offences resulting in a caution or conviction committed by children rose by almost 70% between 2013 and 2018.
[2] The Offensive Weapons Act 2019 (Commencement No. 2) (England and Wales) (Amendment) Regulations 2022.
[3] Offensive Weapons Act 2019, section 19(5)(a) and (b) and section 21.
[4] Sections 14(1) and 19(1)(a).

by the police.[5] The applications must be made to a magistrates' court or, in cases of individuals under 18, magistrates' courts sitting as youth courts.[6]

The test for KCPOs varies slightly depending on the type of application advanced. However, there are two conditions which must be satisfied for both standalone applications and orders made on conviction. The first is that the order must be applied for in accordance with the legislation.[7] The second condition is that the court must think that it is necessary to make the order either to protect the public in England and Wales from the risk of harm involving a bladed article, to protect any particular member of the public (including the individual who is the subject of the potential order) from such risk, or to prevent the subject from committing an offence involving a bladed article.[8]

There is then one further requirement for each type of application. For an order to be made on a standalone application, the court must be satisfied that, in the two years prior to the order being made, the individual had a bladed article with them without good reason or lawful authority, either in a public place, on school premises, or on further education premises on at least two occasions. As a civil order, the standard to which it must be satisfied is on the balance of probabilities.[9]

For an order to be made on conviction the court must be satisfied, also on the balance of probabilities, that the offence for which the defendant is convicted is a 'relevant offence'.[10] It is a relevant offence if either: it involved violence; a bladed article was used by the subject (or any other person in the commission of the offence); or the subject (or another person who committed the offence) was in possession of a bladed article when the offence occurred.[11]

Standalone applications for a KCPO can be made with or without giving notice to the individual.[12] If notice is given, the application must be served on the subject at least five business days before the adjourned hearing.[13] Before making an application with notice for a KCPO for someone under the age of 18, the applicant must also consult the youth offending team in whichever area it appears that the subject lives.[14] These teams are established by local authorities and they co-ordinate the provision of youth justice services, such as appropriate adults and the supervision of children and young people sentenced to custody.[15] Each team includes representatives from probation, the police, social work, education, and local care and health boards.[16]

When considering an application made without notice, the court may either adjourn the proceedings to another date or dismiss the application. In the case of an adjournment, the next date will be set so that there can be a full hearing of which notice has been given to

[5] Section 15(1).
[6] Sections 14(10) and 20(1).
[7] Section 14(2).
[8] Section 14(6).
[9] Section 14(3) and (4).
[10] Section 19(1)(b).
[11] Section 19(10).
[12] Section 16(1).
[13] The Magistrates' Courts (Knife Crime Prevention Orders) Rules 2020 No. 210 (L. 8), Rule 2(3).
[14] Offensive Weapons Act 2019, section 15(6).
[15] Crime and Disorder Act 1998, section 39(7)(a) and 38(1), (2) and (4).
[16] Section 39(5).

the defendant. The urgency of any such application is addressable in the period between the application and the adjourned hearing through an interim order or bail conditions, depending on the type of application advanced. Interim orders apply only to standalone applications, whilst bail conditions are used for applications made on conviction. Both may be made only if the court thinks that it is necessary.[17]

The order must last for a minimum of six months and can last for up to a maximum of 24 months.[18] The breach of a KCPO carries a maximum term of two years' imprisonment.[19]

II. Practical Issues Arising from the Introduction of KCPOs

The debates during the passage of the Offensive Weapons Bill through Parliament reveal both the justifications of those supporting the introduction of KCPOs and the reasoning of those opposing them. From this, four key issues have been extracted and are discussed.

The first concerns the fact that KCPOs were proposed as an essential response to rising knife crime and raises the question of whether they are indeed essential. The second is about whether KCPOs fulfil their purpose of steering their subjects away from knife crime or if they in fact result in the opposite. The third addresses the contrast between the low threshold for granting the orders and the severity of repercussions for breaching them. The fourth and final issue concerns the lack of representation available for those facing an application for a KCPO against them, despite potential difficulties in navigating the law governing them and the process of applications.

