IN THE HIGH COURT OF JUSTICE AC-2025-LON-000781

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

SEX MATTERS

Claimant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

SKELETON ARGUMENT ON BEHALF OF THE DIRECTOR OF PUBLIC PROSECUTIONS

References are to the Core Bundle [CB/page] and the Supplementary Bundle [SB/page].

Essential reading:

(i) Exhibit TG/2: CPS Guidance on 'Deception as to Sex', as presently sought to be published at the conclusion of these proceedings [CB/ 319-334]

(ii) The sentencing note in R v H [SB/188]

(iii) 'Chapter 10: Consent' of the CPS Rape and Sexual Offences Guidance [herewith, to be added to the supplementary bundle]

(iv) The first witness statement of Thomas Guest at [CB/ 302–317] and particularly §§6, 10-13; 26-31

(v) The second witness statement of Thomas Guest at [CB/ 335–341].

(vi) The Defendant's Detailed Statement of Grounds [CB/116-150]

I. INTRODUCTION

1. This claim, brought by Sex Matters, seeks to quash the Guidance that the Director of Public Prosecutions ('the DPP') issues to specialist Crown Prosecutors who prosecute rape and sexual assault cases, on grounds that it is unlawful. The core of the supposed illegality is the Claimant's contention that a deception as to *gender* identity or status as opposed to *sex* can never vitiate consent for the purposes of rape or sexual assault. This claim is, in essence, an invitation to the High Court to state that this is the law and thereby find that the DPP's Guidance is unlawful.

2. The simple point on behalf of the DPP is that the law is not as definitive as the Claimant contends and that it would be an error to present the guidance as though it were. The implications of the Claimant's core contention also go beyond the contested Guidance. The Claimant's argument (by necessity) includes that the case of *R v H* (sentencing note at [SB/188]) amounts, in part, to a wrongful conviction. The Defendant in that case pleaded guilty, has not appealed their conviction and neither they, nor the victim, are parties to this claim. Consideration of the facts of that case demonstrate the sorts of issues which Crown Prosecutors may have to grapple with in this field and why this Court ought to be slow to accept the Claimant's principal contention.

3. All of this underscores the Director's concern about the Claimant's standing to bring this claim. It is not affected by the DPP's Guidance itself. It is an organisation with no special expertise or interest in the field of sexual offences. It does not represent the interests of any transgender people accused of rape or sexual assault but to opposite effect accuses the Director of Public Prosecutions of drafting guidance as "*though it were an inclusive equalities policy*" [Claimant's skeleton argument at [§44]]. It has no evidence to suggest that the Guidance is producing wrong decisions or leading to over or under prosecution or indeed leading to any problems at all.

4. Aside that the allegation of some form of ideological capture of the DPP is false (and has the appearance of wanting to politicise the issues), it also confuses the entirely legitimate exercise by the DPP of seeking to contextualise some of the issues that prosecutors might have to consider under the legal test that applies where consent may have been vitiated by

deception. This confusion is apparent in the very first paragraph of the Claimant's skeleton which attacks the Guidance for saying that "*questions of deception and consent may involve more/ complex issues where the suspect is trans or non- binary.*" That passage is not a statement of law but a reflection of the realities that prosecutors may face in this context. Consideration of some the cases which the CPS has had to decide whether or not to prosecute bears this out.

5. The Judgment of the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* [2026] A.C. 315 concerns only the construction of the words "sex", "woman" and "man" in the Equality Act 2010 and concludes that for the purposes of sections 11 and 212(1) of that Act they mean biological sex, biological woman and biological man. This statutory construction is not however relevant to, and is of no application to, Crown Prosecutors determining whether an individual should be charged with rape or sexual assault where it is alleged that consent has been vitiated by deceit.

6. The statutory test for consent is contained in section 74 of the Sexual Offences Act 2003 ("….*a person consents if he agrees by choice, and has the freedom and capacity to make that choice*."). This test requires a Crown Prosecutor to conduct a fact sensitive assessment as to whether any deception was sufficiently connected to the sexual act so as to vitiate consent. On the current state of the law, it cannot categorically be said that a deception as to gender will never be sufficiently connected to the sexual act. It would be wrong for the Guidance to state this and to therefore exclude any such case ever coming before the criminal court (and to exclude the law on this point being the subject of judge-led development and refinement).

7. The driver for this claim is the Claimant's ideological position that biological sex is immutable. From the Claimant's perspective, people who are transgender (regardless of any treatment they have or 'cosmetic surgery' [see the Claimant's skeleton at §40 (1)], remain their birth sex. Their gender identity is a construct or subjective belief about themselves [Claimant's skeleton at [§37]]. The Supreme Court in *For Women Scotland* stated that it is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex [§2]. Care needs to be taken in this claim not to produce

an outcome which risks precluding cases from even reaching court based upon the Claimant's core ideological, 'gender critical' or 'sex realist' beliefs.[1] These are the Claimant's principled beliefs rather than a statement of legal principle. The reality is that issues have already arisen in relation to consent connected to issues of gender identity and the Guidance must grapple with that (by providing a framework for decision making based upon those legal principles which can be stated with certainty and clarity).

8. It is repeated that the DPP has no ideological stake in the questions the claim raises. The DPP's only and proper concern is to assist Crown Prosecutors to apply the law and the Full Code Test to the varied (often complex) circumstances in which charging decisions, in this field, fall to be made.

