IN THE HIGH COURT OF JUSTICE **AC-2025-LON-000781**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE KING
on the application of
SEX MATTERS

Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

SKELETON ARGUMENT FOR THE CLAIMANT
For the Hearing on 8-9 July 2026

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

INTRODUCTION

1. This claim concerns the legality of the guidance issued by the Crown Prosecution Service ("**the CPS**") entitled '*Deception as to Sex*' ("**the Guidance**"), and forming part of a wider suite of CPS guidance on '*Rape and Sexual Offices - Chapter 6: Consent*' [CB/53-68]. The focus of the Guidance is the asserted position that "*questions of deception and consent may involve more complex issues where the suspect is trans or non-binary*" [CB/53]). That assertion is wrong. The error of law permeating the Guidance is that a suspect's asserted gender identity can be relevant in law to the concept of intentional deceit vitiating ostensible consent under section 74 of the Sexual Offences Act 2003 ("**the SOA**"). The conflation throughout the guidance of a suspect's subjective gender identity with their objective biological sex amounts to a misstatement of the criminal law. Moreover, the Guidance is drafted in a manner which is so confusing and unclear as to be unlawful in any event.

2. The Claimant is a well-known charity which campaigns to promote clarity about sex – that is the binary, immutable biological characteristic of being male or female – in law, policy and language in order to protect the rights of all. The Defendant ("**the DPP**") is

head of the CPS and responsible for the Guidance. The Claimant welcomes the constructive willingness of the CPS to have revisited the drafting of the Guidance in the light of the Claimant's concerns – notwithstanding the consultation process having concluded – and to have proposed some changes.[1] But there remains a fundamental dispute of principle between the parties.

3. Questions of deception and the vitiation of consent to sexual acts arise in the context of rape and other sexual offences, intrinsically connected to the privacy and autonomy of those involved. The Claimant does not shy away from the effect of its submissions: that there must be candour about one's biological sex when proposing to engage in sexual activity, unless one's partner has been explicit that biological sex is irrelevant to their willingness to enter into that sexual activity. This may be uncomfortable for some, but it is the unsurprising price the law exacts for consent to be genuinely free in this uniquely sensitive context. Clarity about what the law requires in this context, and how the CPS will approach prosecutorial decisions, is to the benefit of everyone.

4. In this claim, the Claimant uses the word "*sex*" to refer to biological sex (i.e. male (man/boy) or female (woman/girl), a universal and immutable personal characteristic. The use of "*sexual orientation*" adopts the definition in section 12 of the Equality Act 2010, in referring exclusively to the two sexes. The phrase "*gender identity*" is used to refer to a tenet of the belief that every person has an intrinsic and individual relationship with cultural norms of male and female behaviour, roles and appearance, and that it is this relationship which determines whether they are male (a man/boy), female (a woman/girl), or both or neither ('gender fluid/non-binary').

5. The Guidance fails to accurately reflect the law that a deception as to "*gender identity*" cannot constitute a deception capable of vitiating ostensible consent for the purposes of section 74 SOA because it is not sufficiently closely related to the sexual act itself. That is an error of law which meets the test posed in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931. That is Ground 1 of the claim. In contrast, a deception as to sex can and usually will so relate.

[1] Less happily, the evidence of Mr Guest for the CPS explains that at least one of those changes is now to be reversed: W/S Guest 1 at §§23-24 [CB/313-314] and the version of the Guidance at [CB/319-334]. For ease, references to the Guidance in this skeleton are to the version challenged in in claim [CB/53], unless otherwise stated, to retain cross-referencing clarity within the document.

6. Moreover, the Guidance is drafted throughout in terms which impede clarity as what matters of context can be legally relevant to a Crown Prosecutor's decision-making, and at what stage of the analysis, to such an extent as to present a misleading picture of the true legal position. That is Ground 2 of the claim.

7. In the light of the way the CPS advances its case in the Detailed Grounds of Resistance ("**DGRs**") [CB/116], the Claimant structures its submissions so as to address: (1) the criminal law on consent to sexual activity; (2) the law on the judicial review of public authority policies, and its application to the CPS; (3) how the Guidance unlawfully misstates the criminal law and/or is unlawful in its formulation under both Grounds; and (4) the Claimant's standing.

8. The Court is invited to allow the claim and quash the Guidance (or, alternatively, such passages of the Guidance as the Court considers appropriate), and to award the Claimant its costs of these proceedings. It is, of course, a matter for the CPS and not the Court (or the Claimant) as to how the Guidance should then be redrafted and reissued.

THE CRIMINAL LAW AS TO CONSENT

9. Section 74 of the SOA, central to the present case and to the Guidance, defines consent: "*For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.*" The concept of consent is critical to a range of sexual offences provided for in Part 1 of the SOA, within which section 74 falls.

10. Section 75 provides for circumstances giving rise to an evidential presumption as to the absence of consent. Section 76 codifies two particular forms of deception familiar to the case law, which engage a conclusive presumption as to the absence of both consent and reasonable belief in consent. The Guidance is not concerned with section 75 or 76 cases.

11. That a deception falling outside section 76 can affect the legal validity of consent is now the subject of a clear body of jurisprudence. The close relationship between such deceptions and the statutory criteria in section 76(2) (nature, purpose or impersonation) is apparent from the analyses in subsequent case law.

12. The test for what kind of deception may vitiate consent under section 74 was authoritatively set out in *R v Lawrance* [2020] EWCA Crim 971, [2020] 1 WLR 5025. In that case, the defendant lied to the victim about having had a vasectomy, in reliance of which the victim agreed to have unprotected intercourse with him. He was convicted of rape. The Court of Appeal allowed the appeal and overturned the convictions. Having set out the relevant authorities, Lord Burnett CJ articulated the touchstone test as whether the deception "*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. Is it closely connected to the performance of the sexual act?*": *Lawrance* at §35 (and at §41). See too: *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin), [2019] QB 1019 at §74.