Uncertainty about the usefulness of KCPOs

It is clear from the Parliamentary debates that KCPOs were proposed in response to rising incidences of knife crime. The Office for National Statistics' 2019 publication of knife crime statistics was the worst in a decade. This was the same year within which the Offensive Weapons Act 2019 and, ultimately, KCPOs were debated in Parliament. It is clear that the orders were proposed in response to 'a genuine and significant social problem' (Hendry 2022, p. 380).

During the first House of Commons debate involving KCPOs, on 4 February 2019, Victoria Atkins spoke in her capacity as Parliamentary Under-Secretary of State for the Home Department. She suggested that the orders had been proposed because the police had asked for them, believing them to be a necessity.

The question of KCPOs' necessity in combatting knife crime should be considered in light of existing measures. These were discussed by Parliamentarians and the most prominent measure mentioned was the 2015 implementation of mandatory custodial sentences for

[17] Offensive Weapons Act 2019, section 16.
[18] Section 23(3).
[19] Section 29.

those convicted of possessing a bladed article or an offensive weapon in public for a second time. This "two strikes" rule dictates that an offender should receive a minimum sentence of six months' in custody if they are aged 18 or over upon conviction. If they are aged 16 or 17, then the minimum sentence should be a Detention and Training Order of at least four months' duration.[20]

These provisions are significant in that they were the first put in place for any offence since murder which introduced a minimum sentence provision covering those aged 16 or 17 (McCaffrey 2015). However, despite the introduction of the minimum sentences, they do not appear to have acted as an effective deterrent for those considering carrying a knife.

The allowance for discretion has been present since the implementation of the mandatory sentences in 2015, but the scope of it has recently changed. There was previously more discretion allowed in that the minimum sentence must have been imposed unless there were circumstances relating to the currently considered offence, the previous offence of the same nature ("first strike"), or the offender, which would make it unjust in all the circumstances. The standard for this has recently changed in order to raise the threshold for departure from imposing the minimum sentence. In cases of offences committed on or after 28 June 2022, the minimum sentence must be imposed unless there are exceptional circumstances relating to the current offence, the previous offence, or the offender which justify not doing so.[21]

In addition to the minimum sentences, the relevant Sentencing Council guidelines recommend that a custodial sentence of at least six months' imprisonment is the starting point for an offender convicted of possession of a bladed article (Sentencing Council 2018). This can increase to a starting point of one year and six months' custody if the court perceives that the offence caused serious alarm or distress and/or was committed at a school, a place where vulnerable people were likely to be present, in prison, or in circumstances where there is a risk of serious disorder. But, again, the available data suggests that knife crime has not decreased following this guideline coming into force.

The lack of change lays ground for the introduction of a new measure to make progress towards this decrease. However, many dispute whether KCPOs were the right measure to introduce at this time. Sarah Jones MP described them as 'a knee-jerk reaction to a moral panic'.[22] This sentiment was, during the time of the debates, shared by Pippa Goodfellow, Director of the Standing Committee for Youth Justice (Prison Reform Trust and Standing Committee for Youth Justice 2019).

Moreover, several have questioned whether KCPOs will achieve anything that is not already covered by the existing measures. In a statement, the Magistrates Association (2021) acknowledged the rising levels of recorded knife crime. However, they raised concern that the orders had 'been introduced without proper consultation or a firm evidence base' and stated that they 'do not believe there is a clearly defined gap in existing police and court

[20] Through the Criminal Justice and Courts Act 2015 (Commencement No. 2) Order 2015 bringing section 28 of, and Schedule 5 to, the Criminal Justice and Courts Act 2015 into effect.
[21] Through section 315(2A) of the Sentencing Act 2020 and section 124 of the Police, Crime, Sentencing and Courts Act 2022.
[22] Hansard HC Deb. Vol. 657 Col. 247, 26 March 2019.

powers currently used to respond to possession of knives that would show that these orders are needed'.