9. The DPP's response to this claim may be conveniently summarised as follows:

   i. The Claimant lacks standing. It does not represent the interests of those persons affected by the Guidance (the victims of crime or defendants). It does not otherwise have a sufficient interest in its subject matter.

   ii. The Guidance reveals no error of law (contrary to Ground 1) – there is no authority for the Claimant's principal proposition, that a deception as to gender identity (or status) is incapable of vitiating consent. Nor does the Guidance direct prosecutors to treat self-identification as sex. The Guidance does not therefore positively direct or authorise Crown Prosecutors to commit unlawful acts; and

   iii. The Guidance does not, read as a whole, present a misleading picture of the true legal position (contrary to Ground 2). It must be assessed in its highly specific context. The guidance does not purport to be exhaustive as to the law but provides a framework for making the decision whether to prosecute. Standing back and assessing the guidance as a whole, it is not confusing nor misleading.

II. The Guidance and its context.

10. Under section 10(1) of the Prosecution of Offences Act 1985, the DPP is required to issue a Code for Crown Prosecutors: "*giving guidance on general principles to be applied by*

[1] These are the terms which Ms Forstater uses in her statement [CB/267- 268 at paragraph 5].

[prosecutors] (a) in determining in any case— (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or (ii) what charges should be preferred; and (b) in considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case."

11. This Code is the Code for Crown Prosecutors, which sets out the full code test for the prosecution of offences. The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage. The evidential test requires prosecutors to be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. It also requires prosecutors to consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed.

12. A finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence. It requires the prosecutor to determine whether an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

13. The Code for Crown Prosecutors is the basis of the decision to prosecute and no legal guidance replaces it or takes precedence over it.[2] But, as explained in the first witness statement of Mr Thomas Guest [CB/302–317], the DPP issues guidance which supplements the Code for Crown Prosecutors. This includes the Rape and Sexual Offences (RASSO) legal guidance which consists of 16 separate Chapters. The "Deception as to Sex" section forms part of Chapter 6 (Consent).

14. The RASSO guidance should be seen as a *framework* for prosecutorial decision making. As stated by Mr Guest:

[2] Per Rape and Sexual Offences - Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences

"There are authoritative texts including Archbold, Blackstone's and Rook and Ward available to prosecutors as legal resources: prosecution guidance should focus less on being a guide to the law and more on suggesting a framework for decision-making. The Code for Crown Prosecutors is the primary decision-making guidance for prosecutors: prosecution guidance should supplement this where necessary, particularly to assist prosecutors with the assessment of the evidential and the public interest stage of the decision to prosecute and also the selection of charges."[3]

15. The "Deception as to Sex" section of the Guidance does not purport to define the limits of qualifying deceptions, nor does it bind prosecutors to a particular outcome. It assists prosecutors in applying the law, in determining whether to prosecute, in an often complex and relatively rare class of case, namely where it is alleged that consent to sexual activity was obtained by a deception as to sex.

16. The Guidance was the subject of a public consultation. The CPS published a consultation document in 2022 [SB/55–59], which generated 409 responses (including from the Claimant [SB/60–82] and a range of other organisations). It published a summary of those responses and its analysis [SB/151–186]. This is a high level of response despite how infrequently deception as to sex actually arises (Mr Guest was able to identify only three cases which have fallen for decision since December 2024) [CB/ 307 §12].

17. The version of Chapter 6 under challenge was issued following that consultation process. Its operative part directs prosecutors through a structured "Three Stage Test" – (i) was there a deception; (ii) did it vitiate consent (applying the close-connection test in *R v Lawrance* [2020] 1 W.L.R. 5025); and (iii) did the suspect reasonably believe in consent.

18. The Crown Prosecution Service engaged with the Claimant at the pre-action stage of these proceedings. As set out in the statement of Mr Guest [CB/313 §23], the CPS was willing to make some amendments to the guidance. These amendments are apparent on the version of the guidance at [CB/ 53- 68]. However, upon reflection the CPS considers that some of these concessions went too far and are not helpful to prosecutors. It intends to retain some of the guidance [Guest at CB/313 §23 and CB/329 and 330 (which highlights the passages the DPP wishes to retain)].

[3] First witness statement of Thomas Guest, para.6, [CB/304]

III. Public law challenges to the DPP

19. Public law challenges to the DPP are usually challenges to decisions whether or not to prosecute in a specific case. It is exceptionally rare for issues as to the legality of CPS policy to arise: *R(L) v DPP* [2013] EWHC 1752 (Admin), Sir John Thomas P (as he then was) [§7]. This reflects the courts' very strict self-denying ordinance about interfering in the functions of the DPP. To do so is "rare in the extreme" (*R v Inland Revenue Comrs, Ex p Mead* [1993] 1 All ER 772, 782); the Court's supervision is "sparingly exercised" (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136 , 140); the Courts are "very hesitant" to interfere; (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); it is "very rare indeed" (*R (Pepushi) v Crown Prosecution Service* [2004] Imm AR 549 , para 49) and occurs "very rarely": (*R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635 § 63).

20. This line of case law is not simply a reflection of the constitutionally sensitive position of the DPP as independent of the Courts but also lies in "*the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits." Per* Lord Bingham in *R (Corner House Research) v SFO* [2009] 1 AC 756 § 31 approving *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735-6).

21. Whilst it may be open to the Courts (in limited circumstances) to require the DPP to publish a policy, it cannot say what that policy should be: *R (on the application of Nicklinson and another) v Ministry of Justice* [2015] A.C. 657, per Lord Neuberger at §41(emphasis added):

> *"However, that does not undermine the force of the constitutional argument that it is one thing for the court to decide that the DPP must publish a policy, and quite another for the court to dictate what should be in that policy. The purpose of the DPP publishing a code or policy is not to enable those who wish to commit a crime to know in advance whether they will get away with it. It is to ensure that, as far as is possible in practice and appropriate in principle, the DPP's policy is publicly available so that everyone knows what it is, and can see whether it is being applied consistently. While many may regret the fact that the DPP's policy is not clearer than it is in relation to assistance given by people who are neither family members nor close friends of the victim, and while many may*

believe that the policy should be the same for some categories of people who are not family members or close friends as for those who are, it would not be right for a court in effect to dictate to the DPP what her policy should be."