13. That test was approved and restated in the same terms in *R v BVA* [2025] EWCA Crim 1359, [2026] 1 WLR 621 at §46(iii).[2] The Court also approved, at §46(iv), the point made in *Monica* at §80 and *Lawrance* at §33, that an "*appeal to "broad common sense" in the application of any law does not relieve a court from the obligation of identifying the boundaries within which a jury will be asked to bring to bear its common sense and experience of life*". In other words, although there will always be factual scenarios with a degree of novelty, the law does not permit all such cases to be left to the jury: the court's role is to ensure that only deceptions legally capable of meeting the *Lawrance* test are advanced as potentially relevant.

14. The decided case law consistently illustrates the strictness of the test:

    (1) In *Lawrance* itself, the lie about fertility was not a deception vitiating consent because the "*deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it*": at §37.

    (2) In *R v EB* [2006] EWCA Crim 2945, [2007] 1 WLR 1567 a deception in the form of the defendant failing to disclose his being HIV positive did not vitiate consent to sexual intercourse.

[2] This is presumably why the CPS now accepts – DGRs, §§74-75 [CB/137-138] – that the test set out in *Lawrance* is indeed the law, having been decidedly, and surprisingly, doubtful on the point in its SGRs at §53 [CB/87]. The Guidance itself correctly states the test as set out in *Lawrance* [CB/61].

(3) In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), the deception alleged in the context of a European arrest warrant was that the defendant had had sex with the victim without wearing the condom he had promised to wear, and which was a condition of the victim consenting to have sexual intercourse. Sir John Thomas P held that this was a set of facts relevant to section 74, and that such a deception was capable of vitiating consent.

(4) In *R (F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581, a judicial review of a decision not to prosecute an allegation of rape, the Divisional Court held that consent could be vitiated where the victim had consented to sexual intercourse on condition that the perpetrator withdraw before ejaculating, and the perpetrator had in fact intended not to withdraw whatever her wishes and understanding.

(5) In *Monica*, also a judicial review of the CPS declining to prosecute, the claimant had consented to sexual intercourse with the perpetrator believing that he was a fellow environmental activist. Had she known that he was in fact an undercover police officer, she would not have consented to sexual intercourse; his asserted identity was a condition on her consent. Applying the test set out above, the Divisional Court rejected the submission that a deception of this kind could be sufficiently closely connected.

(6) In *BVA*, the defendant had filmed himself sexually touching the victim whilst she was asleep, with a dispute at trial over whether the victim had agreed to being filmed in this way. The issue on appeal was whether the filming was a part of the broader circumstances or closely connected to the performance of the sexual activity. The Court held that the test was met, because the filming was integral to the touching: "*if not the sole purpose, then a central purpose of the sexual touching was to film the sexual activity*": at §49. It was much more closely connected to the sexual activity than the facts of *Lawrance* or *EB*: at §50.

15. Of most direct relevance to the focus of the Guidance is the judgment in *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593. The defendant, who was female but purported to be male, conducted a relationship over the internet with another girl. When

they were 17 and 16 respectively the defendant, presenting herself as a boy, visited the complainant and there was digital and oral penetrative sexual activity. It was clear on the evidence that the victim would not have consented to this had she known that the defendant was female. The Court of Appeal held that these were circumstances in which consent was vitiated, explaining at §§26-27 that:

"*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 appellant's deception.*

It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent" (emphasis added)

16. As the Guidance itself recognises, it is apparent that when the Court of Appeal in *McNally* used the word "*gender*" they were in fact referring to the sex of the defendant; see too the infelicity in *Lawrance* at §36.

17. There is neither dispute nor doubt that the appellate courts will continue to consider the application of section 74 to novel sets of facts. But there is legal clarity as to the test to be applied in a section 74 case (*Lawrance*, *BVA*), a material body of case law guiding how that test is to be applied to different kinds of deception, an approved principle of law that the courts must address whether an alleged deception can meet the test, and an established legal analysis that it is a matter of common sense that a deception by the perpetrator as to their biological sex meets that legal test.

CHALLENGES TO THE GUIDANCE

18. The DPP issues, under section 10 of the Prosecution of Offences Act 1985, the Code for Crown Prosecutors ("**the Code**"). By §§2.10[3] and 3.1[4] of the Code, Crown Prosecutors should make their decisions on prosecution in accordance with any guidance issued by the DPP. Thus, the Guidance is a non-statutory policy promulgated

[3] "*They must comply with any guidelines issued by the Attorney General and with the policies and guidance of the CPS issued on behalf of the DPP, unless it is determined that there are exceptional circumstances.*"
[4] "*They make their decisions in accordance with this Code, the DPP's Guidance on Charging and any relevant legal guidance or policy.*"

by the DPP for the purpose of guiding Crown Prosecutors when taking decisions as to whether to authorise prosecutions in particular cases.

19. The meaning of a policy or guidance document is an objective question for the Court: *R (The Duke of Sussex) v Secretary of State for the Home Department* [2025] EWCA Civ 548, [2025] 4 WLR 66 at §63 *per* Sir Geoffrey Vos MR (and the authorities there cited). The approach to interpretation of such documents was summarised by Lord Carnwath in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317 at §19: "*whatever the legal character of the document in question, the starting point – and usually the end point – is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.*"

20. The CPS accepts that if the Guidance "*contains clearly identifiable errors of law, then it may be susceptible to judicial review*" (DGRs, §20 [CB/121]). That concession is inevitable, given the terms of *R (End Violence Against Women Coalition) v DPP* [2021] EWCA Civ 350, [2021] 1 WLR 5829 at §68. The CPS was not legally required to promulgate this Guidance and express in it statements as to the effect of the criminal law and section 74 SOA. But having done so, the CPS must get those statements of the law correct.