Gilbert (2019) shared this sentiment from his analysis as a practitioner. He described the Government as 'seeking to close a lacuna that does not, on closer inspection, exist'. He reflected on the fact that the nature of potential punishment for breaching a KCPO is similar to that for existing knife offences, with the most serious circumstances attracting a possible custodial sentence. Furthermore, he pointed out that the maximum sentence for carrying a knife in public is four years' imprisonment, which is much higher than the two year maximum for the breach of a KCPO. It is questionable then, how much this potential punishment will provide a deterrent that is not already present.

Gilbert also looked more broadly in questioning whether KCPOs addressed the most urgent causes and influences of knife crime. He argued that measures to combat knife crime should focus on areas other than sentencing or the granting of new orders after offences have been committed. He suggests that greater police presence is important to 'enforce the existing law'. This shares the sentiment of several Members of Parliament who had concerns about the Government's focus when considering causes of knife crime. When discussing the role of police officers and the youth service, Diane Abbott, then Shadow Home Secretary, suggested that 'the problems of knife crime and other types of violent crime are as much about capacity as the law'.[23]

Similar assertions about the need for a more holistic approach have been voiced in academic articles. Stone advocated for legal approaches focusing on 'the community, individual offender, and the circumstances which informed crime' (2022, p. 80). Previously, Aylott and Spenwyn (2019) argued that it is not clear how the orders will address the 'root causes of crime' and stated that they will fail to help people who may live in 'deprived circumstances'. They contended that focusing on tough sentencing fails to address the mindset of individuals carrying knives for their own protection.

This point about protection is particularly important given that the Government framed KCPOs as 'fill[ing] a gap which is not covered by gang injunctions' (HM Government 2019). Gang injunctions are aimed at those suspected of engaging in gang-related activity. KCPOs were said to have a bigger aim in that they are also applicable to those who 'carry knives out of a misplaced sense of security'.[24]

A potential counterargument to the criticism of KCPOs failing to address underlying causes comes through the potential of positive requirements as part of the orders. Those requirements can include measures such as attending awareness classes, counselling, and mentoring. It could therefore be argued that this goes someway to attempting to address the root causes of offending.

Nevertheless, the necessity of these positive requirements has been questioned. Monaghan (2021) asserts that KCPOs do not add anything to existing opportunities provided to young people through courts imposing requirements in a Youth Rehabilitation Order. Youth Rehabilitation Order requirements include an activity requirement, a programme

[23] Hansard HC Deb. Vol. 654 Col. 31, 4 February 2019.
[24] Hansard HC Deb. Vol. 654 Col. 34, 4 February 2019 (Victoria Atkins MP).

requirement, and an education requirement.[25] Although Monaghan's criticism focuses on the usefulness of KCPOs for those aged under 18, it is arguably extendable to adult cases where a community order or suspended sentence is imposed with similar community requirements.[26]

It should be noted that Monaghan's criticism is only applicable to KCPOs on conviction. However, another difficulty applies to both those orders on conviction and those on complaint, which concerns whether the positive requirements are accessible. As Broadbent (2021) points out, intervention strategies often suffer from funding issues; for instance, 'there can be no mentoring requirement if there are no available mentoring services'.