22. *End Violence Against Women (EVAW) v DPP* [2021] 1 W.L.R. 5829 is a rare example of a challenge to prosecutorial guidance but was brought by a large coalition of organisations with expertise in violence against women and girls (including organisations representing female complainants in sexual offences cases). It was brought on the specific basis that a change to guidance on the prosecution of rape was irrational and gave rise to a risk of systemic illegality (which the Claimant sought to prove by adducing evidence that the change to the guidance precipitated a statistical decline in cases being prosecuted). The Court of Appeal (hearing the claim at first instance) rejected both grounds. It did not accept the changes to the guidance left specialist RASSO prosecutors in a state of confusion or created any risk of systemic illegality (i.e. that prosecutors would not apply the Code for Crown Prosecutors correctly).

23. The Courts' reluctance to interfere with the DPP's exercise of his powers or in his promulgation of policy continues to matter in this claim because it is not simply a challenge to a statement or a test as to what the law is. It encompasses a broader challenge to the guidance (questioning for example those parts of the guidance which considers background matters [See the Judicial Review Grounds at §26]). Equally, the polycentric nature of prosecutorial policy requires the DPP to hold in balance the interests of complainants, of those suspected of crime, and of public interest.

IV. Standing

24. Standing does not have to be raised at the permission stage of a judicial review; *The Queen* (*On the Application of Good Law Project Limited*, *Runnymede Trust*) v *The Prime Minister*, *Secretary of State for Health and Social Care* [2022] EWHC 298 (Admin) [§17] ("*Good Law Project")*.This is because it may only be at the point of the substantive hearing, when the legal and factual merits of the claim are clear, that lack of standing is apparent or the implications of a Claimant's lack of standing are apparent. Standing and the merits of the issues are often strongly interlinked; *Good Law Project* at [§19].

25. This is a claim with the potential to affect prosecutorial decision making in future, unknown cases and in relation to at least one conviction (*R v H*). It encompasses the interests of future victims of potential crime and defendants and the actual victim and defendant in *R v H*. No such challenge was brought in that case to the guidance or to the law upon which the prosecution was based (to the contrary the defendant pleaded guilty). No challenge has been brought to guidance on deceit as to sex by anyone directly affected by it. The Claimant is not personally nor directly affected by any past decisions in this area and will not be so affected by future decisions.

26. The Claimant's interest in advancing gender critical approaches in different arenas does not give it expertise or a special interest in the prosecution of sexual offences. Rather, the Claimant appears to want to use the guidance on consent to further its much broader gender critical agenda. This is apparent given the tiny number of cases this area of law actually generates (i.e. the three cases since December 2024).

27. But even a sincere or expert interest in a subject to which the claim relates may not be enough to demonstrate sufficient interest under section 31(3) of the Senior Courts Act 1981; *Good Law Project* at §§ [28], [31]–[34] citing *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 and *Walton v Scottish Ministers* [2012] UKSC 44); *R (Good Law Project Ltd) v Equality and Human Rights Commission* [2026] 4 W.L.R. 36 (at [§16]).

28. The Claimant falls into none of the categories of organisations which might ordinarily have standing to bring this sort of policy challenge. It does not have "associational standing" (it is not bringing a claim on behalf of members affected by the policy). It does not have surrogate standing (it is not bringing the claim to represent people who might be affected by a decision to prosecute and who may be incapable of bringing a challenge to the specific prosecutorial decision affecting them) and it cannot claim public interest standing given that it does not represent the public interest but a body of people with an interest in gender critical ideas.

29. In *AXA General Insurance Ltd v HM Advocate* Lord Reed at [170]) stated that some contexts make it appropriate to require an applicant for judicial review to demonstrate that

it has a particular interest in the matter complained of. The DPP would not use the pejorative 'busybody' of *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51 Lord Reed (at [94]) (clearly Lord Reed was referring to the sort of claim brought by a single person when using it). Rather, in a challenge to guidance on prosecutorial decision making, where the Claimant is not an individual directly affected by it, there *is* a need to demonstrate a particular interest or expertise, for example, in representing people affected by that area of criminal law (like End Violence Against Women).

30. Moreover, in circumstances where the Claimant promotes a particular position on a subject of special interest to it (here the relationship between sex and gender identity) and which is a contested one in public discourse, characterising its *own* contested viewpoint as "the public interest" does not give it standing.

31. Per *Good Law Project* at §28, one question which bears upon standing is whether there are, or would be, "obviously better-placed challengers". People affected by a decision made under the policy would plainly be better placed to bring such a challenge.

32. The Court of Appeal's grant of permission in the Hampstead Ponds litigation [CB/259], on which the Claimant relies, does not assist it. Permission was refused below on the ground that an individual affected by the access decision was the better-placed challenger ([2026] EWHC 149 (Admin)). As it is understood, the subsequent grant of permission on the papers means that standing in that claim will not be the subject of full argument in the Court of Appeal. In any event, the claim is distinguishable. It concerned a discrimination challenge to an access arrangement directly affecting an identified class, supported by evidence from affected individuals and brought under section 113(3) of the Equality Act 2010. The point here is that challenges to prosecutorial policy are in a different category when it comes to standing given their scope to affect (in profound ways) the rights and interests of a very specific class of people. This is not the equivalent of using a pool.