21. As to whether there is such an error in the Guidance, it is unclear whether the CPS accepts that the legal test is that set out in *R (A)*: DGRs, §§99-102 [CB/145]. However, the CPS does appear to dispute that *R (A)* otherwise applies to CPS guidance: DGRs, §§26(ix), 104-106 [CB/124, 146]. In neither instance does the CPS identify what the legal test is, if it is not that addressed in detail in *R (A)*. Coherence in the law, and the principles identified in *R (A)*, require the application of the same tests even if the document in question is not of precisely the same character as that analysed in *R (A)* itself: see *R (British Medical Association) v General Medical Council* [2026] EWCA Civ 143 at §§102-107 *per* Coulson LJ. Whether or not the policy was produced to guide a 'wide discretion' (DGRs, §§101-102 [CB/145]) is not the question.

22. In *R (A)*, Lords Sales and Burnett CJ for the Court reiterated that the primary test for the assessment of the lawfulness of a policy was effectively that of error of law, as established by the House of Lords in *Gillick*, which it characterised in the following way at §38:

> "*does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned…it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others*".

23. At §41, the Court explained that: "*The test set out in* Gillick *is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful.*" This category of error was also set out at §46(i): "*where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way*".

24. The CPS asserts that even if the Guidance is wrong in law, it does not meet the test in *R (A)* because it does not authorise "*criminal conduct or other substantive illegality*". Quite what the CPS means by the insertion of the gloss of "*substantive*" is unclear; it is not how the Supreme Court limited the test, *R (A)* itself concerning a complaint that the guidance authorised procedural unfairness in not seeking representations.[5] Any form of unlawfulness engages the principle; thus, in *R (MXK) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin) a Home Office policy concerning NHS debts failed the test because its language implied that an NHS debt could justify the cancellation of leave to remain, or an examination by an immigration officer, or detention. None of these would have been lawful exercises of power: §§72-73.

25. It is a surprising proposition for the CPS to advance that it will not act unlawfully if it decides to authorise, or not to authorise, a prosecution based upon a mistaken understanding of the criminal law. An erroneous decision not to authorise is in principle contrary to the DPP's public law obligations and can be challenged by way of judicial review: *Monica* and *F* are both such cases. A legally erroneous decision to authorise a

[5] No suggestion is made of criminal conduct, but only *Gillick* concerned a policy which authorised illegality of that type in any event.

prosecution is similarly unlawful, although it is doubtless the case that the most appropriate procedure to raise such an error is within the criminal trial process by way of applications to stay for an abuse of process, or to dismiss the charges prior to arraignment or at the close of the prosecution evidence, rather than by way of judicial review. At a more general level, the CPS accepts that its Guidance forms part of the "*architecture*" to meet the systems duty imposed on it to secure the Article 3 ECHR rights of victims of serious sexual offending: see DGRs, §§47-48 (and the authorities cited) [CB/130-131]. If a part of that architecture is wrong in law, the CPS may breach that systems duty.[6]

26. Moreover, the Supreme Court recognised that there could be other types of case in which a policy would also be unlawful, particularly at §46:

"*In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: … (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis.*"

27. These categories are not exhaustive or intended to operate as a rigid categorisation, but they will operate as an appropriate starting point or benchmark: *BMA* at §108. Guidance which causes confusion to CPS staff has been accepted in principle to pose legality issues, but was not made out on the facts: *End Violence*, §83 (pre-dating the more precise formulation in *R (A)*). The assertion that CPS guidance is apparently immune from a category (iii)-type analysis has no basis in authority, or in principle.

[6] That is not, and need not be, the claim in the present case. It simply underscores the various legal obligations on the CPS to which the Guidance relates.

28. Whether a case falls within category (iii) is to be considered in context. But it readily applies to a document issued to the staff of the public authority in question, explaining the legal framework in which they exercise their functions, which is intended to guide the exercise of their discretion: *R (Timpson) v Secretary of State for Work and Pensions* [2022] EWHC 2392 (Admin) at §223 *per* Cavanagh J. This is the context of the Guidance. Crown Prosecutors are required by the Code to "*comply with*" the Guidance, which is plainly intended to guide them as to the proper application of section 74 in this context. That is in fact what happens: W/S Guest 1, §6 [CB/304]. That Crown Prosecutors are lawyers, and doubtless will consult works on criminal law in decision-making (DGRs, §105 [CB/146]), is of no assistance where they are expected to comply with the Guidance issued in the name of the DPP and where – as the CPS otherwise emphasises – there is no reported case addressing the specific issue of deception as to gender identity directly; the authoritative legal textbooks[7] do not address the specific issue more directly than the Guidance and the CPS makes no attempt to evidence any such instance.

29. Nothing in *R (A)* provides the Court with a jurisdiction to engage in policy formulation, or to require guidance where none has been provided. The case law warning against the Court engaging in the substance of prosecutorial policy formulation, emphasised by the CPS, is not in substance different from the general constitutional separation of responsibilities. The Claimant makes no invitation to stray into forbidden territory, or any criticism of a legally accurate form of the Guidance.

THE GUIDANCE

30. The Guidance was produced following a consultation exercise run by the CPS on an earlier version of the guidance entitled '*Deception as to gender*', which was published on 21 May 2021 [SB/56]. That consultation commenced in September 2022 and closed in December 2022. The Claimant contributed to that consultation, expressing extensive concerns about the content and language used in the guidance under consultation [SB/61]. The Guidance was published by the CPS on 13 December 2024. In the course of correspondence connected to these proceedings, the CPS agreed to make various

[7] Namely: Archbold: Criminal Pleading Evidence & Practice 2026; Rook & Ward on Sexual Offences (2025, 7th edition); Blackstone's Criminal Practice 2026.

changes to aspects of the Guidance, the final version of which (prior to its evidence) it set out in a marked-up copy of the text of the Guidance on 6 June 2025 [CB/217-244, 247-248]. The evidence of Mr Guest, for the CPS, withdrew some of the proposed amendments [CB/313-314] and provided a further version as at 20 February 2026 [CB/319-334]. The published version of the Guidance has not been amended to reflect any of these changes, but was very recently revised to refer to *BVA*.