Overall, although KCPOs were presented as having been asked for out of necessity, there is much debate over whether they are actually essential. They have been criticised by commentators as being motivated by 'political expediency' (Hendry 2022, p. 383) and 'moral panic' (Kinsey 2019, p. 9). It appears that even some Parliamentary supporters of KCPOs are doubtful about just how much change they can make. Baroness Williams of Trafford, Minister of State at the Home Office, stated, 'the Government do not pretend for one moment that KCPOs are the magic wand to answer all the problems of knife crime […] they are one tool, but an important one'.[27] Moreover, as recently as July 2021, during a debate on tackling knife crime, Kit Malthouse, then Minister for Crime and Policing, said that 'such is the urgency of the problem that there is no monopoly on ideas' and that Parliament 'should be willing to try everything'.[28] The pilot for KCPOs is also ongoing and has been extended past the planned conclusion by six months. They may still very much be a work in progress, and this leaves scope for debate about their usefulness.

Do KCPOs fulfil their purpose?

Evidently, the legislative intention behind the creation of KCPOs was that they would steer individuals away from knife crime. However, some have argued that it is questionable whether the orders fulfil this purpose or if, in reality, they encourage the opposite.

During a debate on the Offensive Weapons Bill, Sarah Jones MP stated that 'lawyers, magistrates and youth offending teams are all in agreement that, far from being preventive, as the name of the orders suggests, the orders will have unintended consequences that could criminalise a generation of young people and actively work against the Government's stated aim of reducing knife crime'.[29] This criticism refers to the viewpoint that those orders which are imposed on complaint rather than conviction can be a means by which youths are 'criminalised' through the possibility of them breaching a KCPO instead of being diverted away from the criminal justice system.

Statistically, it is likely that those subject to these orders are young. Unlike other ancillary orders such as sexual harm prevention orders and stalking protection orders, a significant

[25] Sentencing Act 2020, sections 173 and 174.
[26] Sentencing Act 2020, sections 201 and 290.
[27] Hansard HL Deb. Vol. 796 Col. 206, 26 February 2019.
[28] Hansard HC Deb. Vol. 699 Col. 340WH, 20 July 2021.
[29] Hansard HC Deb. Vol. 657 Col. 248, 26 March 2019.

number of KCPOs are being imposed on children. As of May 2022, children accounted for 40% of the total number imposed (18 out of a total of 45) (Metropolitan Police 2022). Only nine were imposed on defendants aged 24 and above. It was suggested during the Parliamentary process that young people can often have chaotic lifestyles, which may make it more difficult for them to comply with the orders. It is this lack of compliance that allows criminal proceedings to be brought against those subject to KCPOs. Thus, this brings them into contact with the criminal justice system and could potentially lead to them being convicted. This concern has since been separately raised by several individuals and organisations. One example is Hendry who referred to the 'comparative ease of inadvertent breach' and asserted that this contributes to 'stealth criminalisation of disadvantaged children' (2022, p. 381).

A joint briefing by the Prison Reform Trust and the Standing Committee for Youth Justice (2019) echoed this point. They suggested that there were 'insufficient safeguards built into the proposed legislation to ensure that the full circumstances of the child are taken into account' which led to the orders 'unnecessarily criminalising vulnerable children'. They feared that KCPOs were 'likely to become a backdoor to custody' rather than 'directing them into the care and support they need'. The helpfulness of the requirement for applicants to consult a youth offending team prior to applying for a KCPO was considered. However, it was criticised for two reasons. This was firstly because the now repealed[30] Anti-Social Behaviour Orders had required a similar endeavour, but findings had shown that the teams were not always consulted in practice, and secondly because the requirement is not present when applying for an interim order.

Ultimately, breaches of KCPOs are offences, which lead to potential criminal proceedings. Many subjects of the orders are young people who often have chaotic lifestyles and, as a result, may end up in breach. Such an outcome does little to prevent the furthering of their journey into the criminal justice system.

The low threshold for implementation of the orders and the significant consequences of breaching them

KCPOs are arguably the most prominent current example of orders making children subject to onerous terms with such a low threshold for their implementation. As mentioned above, potential positive requirements and prohibitions include curfews, exclusions, and counselling. The reality of the low threshold for this becomes apparent when comparing KCPOs with other ancillary orders. This is particularly the case with those imposable on children, such as Criminal Behaviour Orders, Sexual Harm Prevention Orders, and Sexual Risk Orders.