33. If an individual contests the legal basis upon which they have been charged that decision may be challenged through the ordinary criminal process (by way of an application to dismiss, or an abuse of process argument, or by an appeal against conviction). Where a

complainant is aggrieved by a decision not to prosecute, that decision may be the subject of a review under the Victims' Right to Review scheme and by judicial review (as in *R (Monica) v Director of Public Prosecutions* [2019] Q.B. 1019 and *R (F) v Director of Public Prosecutions* [2014] QB 581).[4] Importantly, in all of these contexts, the criminal court or the High Court would have a factual context within which to consider the lawfulness of the approach taken.

34. The Claimant's point (the Claimant's skeleton at §65) that to require a directly affected claimant would exclude expert interest groups – overstates the DPP's case. The DPP does not contend that an interest group can never have standing. The point is more nuanced (per paragraph 29 above).

V. Policy Challenges

35. The DPP accepts that if the Guidance contains a clearly identifiable error of criminal law, then it may be susceptible to judicial review (consistent with the position which was taken in *End Violence* at [§68]). It contains no such error.

36. By taking the same approach as was taken in *End Violence* the DPP is taking a pragmatic approach to this claim (nonetheless the Claimant appears to criticise him for it).

37. The separate point made on the DPP's behalf, is that the prosecutorial guidance does not fall within the rubric of the three broad types of case identified in *R (A) v SSHD* [2021] 1 WLR 3931 at §46 where a policy may be found to be unlawful by reason of what it says or omits to say about the law. In summary:

    (i) The Guidance here does not contain any positive statement of law which is wrong and which positively directs or approves the Crown Prosecutor to commit unlawful acts: see A at § § 34; 38 and 41; *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* at §§ 51- 52; 61.

[4] The Victims' Right to Review ('VRR') Scheme is a non-statutory CPS review mechanism, reflected in the rights conferred by the Victims' Code (issued under s.2 of the Domestic Violence, Crime and Victims Act 2004), by which victims may seek review of certain decisions not to institute or continue criminal proceedings.

(ii) Nor does *Gillick* entail a duty to produce guidance which attempts to eliminate uncertainty in relation to the application of a stipulated legal rule [BF at §52].

(iii) As regards categories (ii) and (iii), this has no obvious application to prosecutors (lawyers) applying the law (and not just guidance) to determine whether on a given case there is sufficient evidence to provide a realistic prospect of conviction. Nor does the guidance have the qualities that (ii) and (iii) are concerned with (in so far as it is a framework and expository).

38. It is accepted that the meaning of the Guidance is an objective question for the Court (*R (Duke of Sussex) v SSHD* [2025] 4 WLR 66 at [63]; *Lambeth LBC v SSHCLG* [2019] 1 WLR 4317 at [19]). Read objectively and as a whole, and giving the words their natural and ordinary meaning in context, the Guidance neither misstates the law nor directs any unlawful course in relation to the law on consent. The Claimant's case depends on reading impugned passages in isolation, against the grain of the document read as a whole.

VI. The Law on Consent

39. Lack of consent is an element of a number of offences under the Sexual Offences Act 2003 (Rape (Section 1(1)(b)); Assault by Penetration (Section 2(1)(b)); Sexual assault (Section 3(1)(c)) and Causing a person to engage in sexual activity without consent (Section 4(1)(c)). It is of note that a penis, for the purposes of these provisions includes a surgically constructed penis (in particular, through gender reassignment surgery) [see section 79(3)].

40. As set out above, it is section 74 which provides for the basic definition of consent (emphasis added): "*For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice*."

41. Sections 75 and 76 provide, respectively, for evidential and (in two narrow categories) conclusive presumptions. Because section 76 enacts presumptions conclusive of guilt it is confined narrowly, see *R* v *Jheeta* [2008] 1 WLR 2582 (at [24]). Cases falling outside this narrow ambit fall to be determined under section 74:

(i) In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Sir John Thomas PQBD and Ouseley J), the deception was that Mr Assange knew that the complainant

would only consent to sexual intercourse if he used a condom throughout, but he had concluded sexual intercourse with her without a condom [at §79]. The High Court concluded [§§ 86 and 87] that s.76 had no application as having sexual intercourse without a condom (or in continuing sexual intercourse having removed, damaged or torn the condom) was not deceptive as to "the nature or quality of the act". Rather the question of consent was to be determined by reference to s.74. The High Court observed that [90]: "*In our view s.76 deals simply with a conclusive presumption in the very limited circumstances to which it applies. If the conduct of the defendant is not within s.76, that does not preclude reliance on s.74."*

(ii) In *R (F) v Director of Public Prosecutions* [2014] QB 581 the deception related to a representation that ejaculation would only take place outside the body. On the question of whether this constituted rape, the High Court (Lord Judge CJ at [§26]) viewed *Assange* as underlining that 'choice' is crucial to the issue of 'consent' and the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a *broad common-sense* way. On this basis, a deceit that ejaculation would occur outside the body was capable of negating consent.

42. *R v McNally* [2014] Q.B. 593 (Leveson LJ, Kenneth Parker, Stewart JJ) concerned the "*undeniably unusual*" circumstances [§3] where a female defendant conducted a relationship with a girl but purported to be a boy. Straightforwardly, the defendant presented herself as male. As the Guidance and the Claimant both accept, references in the judgment, to the complainant being deceived as to the defendant's "gender", refer to her sex. The Court's interchangeable use of "sex" and "gender" was, in that case, a matter of vernacular.

43. The penetrative offences before the Court were six counts of assault by penetration, contrary to section 2 of the 2003 Act, committed by digital penetration. The complainant was not deceived that she had been penetrated by a penis but rather by the identity of the person with whom she had had sexual activity.

44. The Court of Appeal in *McNally* recognised that some deceptions (for example as to wealth) would *obviously* not be sufficient to vitiate consent but beyond this [25]:

"*In our judgment, Lord Judge CJ's observation that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way" identifies the route through the dilemma*."