31. The opening section of the Guidance, and indeed its overall purpose, is explained on the first page by the statement that "*questions of deception and consent may involve more complex issues where the suspect is trans or non-binary*", which follows various terminological paragraphs defining "*sex*" as "*biological sex*" and "*gender*" as "*gender identity*"[8] [CB/53]. After a number of definitions, the Guidance then moves to a series of sections addressing the case law on deception. This claim addresses the principles the Guidance takes from *McNally* and the other cases under Ground 1, below.

32. A longer section headed "*Evidential considerations*" then commences [CB/61]. It is particularly in this section onwards that the Guidance routinely uses the portmanteau phrase "*gender identity and/or sex*" (sometimes vice versa). The principles set out are said to apply to all deception cases, irrespective of a suspect's asserted identity, but then a list of issues is given which exclusively concern suspects who are trans, and/or deceptions as to gender identity [CB/62]. The subsequent subsections then address the three stages that the Guidance identifies as arising in cases of alleged deception ("**the Three Stage Test**"). The Three Stage Test is [CB/62]:

    (1) Was there a condition of the complainant's choice or consent sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving the complainant of freedom to choose? If so, consider the second question.
    (2) Was the complainant deceived in relation to this condition and deprived of their freedom to choose, and therefore did not consent? If so, consider the third question.
    (3) Did the suspect reasonably believe the complainant consented?

[8] In this part of the Guidance, "*gender identity*" itself is given the definition "*social or cultural differences or the way in which someone is perceived or experiences themselves.*" [CB/53]

33. The Three Stage Test is an appropriate formulation of the effect of section 74 as interpreted authoritatively by the courts. At [CB/62-63], the Guidance addresses the First Stage; the Second Stage is at [CB/63-66]; and the Third Stage is at [CB/66-67] (including incorporating by reference the factors set out in the Second Stage). The Claimant considers that the content of all three Stages is unlawful.

GROUNDS OF CHALLENGE

Ground 1: Error of Law in Treating Gender Identity as Relevant to Deception

34. The Guidance correctly sets out the test from *Lawrance* in the sections headed "*Other case law*", in "*Evidential considerations*" and in the heading to the First Stage [CB/61, 62].

35. The Guidance has, however, fundamentally misunderstood the effect and limits of the test as articulated in the case law. In particular, it has erred by advising Crown Prosecutors applying the Guidance that a suspect's asserted gender identity is, or may be, relevant. This is most starkly set out at the outset of the First Stage, when the Guidance asserts that "*prosecutors will need to ascertain whether the suspect's sex and/or gender identity was a matter of importance to the complainant i.e. was it a condition of the complainant's choice or consent? This is exclusively a subjective question and may be expressly stated or inferred from all the facts*" [CB/62-63]. By reference to the close connection aspect of the test, the First Stage advises that "*If the complainant chose to have sexual relations with a person whose sex is male and gender identity is male i.e. a non-trans male, it is likely that this condition is sufficiently closely connected with the sexual nature of the relevant act*" [CB/63], immediately confusing and conflating two fundamentally legally different conditions (the objective fact of sex and the subjective belief of gender identity). Throughout the Guidance, the portmanteau phrase "*sex and/or gender identity*" is used as if the concepts were legally equivalent in the context of deception.

36. They are not equivalent. Gender identity is legally irrelevant to the issue of deception as to sex and the application of section 74 SOA, as authoritatively interpreted by the jurisprudence.

37. Gender identity is a person's subjective belief about him or herself. However sincerely held, such beliefs do not change or dilute the fact of the holder's sex. Unlike sex, beliefs are not material facts nor are they closely connected to the performance of the sexual act (or indeed, connected at all). The remoteness of gender identity from sexual activity as an expression of sexual orientation was noted by the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [2026] AC 315 at §204, in which the Court observed that "*People are not sexually oriented towards those in possession of a [gender recognition] certificate*". In the same way, people are not sexually oriented towards beliefs, whether as to gender identity or otherwise, and any such belief is not part of the "*performance*" of the sexual act.

38. It is clear from *McNally*, and unsurprising, that a deception as to the sex of the suspect meets the legal test articulated authoritatively in *Lawrance*: §26. It is equally clear that a suspect's asserted beliefs, whether sincerely held or not, are legally irrelevant, irrespective of their importance to a complainant. *Monica* was precisely such a case, in which the environmental activist complainant believed that the suspect – in fact an undercover police officer – shared her "*core beliefs*": §3. The test was not met in that case. The cases in which the test is met are those where the deception is directly connected to the physical sexual activity, such as a promise of withdrawal prior to ejaculation (*F*) or to wear a condom (*Assange*). It is not possible to draw an analogy between these cases and gender identity.

39. Thus, the conflation in the Guidance where a complainant chooses to have sex with a person whose "*sex and gender are both male*" [CB/63] is wrong in law; it presents sex and gender (identity) as separate, legally equivalent conditions on consent. The sex of the suspect plainly is relevant because sex with a man and sex with a woman are sexually different acts: that is both commonsense and what *McNally* holds. In contrast, a suspect's subjective gender identity carries no connection to the sexual act because it forms no part of the performance of the sexual act and cannot do so. It may form a part of the broad circumstances surrounding the act, which does nothing to disturb this analysis.

