

IN THE HIGH COURT OF JUSTICE

KING’S BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of

an application for judicial review

B E T W E E N:

THE KING

(on the application of Sex Matters)

Claimant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

WITNESS STATEMENT OF THOMAS CHARLES GUEST

I, Thomas Charles Guest, interim Deputy Director in the Policy Directorate of the Crown Prosecution Service (CPS) based at 102 Petty France, London, SW1H 9EA will say as follows:

1. I am providing this witness statement in support of the Director of Public Prosecution's (DPP) case in respect of the judicial review proceedings in The King on the application of Sex Matters.
2. I am making this statement on the basis of matters which are either in my own knowledge or based on information provided to me by other prosecutors and CPS Policy Directorate colleagues. Where the information has been provided by others I believe, to the best of my knowledge, that it is true.
3. I have exhibited items which I consider may assist the court; elsewhere I have provided footnotes where background information is available.
4. I am an interim Deputy Director employed by the Crown Prosecution Service (CPS). I have been a Crown Prosecutor since 2009. I have held my current post since February 2025.

Career history

5. I have held the following roles which are relevant to this witness statement:
 - a. In 2011-2012, I was a Legal Assistant to the Chief Crown Prosecutor in CPS London and her Deputies. In this role I saw all proposed charging decisions relating to "conditional consent" before CPS London submitted them to the then DPP's Principal Legal Adviser (PLA), Alison Levitt QC (as she then was).
 - b. In 2018, I was a Legal Assistant to the Director's Legal Advisor, Neil Moore, who succeeded Alison Levitt. In this role I saw all proposed charging decisions submitted to his team in cases relating to "conditional consent".
 - c. In 2019, as Head of Policy I engaged stakeholders as the CPS looked to consider what guidance to give prosecutors as to whether a

deception as to sexual transmitted infection (STI) status could amount to rape.

- d. In October 2022, I was appointed as a Senior District Crown Prosecutor (SDCP) with responsibility for prosecution guidance in the CPS. I continue to have oversight of prosecution guidance in my current role.

Prosecution guidance

6. I know that witness statements should not go into matters of law and I am making this statement to provide some background to the guidance and to assist on other matters where I can do so. As a SDCP I was responsible for ensuring prosecution guidance is accurate and useful through an ongoing process of review and revision. The approach I developed was to try to make the guidance more focused and purposeful. 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.
7. The emphasis on framework means:
 - a. for evidence, rather than trying to prescribe what evidence is required, developing an approach to assessing the evidence where the particularly complicated nature of a case requires it: see for

instance the prosecution guidance on Intentional or Reckless Sexual Transmission of Infection¹.

- b. for public interest, asking whether any additional guidance beyond that in the Code is necessary; for instance, the Assisted Suicide guidance² following *R (on the application of Purdy) v DPP* [2009] UKHL 45, in which it was necessary to set out which factors are relevant in favour of and against prosecution in that very special and carefully defined class of case; in others, the Code will provide sufficient guidance. See for instance Misconduct in Public Office³ (minimal guidance needed) and Prostitution and Exploitation of Prostitution⁴ (relevant considerations beyond the Code specific to this offending).
 - c. for selection of charges, providing a framework to apply where more than one charge is available: see for example, Assaults on Emergency Workers⁵.
8. The guidance seeks to assist prosecutors with what the law is in areas which are of particular complexity, sensitivity and/or where challenges have arisen with prosecutorial decision-making in the past. In some cases it is necessary to address a point which is likely to come up in CPS casework but which has not yet been settled by the courts. Two examples are the Communications Offences guidance⁶, which suggests an approach to take to the *mens rea* for the offence contrary to section 127 Communications Act 2003 concerning obscene or indecent messages, and the guidance on Strangulation and Suffocation⁷, which offers a definition of strangulation.