Unlike KCPOs, Criminal Behaviour Orders require the subject to have been convicted of a criminal offence.[31] Sexual Harm Prevention Orders also require a conviction or a caution for an offence.[32] Although their comparable civil orders, Sexual Risk Orders, do not require a

[30] Anti-Social Behaviour, Crime and Policing Act 2014.
[31] Sentencing Act 2020, section 331.
[32] Sentencing Act 2020, section 345.

caution or a conviction, the court must still be satisfied to the criminal standard that the subject has done an 'act of a sexual nature'.[33] This is a much higher threshold than for KCPOs, where the court only needs to be satisfied on the balance of probabilities that the subject has carried bladed articles with them twice.

This standard is significant since it means that individuals with no previous convictions or cautions can be made the subject of KCPOs. The Government appears to believe that this is necessary as a preventive measure. Yet, breaches of these orders can potentially have significant consequences in that they may result in a custodial sentence of up to two years being imposed. There is also a prohibition on courts imposing conditional discharges for such breaches. This means that, if those subject to the orders are brought into the criminal justice system through a breach, courts are restricted to imposing more severe penalties in response, such as fines, community orders, and imprisonment.[34]

Several individuals and groups have expressed their concern about the impact of this low threshold. The Magistrates Association (2021) cautioned that 'a police officer's suspicion would be sufficient evidence to impose a very restrictive order, with criminal sanctions if breached'. Hendry stated that the potential restrictions imposed by KCPOs 'sit uncomfortably alongside the civil standard of proof being employed by the court' (2022, p. 381). She referred to Ashworth's and Zedner's suggestion that 'civil preventive orders' are used as 'a model for increasing social control without the need to abide by the protection accorded to defendants in criminal cases' (Hendry 2022, p. 390). Hendry suggested that KCPOs are examples of such orders. Additionally, she later argued that this low threshold led to conflict between the orders and the rule of law (Green and Hendry 2022). This was said to be because they more easily allow control of individuals and separation between them and others to benefit the latter.

As mentioned previously, it is likely that those subject to these penalties are young. There is not, at the time of writing, a limitation on when KCPOs should be imposed on children, aside from the requirement for applicants to consult with a youth offending team prior to making the application. In contrast, for instance, guidance suggests that Sexual Risk Orders should only be used against children in 'very exceptional circumstances' (HM Government, Youth Justice Board for England and Wales 2022).

Nevertheless, it seems unlikely that defendants, particularly those of this age, would receive any custodial sentence for breaching a KCPO, let alone the maximum. As the Sentencing Children and Young People Definitive Guideline notes, a custodial sentence 'must be a last resort for all children and young people and there is an expectation that they will be particularly rare for children and young people aged 14 or under' (Sentencing Council 2017).

In summary, the terms of KCPOs can have a substantial effect on its subject's life. They can apply to young people and are more easily imposed than other ancillary orders, yet there are very severe penalties available in the case of breach. Although this reality is somewhat mitigated by low likelihood of individuals, and particularly young people, receiving the harshest sentences.

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[33] Sexual Offences Act 2003, section 122A(6)(a).
[34] Sentencing Act 2020, sections 173, 233, and 262.

The availability of legal representation

Another issue that arises with the process for applying for KCPOs is the likelihood of their potential subjects not receiving legal representation or advice.

One of the requirements that must be satisfied for a KCPO to be granted on conviction is that the conviction must be for a relevant offence. This can involve possession or use of a bladed article. Because of this, they may be serious enough to be imprisonable. This means that a defendant attending a first appearance concerning that offence may request the assistance of a duty solicitor to advise and represent them (Legal Aid Agency, October 2021, paras. 10.8c and 10.9). However, this is reserved for that first hearing since, at subsequent hearings, duty solicitors are not then required to help (Legal Aid Agency, October 2021, paras. 10.8a and 10.8d).