40. For the avoidance of doubt, it is not the Claimant's case that a suspect's assertion of a trans identity is necessarily irrelevant to issues of deception as to sex. A person who

tells their partner that they are trans may be able to defend an allegation of deception, if the complainant understands the term to mean that the suspect's sex is the opposite to their presentation (and thus that they were in fact not deceived as to the person's sex). The force of these general points will depend on the facts and context. But that is not how the Guidance persistently frames the relevance of gender identity; in the example just given, a reference to being trans is potentially relevant only to the extent that it is revelatory of a person's sex and thereby within the scope of the *Lawrance* test. More generic references to gender identities are not revelatory of anything concerned with the performance of the sexual act. The Guidance is notably silent on any scenario in which a complainant is deceived as to a suspect's gender identity. In the context of the stated purpose of the Guidance, this is surprising.

41. The answer of the CPS is that none of the decided cases have concerned a trans suspect or have ruled that gender identity is irrelevant, and therefore it is a matter which must be left to the jury. The absence of a decided case is true but no answer of principle to the problem the Guidance is creating, or to the obligation imposed by the case law to identify and apply the relevant legal boundaries. The factual situation must be legally capable of meeting the test, and it is not. If it were capable of doing so, doubtless the Guidance would explain how. This is not (cf DGRs, §86 [CB/141]) the application of an "*ideological position*" but of principle by reference to the decided cases and the test.

42. In its evidence, the CPS has disclosed some details of a small number of cases in which the Guidance was or might have been relevant to the charging decision.

    (1) *R v H* (W/S Guest 1, §§27-28 [CB/315]) pre-dates the Guidance, and it is to be noted that the predecessor version specifically, and misleadingly, advised prosecutors that *McNally* "*determined that 'deception as to gender can vitiate consent'*" (W/S Guest 2, §6 [CB/336-337]). According to the Sentencing Note [SB/188], the defendant ('D') disclosed to the victim ('V') that D was a biological woman, but lied that she was living as a man and had undergone gender reassignment surgery, including the surgical construction of a sexually functional pseudo-penis. D was correctly charged with a count of assault by penetration; having deceived V into believing that she would be penetrated by a pseudo-penis, the penetration was achieved with a sex toy or D's fingers. This deception meets

the *Lawrance* test and is familiar to the ordinary principles, *viz*; consent to penetration with one object does not translate into consent to penetration with an object of a different kind. D perpetrated a number of deceptions on V, including that she identified as a man, lived as a man and had a pseudo-penis; those lies would undoubtedly be admissible as evidence of the wider factual context of the assault. On a proper analysis, however, the only legally relevant deception was that V would be penetrated by a pseudo-penis. By contrast, the two counts of sexual assault in which D performed oral sex on V involved no deception about anything closely connected to the performance of the sexual activity; lies about how D lives or identifies, or what cosmetic surgery she has undergone are not felt in the performance of cunnilingus on V. This is not an illustration of gender identity as legally relevant to consent; the defendant was wrongly charged. She was wrongly convicted by her pleas to the sexual assaults, presumably on the basis of incorrect legal advice. The case does not "*illuminate the issues in the guidance*" in the way for which the CPS contends (W/S Guest 1, §23 [CB/313-314]), still less does it justify the reversal of an earlier concession. Rather, it is an instance – as the Claimant feared (see W/S Forstater 1, §90 [CB/290-291]) – of a lack of clarity leading to over-prosecution.

(2) None of the three cases considered by the CPS under the current Guidance (W/S Guest 2, §§7-15 [CB/338-340]) give rise, on their facts, to the error in issue in the present proceedings, because in two cases (Cases 3 and 4) the material deception was of the suspect's biological sex – and thus directly legally relevant – and Case 2 appears to have been correctly not prosecuted if, as is suggested, the suspect had sought to indicate (even if not unambiguously) that she was not biologically male, and subsequent sexual activity took place after the complainant was clearly aware that she was a biological female. None of these cases involved a deception as to gender identity, and so none particularly assist in understanding whether the Guidance is or is not lawful.

43. The Guidance positively induces Crown Prosecutors to err in law by treating the idea of gender identity as a legally relevant matter to the section 74 test and capable of being sufficiently closely connected to the sexual act. It cannot be, both as a matter of commonsense and on the application of the principles authoritatively established in the

case law. The Guidance is wrong in law and this error is so central to the document as a whole that the Guidance should be quashed outright.

Ground 2: The Guidance Presents a Misleading Picture of the True Legal Position

44. By Ground 2, the drafting of the Guidance, read objectively, presents so many obstacles to its comprehensibility as to present overall a misleading picture of the true legal position in relation to a deception as to sex. It cannot withstand the application of the category (iii) test in *R (A)*. Ground 2 is distinct from, but inevitably closely linked to, Ground 1. Thus if the Claimant is correct as to the irrelevance of gender identity to the proper application of the test set out in *Lawrance* and in *BVA*, but the CPS is right that the Guidance does not authorise unlawful conduct on some unclear technical basis (such that Ground 1 fails for that reason), the Guidance will nonetheless fail the category (iii) test in the alternative (as in *MXK*).[9] If the Claimant is wrong about the application of the legal test, and a deception as to gender identity can (somehow) engage the *Lawrance* test, the Guidance nonetheless creates and exacerbates confusion and misleads as to the extent to which and context in which anything other than deception as to sex is legally relevant. The exercise which Crown Prosecutors must undertake is not assisted, and is undermined, by an exercise in drafting the Guidance as though it were an inclusive equalities policy, rather than a formal guide to the content of the criminal law and how to apply the law to unusual factual contexts.

45. At various points, the Guidance correctly states the legal test drawn from *Lawrance* and the other cases, and gives accurate and fair examples. However, this ability to correctly state the law only exacerbates the adverse effect of the wider array of instances in which the Guidance wrongly states the law, or misleads as to the potential relevance of the point being made. For example, in the two final bullet points under "*Other case law*" (p.9), the second bullet point properly states the test drawn from *Lawrance*, but the first bullet point – introduced to the reader as one of the "*current principles to be applied in cases involving trans or non-binary suspects*" states that:

"*Depending upon the circumstances of the case, a trans or non-binary person (including those who have a [gender recognition certificate] and/or have had gender reassignment) may deceive a complainant as to their sex if they choose not to disclose*

[9] Indeed, this may be what the CPS means when it concedes that if the Guidance misstates the law it falls to be quashed, but denies the application of the *Gillick/R (A)* test.

that they are trans/non-binary, or if they make a deliberate false assertion or lie in respect of their sex and/or gender identity" [CB/61].