¹ [Intentional or Reckless Sexual Transmission of Infection | The Crown Prosecution Service](#) (“the STI guidance”) – see the five evidential propositions

² [Assisted Suicide | The Crown Prosecution Service](#)

³ [Misconduct in Public Office | The Crown Prosecution Service](#)

⁴ [Prostitution and Exploitation of Prostitution | The Crown Prosecution Service](#)

⁵ [Assaults on Emergency Workers \(Offences\) Act 2018 | The Crown Prosecution Service](#)

⁶ [Communications Offences | The Crown Prosecution Service](#)

⁷ [Strangulation and suffocation | The Crown Prosecution Service](#)

9. Guidance sometimes covers topics which may not be familiar to prosecutors by way of background to terminology or concepts they may encounter, or myths and stereotypes they should be alert to, or contextual information relevant to the offending, in a similar way to the guidance the Equal Treatment Bench Book offers for judges. For example, guidance on myths and stereotypes in the Rape and Sexual Offences guidance⁸ and the Domestic Abuse guidance⁹. This is broad context for prosecutors who are familiarising themselves with the material in the case: the guidance then focuses on the Code decision they must make and any framework which will assist with that.

Oversight of conditional consent / deception cases

10. As the caselaw on deception vitiating consent, or conditional consent, developed, the CPS was concerned to grip this area of casework and deception and conditional consent in general. The PLA, and then the DLA, oversaw all decisions in such cases. As DPP, Max Hill QC abolished this role and required Chief Crown Prosecutors to oversee all such decisions.
11. I have enquired of all Chief Crown Prosecutors (CCPs) about prosecutions since this guidance was published in December 2024. The CPS is divided into 14 geographical areas (“the Areas”) in England and Wales (plus the Special Crime and Counter Terrorism Division and Serious and Organised Crime and International Directorate who are unlikely to handle these cases, and CPS Direct who make out of hours charging decisions which then go to the 14 areas). I have been advised of the following. In terms of charging decisions, rather than cases which remain at the pre-charge stage, two areas have made no charging decisions on conditional consent cases in this time

⁸ [Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes | The Crown Prosecution Service](#)

⁹ [Domestic Abuse | The Crown Prosecution Service](#) Annexes C (important points to remember) and D (impacts)

period and the remainder have had single figures (with the exception of CPS London, which reported 15 charging decisions). The total figure divides roughly evenly between decisions to charge and decisions to take no further action. There have been approximately 28 decisions to charge and 26 decisions not to charge. These figures necessarily rely on records of what has been submitted to CCPs for approval and what decisions have been taken which can be identified from the period December 2024 to February 2026. The requirement for CCP approval is to ensure casework oversight and check and challenge, not to collate casework data.

12. Almost all of these cases concern allegations of deception involving the use of a condom or ejaculation during intercourse. Since December 2024, I have identified three cases which have alleged deception as to gender/sex. I refer to these below.

13. In my current role questions, concerns or suggestions about guidance are escalated to me. I have not had any referred to me in terms of casework (as distinct from this litigation or Freedom of Information requests). The number of cases we see at present, both as to deception and conditional consent (low numbers, i.e. <10 in each Area), and deception as to gender/sex (a small subset within this), appear consistent with the numbers of cases I have been broadly aware of, from our casework in this field, since 2011. I would expect to have identified it myself, or have it raised with me, if an issue with the guidance or volumes of cases had arisen. I am not aware of any such issue let alone difficulties.

Background to the current guidance

14. The CPS recognises that its guidance sometimes needs to address how the law might apply to novel situations. An example of where previous guidance has sought to do this is the guidance which related to whether a