45. Applying this in *McNally* the Court of Appeal concluded that [§26]:

"Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant's deception. [§27] It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent …."

46. In *R (Monica) v Director of Public Prosecutions* [2019] Q.B. 1019 the Claimant's case (on a judicial review of a decision not to prosecute) was that she would never have entered into a sexual relationship with a man had she known that he was an undercover police officer. The High Court concluded that this broad deception as to identity did not vitiate consent but that a deception which was closely connected with the nature or purpose of the act, because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, was capable of negating a complainant's free exercise of choice [§72].

47. The High Court also observed that *McNally* could be analysed as an identity or impersonation case, given the centrality of an individual's sexuality to her or his identity [§77]. The significance of this is apparent at §80 where the High Court observed that "*…deceptions which are not closely connected to the performance of the sexual act, or are intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation"* had not been found to vitiate consent.

48. In *Regina v Lawrance* [2020] 1 W.L.R. 5025 (Lord Burnett of Maldon CJ , Cutts, Tipples JJ) (concerning a representation that the defendant had had a vasectomy), the Court of Appeal expressed the issue as whether a lie as to fertility is so closely connected to the

nature or purpose of sexual intercourse rather than the broad circumstances surrounding it, that it is capable of negating consent. The Court of Appeal concluded at [§36] that a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw (having promised to do so) and different from engaging in sexual activity having misrepresented one's gender. The factors which distinguished the case were that [§37] the complainant agreed to sexual intercourse with the defendant without imposing any physical restrictions. She had agreed both to penetration of her vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it. The result was that for the purposes of section 74, the complainant was not deprived by the defendant's lie of the freedom to choose whether to have the sexual intercourse which occurred.

49. *Lawrance* did not purport to be exhaustive as to the circumstances in which a deception might vitiate consent for the purposes of section 74. Rather the Court applied a test as to whether a lie is so closely connected to the nature or purpose of sexual activity rather than the broad circumstances surrounding it, that it is capable of negating consent. The Lord Chief Justice observed:

"42. …consent is defined by section 74 with evidential presumptions found in s.75 and the conclusive presumption in s.76 . Any novel circumstances must be considered by reference to the statutory definition, namely whether an alleged victim has agreed by choice and has the freedom and capacity to make that choice."

50. There is a good deal of academic criticism about this area of law.[5] *R v Lawrance* prompted more. See, for example Ormerod: "*Rape and deception (again)*" Crim LR 2020, 10, 877-881 [at 879] that:

"In practical terms it does not render any easier the prosecutor's task in determining which deceptive conduct reported by complainants constitutes rape. Nor, in policy terms, is the message one that maximises the protection of sexual autonomy. Applying the reasoning in [37] above, a complainant's autonomy is afforded less protection in law where she is

[5] The genuinely unsettled state of this area is independently recognised: the Law Commission's work on consent in the criminal law records that the law on consent remains 'unsettled, incoherent and unpredictable', and that the courts have struggled to reach consistent answers on the effect of deception on consent. See Law Commission, Consent in the Criminal Law (ongoing project), available at https://lawcom.gov.uk/project/consent-in-the-criminal-law/ (accessed 24 June 2026).

deceived about her partner's need to use a condom (leading her to impose no "physical restrictions") than about whether he was actually wearing a condom."

51. The current state of the case law on section 74 prompted the Lady Chief Justice to observe in *R v BVA* [2026] 1 W.L.R. 621:

"45. .... The authorities on section 74 referred to above are not necessarily always easy to reconcile, and there may be no bright lines to draw. Perhaps unsurprisingly, they have aroused considerable academic interest: see for example Rogers " R v Lawrance – the right outcome" Arch Rev 2020, 8, 4-6; Murray and Beattie " Conditional consent and sexual offences: revisiting the Sexual Offences Act 2003 after Lawrance " Crim LR 2021, 7, 556-574; Ormerod " Rape and deception (again) " Crim LR 2020, 10, 877-881.

52. In *BVA*, the Lady Chief Justice sought to distil the caselaw into a set of propositions (set out here for ease and emphasis added) [§46]:

(i) There is no material difference for present purposes between an express deception or, as here, a failure to disclose (*Lawrance* at para 41).

(ii) The "but for" test is insufficient of itself to vitiate consent (*Lawrance* at para 34).

(iii) Consent is capable of being negated as a matter of law if the deception (or failure to disclose) relates to the sexual activity itself rather than the broad circumstances surrounding it (*Monica* at para 72). The issue is whether the relevant matter was sufficiently closely connected to the sexual activity (by reference to its nature, purpose and performance), rather than the broad circumstances surrounding it (*Lawrance* at paras 35 and 41).

(iv) Broad common sense has a role to play in finding the answer but does not relieve a court from the obligation of identifying the boundaries within which a jury should be asked to bear its common sense (*R (F)* at para 26; *McNally* at para 26; *Monica* at para 82 approved in *Lawrance* at para 33). So, a vitiating deception is not limited to the strict (narrow) physical performance of the act (see, for example, the facts of *McNally*).

53. In *BVA*, the appeal gave rise to novel circumstances not considered before. The defendant and the complainant were in a sexually intimate relationship. The defendant filmed himself touching the complainant's breasts while she was asleep. He was charged with sexual assault, contrary to section 3(1) of the Sexual Offences Act 2003. The prosecution case was that any consent which the complainant might have given to the defendant touching

her whilst she was asleep was negated by the defendant filming the touching, to which she had not consented. The Lady Chief Justice set out her approach at (set out here to demonstrate her synthesis of the principles) [§47]:

"We approach the exercise by reference to the statutory definition, namely whether C2 agreed by choice and had the freedom and capacity to make that choice, and adopting a broad common sense yet principled approach. The question is whether a failure by the defendant to disclose to C2 the filming that took place was capable in law of negating her consent. Choice is crucial to the issue of consent. Was the filming that took place sufficiently closely connected to the sexual touching such that a lack of consent deprived C2 of her choice? Or was the filming simply part of the broad circumstances surrounding the sexual touching?"