46. Two errors are readily identifiable from this passage. First, a lie as to gender identity is irrelevant for a section 74 deception – and the inclusion of such points increases the risk that a trans person will be wrongly prosecuted for making an incorrect but irrelevant statement as to gender identity – as is being non-binary. Secondly, this summary is <u>not</u> an encapsulation of principles found in any case law of England and Wales, contrary to the introductory wording.

47. Under "*Evidential considerations*" [CB/61-62] the repeated, erroneous and misleading, conflation of the core distinction between sex – going directly to the satisfaction of the test in *Lawrance* – and gender identity (fundamentally irrelevant to the test) is seen in the use of the portmanteau "*gender identity and/or sex*" throughout the bullet point examples of cases which the Guidance says are particularly weighty. The specific examples given will reappear under the Second Stage in particular and are dealt with there. The Three Stage Test itself is not objected to.

48. The errors in the First Stage section have been addressed under Ground 1 and are not repeated. The Second Stage concerns whether the complainant was deceived in relation to the relevant condition. The Claimant takes no issue with the formulation of the general paragraphs prior to the bullet points in this section [CB/64], save for the persistent equating of sex with gender identity in the portmanteau formulation used throughout.

49. The reinsertion by the CPS with the DGRs of the text reading "*if the complainant chose to have sexual relations with a trans man on condition that they had undergone gender reassignment, there may be a relevant deception if the trans man falsely asserts that he has had gender reassignment (or fails to disclose that he has not). Use of a prosthetic device of which the complainant is unaware would be further evidence of deceit of this nature*" [CB/64, 330] is misleading and confusing. It has been reinserted to avoid implicitly accepting that the *H* case (above) was, on two of three counts, wrongly charged. But the text is wrong, for the same reasons and to the same extent that *H* was

wrong. A false assertion of having undergone gender reassignment[10] surgery is, by definition, not a deception as to sex; it is irrelevant to the performance of the sexual activity whether, and to what extent a person has had surgery, unless there is a deception as to the nature of what the victim is being penetrated with – that is directly concerned with performance. Contrary to the reinserted text, it is not "*further evidence of deceit*", it is the deceit.

50. Moreover, a number of the bullet points given in the Second Stage as factors relevant to deception are not lawful or accurate formulations. In particular:

(a) In the second bullet point [CB/65], it is irrelevant how the complainant's life experiences impacted on their "*understanding of the suspect's gender identity*", and no explanation is given as to how this could be relevant to whether they were deceived as to a relevant condition.

(b) Although the "*degree to which the sex*" [CB/65] of the suspect is "*apparent*" is relevant, the degree to which the "*trans or non-binary identity*" is apparent is not.

(c) "*The opinion of the complainant towards lesbian/gay/trans people etc (the specific sexual orientation or gender identity that is relevant will depend on the facts of the case) and the suspect's knowledge of their opinion*" [CB/65]. The Guidance provides no explanation as to how it could be relevant to the question of fact of whether or not the complainant was deceived as to sex to consider the complainant's opinion of trans people. Indeed, a hostility to trans people may be more likely to have encouraged a deception on the part of the suspect, but this inculpatory reading is not – in context – what the Guidance is intending to convey. The Claimant accepts (as below) that the suspect's knowledge of the complainant's opinion may be relevant to the Third Stage, but it cannot be relevant to the Second Stage.

(d) "*Use of a prosthetic device without the complainant being aware.*" [CB/65] It is unclear whether this refers to use in the performance of sexual activity (where it is

[10] It is unhelpful that the Guidance implies that "*gender reassignment*" amounts to surgical modification; the expansive definition in section 7 of the Equality Act 2010 does not require any medical, surgical or therapeutic treatment.

prima facie evidence of an assault by penetration), or whether it extends to wearing a prosthesis under clothing to mimic the opposite sex.

(e) The portmanteau references to gender identity in considering the length of the relationship, and where the complainant expressed doubts, asked questions or made assertions, are wrong and misleading for the reasons already set out.

51. The coherence of the Second Stage in the Guidance is further undermined by reference to the passages the CPS has conceded must be deleted. The CPS has deleted the final bullet point referring to the complainant exploring their own sexuality at the time [CB/66], presumably (rightly) recognising that this is inconsistent with the focus on the deception of the complainant and the impermissibility of placing the onus on the complainant to ensure she is not being deceived [CB/64]. The deletion of the bullet point reading "*Whether the suspect's gender identity was different to their sex at the time of the alleged offence*" [CB/65] is plainly warranted, but equally plainly inconsistent with the retention throughout the Second Stage of an equiperation of sex and gender identity. Again, no rationale is offered to the reader.

52. In contrast, the Claimant accepts that matters connected to the gender identity of the suspect may be relevant to the Third Stage of whether the suspect reasonably believed that the complainant consented. Matters such as; the presentation of the suspect and the response to that presentation of the complainant; the opinion of the complainant towards particular expressions of gender identity; the complainant's expressed belief that sex is not immutable; and the circumstances in which the suspect considered that the complainant attached no importance to sex as opposed to gender identity; are all matters of fact and context which may go to the reasonableness of the suspect's belief in consent and fall to be taken into account in that context only.

53. Nonetheless, the Third Stage of the Guidance replicates some of the errors in the Second Stage. Whilst the complainant and/or suspect may use the language of gender identity, the exercise for prosecutors is to determine whether there is evidence that the suspect reasonably believed that his/her sex was either apparent or a matter of no importance to the complainant. References in the Third Stage to considering "*the degree to which*

the…trans or non-binary identity of the suspect is apparent" [CB/66] are legally irrelevant, even to the reasonable belief of the suspect.