deception as to STI status amounted to rape. Prior to *Lawrance* [2020] EWCA Crim 971 the CPS decided that it should develop guidance to provide a framework for the application of the evidential and public interest stages of the Full Code Test for such cases. As part of this process in 2019 I was personally involved in stakeholder engagement with advocates on behalf of those who have HIV, and those who have herpes, about what it was proposed the guidance would say. What the CPS was clear about was that this was not a hypothetical question, it was one prosecutors had encountered, and it was one on which guidance needed to be developed, even if unwelcome by those advocates. Indeed, in my role in CPS London, a Deputy Chief Crown Prosecutor and I met with a victim in an allegation of reckless transmission of HIV who had complained about the length of time a police investigation had taken to reach a No Further Action decision by the CPS. Part of that delay was attributable to considering whether an allegation of rape could be substantiated: part way during the investigation the police decided to investigate an allegation of rape by deception as a further strand to reckless transmission. This required them consider what lines of inquiry needed to be followed and then to submit a file to the CPS which was in due course considered by the PLA. Her decision was that no further action be taken in relation to rape whereupon the police resumed their investigation into reckless transmission.

15. Similarly, the CPS considered it should address deception as to gender beyond the circumstances established in *McNally* [2013] EWCA Crim 1051. There were potentially evidential and public interest considerations to be addressed in different factual scenarios. If an investigation was considering other allegations of sexual offending, the CPS should be able to advise the police as to whether or not it also ought to focus on an allegation of deception or conditional consent. I was not involved in the consultation but can give an overview of it.

16. Recognising this was a controversial and contentious topic, the decision was taken to hold a public consultation on draft guidance to receive and analyse the range of responses we could anticipate receiving. The consultation on the first iteration of the draft guidance commenced on 26 September 2022 and went on for 12 weeks.
17. The background to the consultation and revisions to the guidance are set out on the CPS website as follows:

Background

CPS prosecution guidance is an important aspect of our work. It supplements [The Code for Crown Prosecutors](#) (the Code), supporting our prosecutors to make effective decisions in all cases. Prosecutors need the clearest possible guidance on how to assess the evidence and public interest when making charging decisions or reviewing cases. Adherence to prosecution guidance should provide a predictability, transparency and consistency of decision making across the CPS, thereby ensuring the delivery of justice.

The CPS regularly reviews and updates its legal guidance, to reflect changes in law or policy, and to provide prosecutors with more detailed or clearer guidance, or a better understanding of a particular subject matter.

Chapter 6 of the CPS guidance on RASSO addresses the issue of consent in sexual offences. The offences under sections 1-4 of the [Sexual Offences Act 2003](#) require the prosecution to prove absence of consent. Section 74 of the Act defines consent as follows: “for the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice”.

This statutory definition has been examined in a number of cases, where ostensible consent was considered not to be true consent, and consent was therefore vitiated or negated. These cases are said to give rise to the developing concept of conditional consent. Deception as to gender is one of these areas of conditional consent. In the case of [McNally v R. \[2013\] EWCA Crim 1051](#) the Court determined that “depending on the circumstances, deception as to gender can vitiate consent”.

The revision to the guidance on Deception as to Gender is intended to address in more detail some of the complex and sensitive issues around this area of law. This will provide more support for prosecutors when dealing with these cases.

18. The consultation received 409 responses expressing a wide range of diverse views. They were all analysed including responses received after the consultation closed and points raised by the think tank *Policy Exchange*, in its paper *The Crown Prosecution Service’s approach to transgenderism: legally inaccurate and ideologically captured*, dated 5 November 2023.
19. The analysis of the responses took some time as did considering the significance of the decision in *Lawrance*. The draft guidance (issued for the consultation in 2022) [MF/1, pp196-200] and many of the responses to the consultation did not deal adequately with *Lawrance* in my view. Those who had taken the work on with the STI guidance had considered the impact of *Lawrance* and revised guidance on this topic was published in 2023, containing the CPS’s understanding of the ratio of this case and that a deception as to STI status could not found an allegation of rape.
20. Once the relevance of *Lawrance* had been appreciated, and the current DPP had been briefed about next steps, I was asked to work on progressing the

guidance in my role as an SDCP. I expressed the view that the guidance needed, in terms of evidential considerations, to focus prosecutors on the test established in *Lawrance* and, as above, creating a framework for decision-making under the evidential stage which promoted that focus. On public interest, it should only address further considerations beyond the Code if they arose specific to these cases; otherwise it should focus on the Code factors. Throughout the course of 2024, from January onwards, I was engaged on work to ensure we set out the law accurately in the guidance and to consider how to frame guidance on decision-making which ensured it could be applied to a range of circumstances in which a prosecutor might realistically be asked to provide early advice or a charging decision.