54. Recognising that vitiating deception is not limited to the strict physical performance of the act and applying this synthesis (a *broad common sense yet principled* approach to whether the filming was *sufficiently closely connected* to the sexual act), the Court of Appeal concluded that it was.

55. *BVA* reinforces the points that the caselaw is not straightforward and is subject to ongoing development (the holding of a camera / taking of images is wholly extraneous to the sex act hence deceit is not limited to the physical performance of the act); that the law in this area will continue to apply in novel situations and that there is a need for guidance to permit of this. Indeed, that the guidance addresses a developing field on a fact-sensitive basis, rather than purporting to resolve it, tells against any suggestion that it misstates a settled legal position.

56. In summary, none of the authorities cited above addresses whether a deception as to a suspect's transgender status or history, or as to gender identity, can vitiate consent. That is the gap the Guidance recognises and addresses.

57. Applying *BVA,* whether a deception as to a suspect's gender identity or transgender status is sufficiently closely connected to the sexual activity (by reference to its nature, purpose and performance), rather than the broad circumstances surrounding it in a given case will likely turn on a fact sensitive assessment. The Lady Chief Justice's point, that resolving whether consent has been vitiated by deceit, may oblige a Court to identify the boundaries within which a jury should be asked to exercise its common sense is an observation about how criminal courts should approach these issues, developing the law case by case, given that there are no bright lines.

R v H (Case 1)

58. The case of *R v H* [Sentencing Note at SB/ 188] illustrates the risks in the Claimant's invitation to the High Court to declare that consent cannot be vitiated by a deceit as to gender identity. In *R v H*, the victim had been in a relationship with H. The defendant, a biological woman, disclosed that she was a biological woman but deceived the complainant into believing that she lived as a man and had undergone gender reassignment, including having a surgically constructed penis. As the sentencing note details the defendant provided the victim with information intended to and which did convince her that the defendant was no longer female but a post-operative male. The victim would not have had a sexual relationship with a woman [§21]. The counts on the indictment related to acts of oral sex and one of penetration (when the victim believed that she was being penetrated by the defendant's penis).

59. The High Court is asked to consider this sentencing note carefully in light of the Claimant's core submission that a deception as to gender cannot vitiate consent because it is not sufficiently connected to the sexual activity. The Claimant appears to accept that the penetration constituted an offence (on the basis the claimant was deceived into thinking she was being penetrated by a penis) but that the offences related to oral sex amount to wrongful convictions because lies about how the defendant identifies or what 'cosmetic surgery' she had "are not felt in the performance of cunnilingus" on the victim [the Claimant's skeleton at §42(1)]. It is respectfully submitted that drawing such a distinction appears artificial and to minimise the nature of the deceit upon the victim (which can't sensibly be thought to turn on the difference between penetration and oral sex). The distinction also cannot be reconciled with *McNally*, where the penetration was digital. A hand is no more inherently sexed than the mouth; yet in *McNally* the deception as to the defendant's sex vitiated consent and the convictions were upheld. If such a deception can vitiate consent to digital penetration, there is no principled basis on which it cannot equally vitiate consent to oral sex.

60. The evidence about other cases shows, despite the difficult case law in this field, the Guidance operating soundly, not producing over or under prosecution. Mr Guest's evidence describes the cases considered under the current Guidance [CB/338–340]:

(i) In Case 2 (a trans man and a cis man who met online), no further action was taken: there was insufficient evidence of any deception, and the complainant had continued sexual activity after learning the suspect was trans [CB/338–339]. This is an example of the Guidance screening out a weak case, not over-charging.

(ii) In Case 3 (a cis woman deceived by a biologically female suspect who lied about wearing a binder) the deception was as to sex, and the charges (assault by penetration and sexual assault) fall squarely within *McNally* [CB/339–340].

(iii) In Case 4 (a female complainant deceived into believing she was engaging in sexual activity with a fictional male nephew) the deception was, again, as to sex, within *McNally* [CB/340].

VII. GROUND 1 – THE GUIDANCE DOES NOT MISSTATE THE CRIMINAL LAW

61. Ground 1 is that the Guidance confuses two legally distinct conditions – the objective fact of sex and the subjective belief of gender identity – and treats "sex and/or gender identity" as if they were legally equivalent (Claimant's Skeleton at §35). The premise is wrong and the conclusion does not follow.

62. First, the Guidance does not conflate the two concepts. They are separately and carefully defined [CB/53–56]. Nowhere is a prosecutor guided to accept that whatever sex a suspect identifies as is to be treated as their sex. The portmanteau "sex and/or gender identity" does not assert legal equivalence; it reflects that, at the first stage, the question is the subjective one of what was of importance to the complainant. This may, as a matter of fact, relate to the suspect being or not being transgender.

63. Second, the impugned passages are legally sound. The statement that prosecutors must ascertain whether the suspect's sex and/or gender identity was a matter of importance to the complainant – "exclusively a subjective question" [CB/62–63] – is correct: its focus is on what was important to the complainant, and it leaves open the factual possibility that a suspect's transgender identity was important, without directing that such importance suffices in law. The "non-trans male" illustration [CB/63] is simply an illustration of the straightforward case, not an assertion of legal equivalence.,

64. It is significant that the passages the Claimant attacks are directed to the complainant's subjective state of mind – what mattered to the complainant, and whether the complainant was deceived – not to any direction that a suspect's self-identification fixes the suspect's sex. This is an orthodox application of section 74, which is concerned with the /complainant's freedom and capacity to choose. To the complainant in a case such as *R v H*, the suspect's asserted male identity, and the belief that the suspect had transitioned and had male genitalia, were matters of fact and of evident importance. The Guidance also reflects, correctly, that a deception may be analysed as one of impersonation where it is intrinsically fundamental owing to its connection to the act (*Monica* at [§80]). None of this misstates the law.