This situation is not specific to defendants who enter not guilty pleas or who give no indication of plea and proceed to trial. If a defendant enters a guilty plea at first appearance, the relevant magistrates or judge may determine that a pre-sentence report is required before sentence, which may then necessitate an adjournment. This can leave defendants unrepresented for later hearings when there may also be an application for a KCPO.

It may then be difficult for defendants who are faced with the lack of a duty solicitor after a first hearing to find and instruct a representative. Factors such as income and immigration status may mean that they cannot successfully apply for legal aid. It could also be the case that, despite them not qualifying for legal aid, they cannot afford to pay privately or find someone willing and able to represent them on a pro bono basis.

Adding to any uncertainty is the fact that the law governing these orders has already been subject to clarification and change. For instance, in November 2022, judgment was handed down in the outcome of an appeal against the decision of a district judge to refuse to grant a KCPO.[35] The reason for his refusal had been his view that the offence of possessing a bladed article in a public place was not a 'relevant offence' within the meaning of the test for an application made following conviction. The prosecution had, during the application, submitted that it was a relevant offence because the defendant had a bladed article with him when the offence was committed. However, the district judge had disagreed, stating that 'as a matter of logic […] the offence could not be both the underlying offence and fulfil the requisite additional feature of involving the possession of a blade'.[36] The High Court ultimately decided that it was a relevant offence, stating that the 'obvious meaning […] must be taken as the meaning for which Parliament intended'.[37]

There has also been a change which has impacted on the process following applications for KCPOs. Since June 2022, courts have been allowed to adjourn criminal matters following conviction and sentence, purely for the consideration of a possible KCPO.[38] This means that, even after a defendant may seem to have received punishment through a sentence, the court proceedings are continued. This can consist of hearings weeks or months later.

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[35] *Director of Public Prosecutions v Stanley* [2022] EWHC 3187 (Admin).
[36] [2022] EWHC 3187 (Admin) at para. 7.
[37] [2022] EWHC 3187 (Admin) at para. 22.
[38] Police, Crime, Sentencing and Courts Act 2022, section 167.

In addition to this prospect of adjournment after sentence, there is the possibility of the individual being deprived of their liberty in between hearings. For instance, if a matter is put over to another date for this reason and the individual is bailed to attend but does not, the court has the option to put out a warrant for their arrest. If the warrant is not backed for bail this may mean that, if the warrant is executed, they will be brought before the court in custody. It is unclear how often this would happen in practice but its existence as a possibility is significant.

Another option is that the proceedings are heard in the defendant's absence.[39] This is important given the potentially onerous terms and consequences involved in a KCPO, which a defendant may benefit from challenging.

Given all of this, it may be difficult for respondents to applications for these orders to navigate the process. This is even though the potential for onerous terms of the orders and consequences of any breaches means it is crucial for them to have sufficient understanding. The commonly young age of these individuals makes this consideration all the more paramount.

III. Conclusion

KCPOs have only recently been introduced and the law governing them is already changing. They can significantly impact those subject to them through prohibitions and positive requirements. Although they are civil in nature, breaching such an order amounts to a criminal offence and can attract a penalty of imprisonment.

Despite their severe consequences, they can be made against individuals who do not have previous convictions and the Metropolitan Police's most recent statistics show that 40% of those subject to KCPOs so far have been children.

Further difficulties arise in that the process of applications for these orders can be onerous and difficult to navigate and can even involve the deprivation of liberty. The individuals facing applications for these orders may be unrepresented due to the unavailability of legal aid and the restrictions of duty solicitors. This can leave them ill-equipped to effectively face a potential order. It is hoped that the law surrounding the orders will be further clarified as the pilot comes to an end and that the importance of individuals who face these applications having access to legal representation is well communicated.

[39] Offensive Weapons Act 2019, section 1(9)(b).

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