21. The CPS published a response to the consultation, which I exhibit as [TCG/1]. The response addresses key themes and explains why this section of the Consent chapter within the CPS Rape and Serious Sexual Offences guidance is entitled “deception as to sex” rather than “deception as to gender”:

Nature of the deception – sex and gender distinction

A large number of respondents pointed out that clarity of terms is needed, as the deception in question is one of deception as to biological sex, as recorded at birth, as opposed to gender identity. They point out that the judgment in *McNally v R.* [2013] EWCA Crim 1051 (2013) dates back to a time when reference to a person’s “gender” was commonly understood to be a reference to their sex (as the terms were often used interchangeably) and therefore, although the court used the word “gender”, it was clearly referring to sex. For example:

- The draft guidance fails to clarify the difference between sex and gender ... Specifically, where the word ‘gender’ has

been used to infer 'sex', the CPS must change this to reflect accuracy.

- The victim's consent is vitiated by an act of deception as to sex, not an act of deception as to gender (which logically does not happen anyway, since the person who has a Gender Recognition Certificate has by definition gone to some lengths to present themselves in their preferred gender role – they are not deceiving anyone about that).
- Sex is an objective, well understood, class across biological species. It is binary. Gender is a non-specific word, sometimes used instead of 'sex', sometimes meaning stereotypes and norms, sometimes behaviours, but it is not sex.

CPS comment

- The proposed revisions to the guidance used the same terminology as that used by the court, as we wished to use language consistent with the judgement and case law.
- We agree that although the court in McNally used the word "gender" with regard to the deception in question, it was probably referring to a deception as to sex, as there was no issue of "gender identity" in the case: the defendant in McNally was not trans or non-binary; she was female but presented as male.
- We therefore regard McNally as authority for the proposition that a deliberate deception as to the defendant's sex is capable of vitiating consent.

- We have now made this clear in the guidance, changing its title and using the term “deception as to sex”, instead of “deception as to gender”.
- However, we acknowledge that impersonation / deception as to identity is a potential separate line of authority: as noted in *R (Monica) v DPP (Boyling) [2018] EWHC 3508 (Admin)*, McNally could be analysed as an identity or impersonation case, “given the centrality of an individual’s sexuality to her or his identity” [77].

22. I do not propose to set out the CPS analysis of the law at present, which is contained in the guidance. However it follows from the passage above and the published guidance that the CPS position is that neither *McNally* nor *Lawrance* are authority for the proposition that only a deception as to biological sex can vitiate consent and that, when considering whether a deception as to gender can vitiate consent the focus should be on addressing the propositions in *Lawrance* with which the three-stage framework in the guidance may assist.

Pre-action protocol

23. I was not directly involved in the pre-action protocol phase but my approach following proceedings being issued and leave to seek judicial review being granted was the same as that taken by those at the pre-action protocol stage: we should consider any revisions which will help clarify the guidance, or streamline it, and which remove unnecessary points of contention. In particular, whether examples of cases were helpful or not should be considered and where appropriate concessions made. In the section headed “Case examples” below, I set out a concession which was made during the PAP process in this case, which on reflection ought not to have been made,

appreciating that it relates to an actual case which illuminates the issues in the guidance.

24. The Claimant's amended permission bundle already includes the draft guidance produced for the consultation in 2022 (MF/1, pp196-200), and the proposed version of the guidance at the conclusion of the PAP process in June 2025 (annex to N461, pp58-73). To this I add the updated version which the CPS intends to publish at the conclusion of these proceedings (i.e. with the case example references reinstated and highlighted in yellow), as my exhibit [TCG/2].