65. Third, there is no authority for the proposition that gender identity is "legally irrelevant", such that a deception as to it can never vitiate consent. Section 74 does not limit the circumstances in which consent may be vitiated by deception. The Claimant's reliance on *Monica* does not establish the proposition: a deception about whether a partner is transgender is not equivalent to a deception about political beliefs, because the former is capable of bearing on the basis on which the complainant chose to engage in the act in a way the latter is not. Indeed the Divisional Court in *Monica* itself accepted that *McNally* could be analysed as an identity or impersonation case, given the centrality of an individual's sexuality to their identity (at [77]) – an analysis sensitive to the facts, not a categorical exclusion. Whether, on the facts of a given case, such a deception is sufficiently closely connected is a fact-sensitive question, not one foreclosed by law. The point is not academic. If a complainant agrees to sexual activity on the understanding that her partner is a trans man, and that is a matter of importance to her, a suspect who has fabricated that history in order to obtain her agreement has practised a deception bearing directly on her freedom to choose. On the Claimant's absolute rule, a prosecutor could not even assess whether it vitiated consent. That cannot be right, and it is not what section 74 requires.

66. Fourth, *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2026] AC 315 does not assist the Claimant. The implications of the Supreme Court's observation that people are not sexually oriented towards those holding a gender recognition certificate (at [204]) should not (as the Claimant seeks) be overstated. The Claimant builds on the same observation (the Claimant's skeleton at §37) to argue that gender identity is too remote

from the sexual act because it is "not part of the 'performance' of the sexual act" and is not something towards which a person is sexually oriented. But that is not the test. In *BVA* the deception lay in the defendant's covert filming of the sexual activity: the filming was no part of the strict physical performance of the act, and is not something towards which a person is sexually oriented, yet the Court of Appeal held it capable of negating consent. The only test, it held, is whether the matter is sufficiently closely connected to the sexual activity by reference to its nature, purpose and performance (at [§46]). The court expressly held that a vitiating deception is "not limited to the strict (narrow) physical performance of the act" (at [§46]). The narrower test the Claimant advances, which would confine section 74 to the act's strict physical performance, is the very test *BVA* rejected.

67. Fifth, the law does not exact what the Claimant says it does. The Claimant's case is that there must be candour about biological sex before any sexual activity can be deemed consensual; unless there has been express mutual acceptance of the irrelevance of biological sex to the contemplated activity (the Claimant's skeleton at §3). That is not the law. The implication is that a trans person could not lawfully kiss a willing partner on a dancefloor without first disclosing their birth sex, against the contingency that the partner might have attached importance to it – an outcome the authorities, with their insistence on a close connection to the performance of the act and a broad, common-sense approach, do not support. It is precisely because the criminal law in this area is intended to track common-sense intuitions about sexual autonomy, rather than to impose bright-line interpersonal duties of disclosure, that the fact-sensitive approach in *Lawrance* and *BVA* is to be applied. The Guidance properly directs prosecutors to conduct a fact-sensitive assessment rather than purporting to pre-empt the conclusion to be reached in every case.

68. Two subsidiary points may be taken shortly. First, the Claimant complains (the Claimant's skeleton at §40) that the Guidance is "silent" on any scenario in which a complainant is deceived as to a suspect's gender identity. That criticism sits uneasily beside the Claimant's separate complaint that the Guidance says too much. The entire subject of the contested Guidance is how the close-connection test applies where a suspect is trans or non-binary. A framework document is not required to set out a worked example of every factual permutation. Second, the Claimant accepts (the Claimant's skeleton at §40) that a reference to being trans may be "revelatory" of sex, and so relevant. That concession is fatal to the

absolute proposition on which Ground 1 depends: if a representation touching gender identity can, depending on the facts, bear on the complainant's knowledge of sex, then whether it does so is a fact-sensitive question, exactly what the Guidance conveys.

VIII. GROUND 2 – THE GUIDANCE DOES NOT PRESENT A MISLEADING PICTURE

69. Ground 2 invokes the third category of case in *R (A)* at [46(iii)]: where an authority purports to provide a full account of the legal position but, by misstatement or omission, presents a misleading picture. The DPP's response is twofold: as above, the Guidance does not fall within the rubric of the third category; but in any event, read as a whole, the Guidance is not misleading.

70. A Crown Prosecutor is not analogous to a civil servant who is given legal direction in order to apply a policy to produce an outcome. Prosecutors are themselves lawyers applying the law, with recourse to the authorities and the standard practitioners' textbooks in order to make a decision as to whether an individual should be prosecuted under the Code for Crown Prosecutors. Moreover, the Guidance provides a framework for decision-making, not an exhaustive statement of the law. Whilst it outlines existing law and the authorities, it does not direct or condition prosecutorial outcomes by prescribing how a discretion should ordinarily be exercised. It is essentially expository, identifying the principles drawn from section 74 and the authorities, and the matters that may bear on a prosecutor's fact-sensitive assessment, rather than prescribing outcomes in defined classes of case. Expository guidance of that kind does not hold itself out as a comprehensive, self-applying statement of the law, and is not obviously within category (iii).

71. In any event, the Guidance is not misleading read fairly and as a whole. The Claimant accepts that the Three Stage Test which structures the Guidance is an appropriate formulation of section 74 (the Claimant's skeleton at §33), and that the Guidance states the *Lawrance* test correctly at several points (the Claimant's skeleton at §§34, 45). Its remaining complaints are directed at individual passages read in isolation.