54. Moreover, it is misleading by omission for the Guidance to fail to explain whether matters said to form part of "*Trans and non-binary persons – experiences*" [CB/55-56] are properly to be considered as inculpatory or exculpatory, or to explain precisely to what Stage of the framework a suspect's life 'experiences' are said to be relevant. For example:

    (a) The statement in this section that "*Many people who have transitioned may not regard themselves as trans, but simply as a man or a woman*" [CB/55] is immaterial to the First and Second Stages and can only bear on the Third Stage. It appears to describe the suspect's own belief that s/he is exempt from liability for a deception as to sex. In light of the CPS's concession in the PAPR that every sane and capacitous person can be presumed to know their birth sex (at §§22(iv)-23 [CB/224]) this could only mean that the suspect (i) suffers a delusion that s/he *is* the opposite sex or (ii) believes that s/he is entitled to engage in sexual activity as if s/he were. A belief in consent based on either of these perspectives could not be treated as reasonable.[11]

    (b) The assertion that a "*person whose gender identity isn't the same as their sex may express their gender through their speech, dress, gestures, mannerisms etc, without this being a fabrication, a performance or a deception*" [CB/56] improperly imports a philosophical element to the factual question of whether a deception has occurred. The motive for the intentional deception of presenting as the opposite sex has no bearing on its legal effect.

    (c) The reference to a person who is seeking a gender recognition certificate "*may think it necessary to conceal their sex*" [CB/56] can only, in the context of guidance on '*Deception as to sex*', be inculpatory and seriously so.

    (d) Similarly, a reference to trans people being "*wary of revealing their biological sex*" as a result of "*anxiety*" is also an inculpatory factor in the deception context

[11] See *R v B* [2013] EWCA Crim 3, [2013] 1 Cr App Rep 36 at §35.

[CB/56]. (The suggestion in the DGRs, §121 [CB/149-150], that similar statements are made in the Equal Treatment Bench Book is both wrong – see W/S Forstater 2, §11 [CB/296] – and also irrelevant, given that the Bench Book is not concerned with whether there has been deception as to sex.)

(e) The reference in the final bullet point to the particular complexities of the position of intersex persons is wrongly situated in a section concerned with "*Trans and non-binary persons*", neither of which is, or is akin to, a person who has a disorder of sexual development (which is sometimes termed "intersex") [CB/56]. The conflation is misleading and obfuscatory.

55. Overall, in this "*experiences*" section of the Guidance factors which are on a proper analysis inculpatory are being presented to the reader as though they were exculpatory, and points entitling the suspect to prosecutorial sympathy: that is the objective effect of the drafting deployed. This is wholly inappropriate and helps explain why the concerns raised go well beyond drafting infelicities. The Guidance is fundamentally degrading to the right of the victim to have sexual offending by deception prosecuted without fear or favour and robustly. It is also particularly discordant with the objectives of the National Operating Model, which mandated the "*offender-focussed*" and "*victim-centred*" approach to investigations and charging decisions in RASSO[12] cases.

56. If the Guidance is in this respect anticipating consideration of the public interest test [CB/67-68], and the question of culpability within that stage of the analysis (but not at any other stage), it is also inconsistent with the Court of Appeal's ruling, in *R v Singh* [2024] EWCA Crim 815 at §51. In that case, the Court dismissed an appeal against sentence, holding that the diagnosis of a trans-identifying male defendant (i.e. a biological female) with gender dysphoria "*does not mitigate the appellant's actions in deceiving the three separate complainants into being penetrated without their consent.*"

57. Further, the Guidance's references to the position of those who are "*intersex*" – more properly those with differences in sex development ("DSD"), rare conditions involving genes, hormones and reproductive organs, including genitals – betray the legal and practical confusion evident throughout. The very rare instances of those with DSD are,

[12] Rape and Serious Sexual Offences.

correctly, introduced by the Guidance under the heading "*Biological sex*" [CB/54], but the point is then made that they "*may or may not see themselves as having a trans or non-binary gender identity*", which is also true but both meaningless (because it is true of everyone) and irrelevant to the law on deception. DSD is a matter of biological fact; unlike gender identity, it is not an aspect of subjective belief. Yet the Guidance then references those with DSD again in the context of *"Trans and non-binary persons – experience*" and explains that they "*may have particular difficulties in communicating their sex to potential sexual partners, as their gender/sex presentation is inherently complex*" [CB/56]. This further underlines the incoherence of the Guidance: (i) the experiences of those with DSD have nothing whatsoever to do with the experiences of trans and non-binary persons; (ii) those with DSD do not have any "*inherently complex*" presentation of their "*gender*" as opposed to their sex and the conflation is nonsensical; and (iii) it is undoubtedly true that those with DSD may have difficulty in communicating that fact to a partner, such that there may be no true deception as to sex at all in such cases, and/or they may be wholly inappropriate cases for prosecution, but they are fundamentally distinct from the position of those who believe in gender identity.

58. For these reasons, and as applicable to the passages identified, or alternatively any combination of passages identified by the Court as justifying the grant of relief, the Guidance generally presents a misleading picture of the true legal position such that it should be quashed in accordance with the principles of law set out by the Supreme Court in *R (A)*.

STANDING

59. For the first time in its DGRs, the CPS advances a belated challenge to the Claimant's standing [CB/118-121]. Any adverse ruling on standing could accordingly only go to relief (and the Claimant reserves its position on costs). It is in any event a bad point. The Claimant has a sufficient interest in the subject matter of the claim.