Duty of candour

25. The guidance reflects the CPS view that *McNally* [2013] EWCA Crim 1051 has not resolved the questions that arise in this area of law. It is an authority for the proposition that a deliberate deception as to the defendant's sex is capable of vitiating consent but (as the published guidance states) it is arguable that it does not address the position in relation to trans and non-binary suspects. There are different views within the CPS, not in relation to actual casework, but when we have discussed hypothetical examples and whether they would provide useful guidance to prosecutors, as to (i) whether a prosecution would follow in different factual scenarios, (ii) what circumstances a deception as to gender might or might not vitiate consent and (iii) whether often the deception as to gender in reality is also a deception as to sex. In discussing those examples, we have sought to explain or to bring the discussion back to the decision in *Lawrance* and also to accept that prosecution guidance (in general) can promote consistency of approach even if it cannot secure consistency of outcome. Provided that a view explains how it has approached the allegation of deception in accordance with *Lawrance* it is possible for such discussions to recognise alternative views.

Case examples

26. I have identified an example of a case which may assist the court. It concerns a case which pre-dates the guidance, but which may illustrate a deception as to gender rather than deception as to sex. I exhibit the sentencing note from this case as [TCG/3]. I have edited this in one respect only, to remove the full surnames of those involved as this personal data (as distinct from the first names used) is not relevant. The second and third are cases which post-date the guidance and illustrate how decisions are made in sex or gender deception cases.
27. In this case, the defendant pleaded guilty and was sentenced in September 2021 and was sentenced to 24 months' imprisonment suspended for 2 years with requirements attached. The defendant and victim had a brief relationship. The victim was under the impression that the defendant was male, having transitioned from female to male and having had an operation to create male genitalia. It transpired that the defendant was in fact a gay female and not a transgender male. The victim was therefore deceived not as to sex – she knew that she was having sex with a person born a female – but gender – she was deceived as to the female now having a male gender identity.
28. This case illustrates that the prospect that conditional consent cases might arise for which guidance should be developed was not fanciful. It also illustrates that while during the pre-action protocol efforts were made to remove examples which were merely hypothetical and simply serving to demonstrate that different factual scenarios might exist, this inadvertently removed an example based on a real case and one which draws out how deceptions of a different nature to that in *McNally* and with different conditions on consent can arise. As noted above, on reflection, the CPS's

considered view is that this aspect ought to remain included within the guidance.

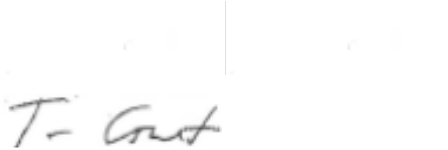
29. As noted above, there have been three cases which considered deception as to sex/gender since December 2024. The first case involved a trans man as the suspect and a gay man as the victim. They met for sexual activity on an online platform. The CPS decided no further action should be taken. As the decision has been explained to me, there was insufficient evidence that a deception had taken place on review of communications between the suspect and the victim. Further, the victim continued with sexual activity after learning the suspect was a trans man.
30. In the second case, the victim was a 16-year-old female and the suspect biologically female but identifying as a male. The suspect lied to the victim about wearing a binder to conceal breasts and engaged in sexual activity with the victim who was misled. This case has been charged and the defendant pleaded guilty with sentencing adjourned until March 2026.
31. In the third case, the victim was a female, and the suspect was a female staff member in her pupil referral unit. The suspect introduced the victim to the suspect's 15-year-old nephew and, as the relationship between victim and nephew developed, the suspect took the victim to a hotel. There, the victim believed she was engaging in sexual activity with the male nephew but in fact was doing so with the suspect who was deceiving her. This case has been charged, and the first hearing is listed for March 2026.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or

*causes to be made, a false statement in a document verified by a statement of truth
without an honest belief in its truth.*

Signed:



T- Guest

Thomas Charles Guest

Date: 20 February 2026