72. The second-stage factors *('was the Claimant deceived')* the Claimant criticises (the Claimant's skeleton at §50) are, on examination, proper evidential considerations going to whether the complainant was in fact deceived: the complainant's characteristics and life experiences; whether the suspect has had gender reassignment treatment (relevant where a deception is alleged against a person who is, or claims to be, transgender); the degree to which the suspect's sex or trans identity was apparent (which bears directly on whether there was any deception); the complainant's opinion towards lesbian, gay or trans people and the suspect's knowledge of it; the length and nature of the relationship; and the use of a prosthetic device. None of this misstates the law. That individual errors in applying the Guidance can be imagined does not make the Guidance unlawful: the question is whether it is capable of lawful operation and plainly it is.

73. As regards the third stage (*did the suspect reasonably believe that the complainant consented*), the degree to which the suspect's trans or non-binary identity was apparent to the complainant is capable of bearing on the reasonableness of that belief: a suspect whose position was obvious may the more readily have believed in consent. This reflects the orthodox position that *whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents*. In light of the Claimant's acceptance (the Claimant's skeleton at §52) that matters connected to gender identity may be relevant at the third stage, the objection at §53 is difficult to reconcile with that concession.

74. The Claimant's complaint about the first bullet point under "Other case law" (the Claimant's skeleton at §§45–46) – that it states principles not found in any decided case – misunderstands the Guidance. The Guidance does not present that passage as a distillation of decided authority on trans and non-binary suspects; it expressly recognises that the position of such suspects has not been conclusively decided, and offers considerations that may arise. A policy may lawfully identify considerations relevant to an undecided question without thereby misstating the law: a policy is not required comprehensively to set out the law (*R (MA)*; *R (BF (Eritrea))* at [48]–[53]). The Guidance is not a legal textbook.

75. The Claimant's complaint about the reinserted "gender reassignment" passage (the Claimant's skeleton at §49) does not establish an error of law. The passage is an illustration,

expressly conditional ("there may be a relevant deception"), of a case in which the complainant made the suspect's having undergone gender reassignment a condition of consent. Where consent is conditioned in that way, a deception about the relevant body part – including by the undisclosed use of a prosthetic in the performance of the act – is, on the conditional-consent line of authority (*Assange*; *F*), capable of being closely connected to the performance of the act and so of vitiating consent. The Claimant's objection that a false assertion of gender reassignment "is the deceit" rather than "further evidence of deceit" (the Claimant's skeleton at §49) assumes the very point in issue – that gender-reassignment status can never be relevant. Whether it is relevant is fact-sensitive; on facts such as those in *R v H*, a jury could properly conclude that it was. The objection is, in truth, a quarrel with labelling rather than with the law: whether the false assertion is described as the deception itself or as evidence of it, the test is the same – whether the deception was so closely connected to the sexual act as to deprive the complainant of the freedom to choose – and the label does not alter it.

76. The Claimant's reliance on the amendments and deletions made in the course of the proceedings (the Claimant's skeleton at §51) does not advance its case either. That the CPS was willing to refine particular passages – and, on reflection, to retain others – reflects a constructive and proportionate approach to drafting, not an admission of illegality. The lawfulness of the Guidance falls to be assessed on its terms, read as a whole, not by inference from the history of its revision.

77. The Claimant's principal Ground 2 complaint is directed to the introductory section "Trans and non-binary persons – experiences" [CB/55–56], said to be misleading because it does not state whether the matters listed are inculpatory or exculpatory or to which stage they go (the Claimant's skeleton at §54). That section is, on its face, background and contextual material; it is not part of the "Evidential considerations" incorporating the Three Stage Test, and it states that the decision to prosecute must be based on the evidence in each case. It sets out matters which are, for the most part, uncontroversial and commonly understood, and which are similar in kind to the background found in the Equal Treatment Bench Book (Chapter 12). It is not the function of such material to be labelled, item by item, as inculpatory or exculpatory; its purpose is to inform the prosecutor so that the evidential and public-interest assessments may be made on a properly informed basis. The charge

that it is "degrading to the right of the victim" (the Claimant's skeleton at §55), or discordant with the joint police-CPS National Operating Model for these offences, is misplaced: background that promotes informed, consistent decision-making serves victims and suspects alike.

78. The Claimant's reliance on *R v Singh* [2024] EWCA Crim 815 (at [51]) does not assist: that was a sentencing appeal, in which the appellant's culpability was held not to be reduced by gender dysphoria for want of a sufficient connection between the impairment and the offending. The Guidance does not suggest that gender dysphoria reduces culpability. Nor is the treatment of differences in sex development (sometimes termed "intersex") confusing or unlawful: the Guidance correctly introduces such conditions under the heading of biological sex, and observes that those affected may have difficulty communicating their sex – a matter which may bear on whether there was any deception as to sex at all.

79. That the CPS engaged constructively and was willing to refine the Guidance in correspondence does not demonstrate that the Guidance, as challenged, is unlawful: a policy capable of improvement (especially in a very sensitive and contested field) is not for that reason unlawful.

IX. CONCLUSION

80. The Claimant lacks standing. In any event, neither Ground 1 nor Ground 2 discloses any error of law. The Guidance accurately reflects the criminal law as it currently stands in an unresolved and developing area; it does not authorise or approve unlawful conduct; and, read as a whole, it does not present a misleading picture of the true legal position. The Court is invited to dismiss the claim and to award the Defendant its costs.

Clair Dobbin KC

Ruby Shrimpton

3 Raymond Buildings, Gray's Inn

24 June 2026