60. The starting point, unaddressed by the CPS, is the approach of the Supreme Court in *AXA General Insurance Limited v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 at §63 (Lord Hope) and §170 (Lord Reed). Lord Hope observed that "*A personal interest need not be shown if the individual is acting in the public interest and can genuinely*

say that the issue directly affects the section of the public that he seeks to represent". Lord Reed observed that "*In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law.*"

61. The Court of Appeal has recently revisited and summarised the law on standing in *R (Luton Landlords & Letting Agents Ltd) v Luton Borough Council* [2026] EWCA Civ 35 at §§45-47 per Lewis LJ (emphasis added):

"*Other groups or legal entities may have a sufficient interest in a matter for the purposes of section 31(3) of the 1981 Act…Claims may also be brought by pressure groups who may be particularly active, and have particular expertise, in a particular area (such as environmental groups or social welfare groups) or be formed to campaign on particular national or local issues. They may have sufficient interest to bring a claim to challenge a particular measure, particularly if they have established expertise in an area. The fact that a company is incorporated to bring a challenge in such circumstances would not, of itself, prevent the company having a sufficient interest in the matter.*

*There may be instances where a measure or decision affects the public generally, not merely a particular individual or even a group of individuals. In appropriate cases, the courts have held that an individual, or a group, may bring a claim because there is a serious issue of public importance which needs to be addressed (see the observations of Lord Reed in [*AXA*] at paragraph 170). It is also relevant to note that the courts have adopted an increasingly liberal approach to standing in such cases.*

It is also right to note that, at the permission stage, the court is primarily concerned with excluding hopeless cases where a claimant cannot establish he has a sufficient interest in the matter because, for example, he has no private interest in the matter and is not acting in the public interest or is otherwise a "meddlesome busybody"."

62. The Claimant is a charity and a campaigning organisation in relation to issues of sex (i.e. biological sex) in policy and law [SB/84, 108]. That is its reason for existence, as prescribed in its charitable objects: see W/S Forstater 1 at §§3-6 [CB/267-268] and W/S Forstater 2 at §§4-6 [CB/293-294]. It has indisputable expertise in relation to sex and gender (W/S Forstater 1, §§9-17 [CB/269-271]), as has been repeatedly accepted by the courts permitting it to intervene in cases concerned with those issues, as in: *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16; *Higgs v Farmor's School* [2025] EWCA Civ 109; *R (Good Law Project Ltd & Ors) v Commission for Equality and Human Rights* [2026] EWHC 279 (Admin) ("*EHRC*"), as well as in the European Court of Human Rights (see W/S Forstater 1, §11 [CB/269]). It has been granted

permission to judicially review the National Police Chiefs' Council and the British Transport Police in relation to strip searching policies: AC-2025-LON-002926 and W/S Forstater 2, §10 [CB/295]. It has been granted permission to claim judicial review in relation to sex-based access to Hampstead Ponds in *R (Sex Matters) v City of London Corporation*, by Order of Laing LJ in the Court of Appeal [CB/259].

63. The present claim is plainly a matter of wider public interest, given the importance of the Guidance to the public functions of the CPS. The Claimant's challenges to the Guidance cannot be dismissed as unmeritorious (permission having been granted) or those of a 'mere busybody': the CPS has already accepted that significant amendments to the Guidance are required in response to these proceedings, despite its consultation process.

64. Reliance is placed by the CPS on various cases concerning the Good Law Project. None of these are apt. As the Divisional Court held in *R (Good Law Project Limited) v Prime Minister* [2022] EWHC 298 (Admin) at §§54-58, that body's interest has been defined so widely as to be concerned with every form of public law error in any context, with no specific expertise in any of the areas in which it has sought to litigate by way of judicial review. That is plainly not true of the Claimant, whose position is much more analogous to that of the Runnymede Trust in that case, and who the Court found did have standing to advance the Equality Act claim because it "*exists specifically to promote the cause of racial equality*": at §59. That was a better-placed party to the same proceedings. A similar conclusion was reached in the *EHRC* case (in which the Claimant was permitted to intervene), where the Good Law Project was refused standing because its objects remained entirely general and so lacked specific expertise (even if sincerely interested), and because three other claimants were better-placed to advance the claim: at §16 *per* Swift J.

65. There is no other better-placed challenger who is participating in these proceedings who can secure compliance with the rule of law. The CPS assert that an individual affected by the Guidance would be better placed, which may be true but would also rule out nearly all claims brought by expert interest groups; that, as *AXA* and *Luton* recognise, has never been law (and would also have precluded the Runnymede Trust having standing). In any event, on the CPS's own evidence, only a very small number cases

have involved the actual or potential application of the Guidance to date, and it is unreasonable to expect that individuals involved in such cases should also have the ability, inclination and resources to bring the present type of judicial review challenge.

66. The belated raising of standing appears to be particularly predicated upon the refusal of standing to the Claimant in the Hampstead Ponds case by Lieven J: [2026] EWHC 146 (Admin). Even had that judgment refusing permission not been overturned by the Court of Appeal (granting permission to claim judicial review [CB/259]), it would not assist the CPS. That is a claim alleging that permitting transgender males to swim in the women's pond is an unlawful breach of various provisions of the Equality Act 2010. The concern of Lieven J appeared particularly to be that a claim of this kind would be better ventilated by an individual claimant bringing a County Court claim for breach of the Act, so that the particular facts and evidence in that case could be tested; there was accordingly a distinct conflation between issues of standing and issues of alternative remedy: see §§41, 47, 55-65. Nothing of that kind applies here; the CPS, rightly, advance no alternative remedy argument. Moreover, and as noted above, the ability of one of the small number of directly affected individuals to bring this challenge will be particularly attenuated by the context in which their case will arise. A challenge of the present kind is the only realistic form in which the Guidance can be assessed by the Court.

CONCLUSION

67. For the reasons set out in this skeleton and the Claimant's claim, the Court is invited to allow the claim and to quash the Guidance (or parts of the Guidance) in order that it be reconsidered by the CPS in the light of the Court's judgment. Alternatively, the Court is invited to order declaratory relief to reflect its ruling. In either event, the Claimant seeks its costs of these proceedings.

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16 June 2026