

B E T W E E N:

THE KING
on the application of
SEX MATTERS

Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

STATEMENT OF FACTS AND GROUNDS

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 Offences - Chapter 6: Consent*’. Despite the title of the Guidance, its focus is not on cases of deception generally, but rather to address the asserted position that “*questions of deception and consent may involve more complex issues where the suspect is trans or non-binary*” (p.1). That assertion is wrong. The error of law permeating the Guidance is that a suspect’s assertion of a gender identity can be relevant in law to the concept of intentional deceit vitiating ostensible consent under the Sexual Offences Act 2003 (“**the SOA**”). The conflation throughout the guidance of a suspect’s subjective gender identity with their objective biological sex wrongly misstates 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. Its intervention was referred to with approval by the Supreme Court in *For Women Scotland v Scottish Ministers* [2025] UKSC 16; [2025] 2 WLR 879. The Defendant (“**the DPP**”) is head of the CPS and responsible for both the Guidance and the prosecutorial decision-making of Crown Prosecutors, including by reference to the Guidance under challenge.

3. It is uncontroversial that the Guidance published by the CPS to guide its own prosecutorial decision-making must accurately reflect the law and must be quashed if it does not do so: *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.
4. It will also be uncontroversial as to why the accuracy and efficacy of the Guidance is important. 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. A systemic failure of the CPS to understand the criminal law, reflected in its own Guidance, and to fail to prosecute cases of sexual offending by deception (i.e. under-prosecution) may constitute a breach of the Article 3 ECHR rights of the victims of that offending: e.g. *DSD v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2019] AC 196; see further the evidence given in the statement of Maya Forstater of the Claimant (“W/S Forstater”), and the statement of Dennis Kavanagh of the Gay Men’s Network (“W/S Kavanagh”). Conversely, a prosecutorial failure to understand the law relating to sexual conduct leading to unjustified decisions to prosecute (i.e. over-prosecution) may engage the Article 8 ECHR rights of the defendants; see further the examples of how those identifying as trans or non-binary might be wrongly subject to prosecution under the Guidance in W/S Forstater.
5. In these Grounds, the Claimant uses the word “sex” to refer to biological sex (i.e. male or female, an immutable personal characteristic), rather than to a sexual act. The phrase “gender identity” is used to refer to the subjective idea

about a person's relationship to cultural perceptions of masculine and feminine behaviour, roles and appearance. One, important, element of gender identity is where a person identifies as being "trans"; as explained by Lord Nicholls in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 at §10, trans or transexual "is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite sex...The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder". In current usage "trans" has also been adopted as a self-description by people who do not have an unshakable belief or feeling that they are the opposite sex for example see *Castellucci* [2025] EWCA Civ 167 where the appellant identifies as "non-binary" and has transitioned medically via a penile preservation vaginoplasty, which enables the preservation of the penis while also creating a "neovagina". For a more detailed discussion of the terminology, see W/S Forstater. The Claimant understands the terms explained here to be used in the Grounds in materially the same way as they are used, or sought to be used, in the Guidance.

6. In the present case, and notwithstanding the welcome willingness of the CPS to accept the need to make some changes to the Guidance in the light of legal correspondence with the Claimant, the Guidance fundamentally fails to accurately reflect 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, as the law requires. That is Ground 1 of the claim. In contrast, a deception as to sex can and usually will so relate.
7. Moreover, the Guidance is drafted throughout in terms which impede clarity as to 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.

8. The Claimant does not doubt the good faith and desire of the CPS to provide assistance to Crown Prosecutors, but wider societal sensitivities as to debates around the validity and relevance of ideas about gender identity cannot justify the creation of confusion in place of clarity on a matter as fundamental as the content of the criminal law. No-one – including those identifying as trans – is well-served by this Guidance, or by the flawed prosecutorial decision-making it will cause.
9. The Claimant invites the Court to grant permission to claim judicial review, and in due course 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.

THE CRIMINAL LAW AS TO CONSENT

10. Section 74 of the SOA, central to the present case and to the Guidance, provides the basic definition of 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.
11. Section 75 makes provision for some evidential presumptions which are not relevant, and section 76 sets out so-called ‘conclusive presumptions’ in the following terms:
 - “(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed –*
 - (a) that the complainant did not consent to the relevant act, and*
 - (b) that the defendant did not believe that the complainant consented to the relevant act.*

(2) *The circumstances are that –*

(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.”

12. Section 76(2) codifies two particular forms of deception familiar to the case law – for example, where a sexual act is perpetrated with the assurance that it is a form of necessary medical procedure, or where the perpetrator deceives the victim into thinking he is her husband or similar – in which an absence of consent is conclusively presumed.
13. However, whether the definition of consent in section 74 is met in other contexts of deception not falling within section 76 is now the subject of a clear body of jurisprudence.
14. The most recent of these cases is that of *R v Lawrance* [2020] EWCA Crim 971; [2020] 1 WLR 5025, in which the defendant lied to the victim about having had a vasectomy, as a result of which the victim agreed to have intercourse with him without his wearing a condom. He was convicted of rape. The Court of Appeal allowed the appeal and overturned the convictions. Lord Burnett CJ emphasised, at §42, that novel factual circumstances going to consent were now to be “*considered by reference to the statutory definition, namely whether the alleged victim has agreed by choice and has the freedom and capacity to make that choice*”.
15. Having set out the authorities decided in connection with section 74, Lord Burnett CJ explained that the touchstone was whether the deception “*was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it*”: *Lawrance* at §41. See too: *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin); [2019] QB 1019 at §74. The decided case law provides a variety of indications of 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.
- (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, although because it was an extradition case prior to trial it was unnecessary for the Court to definitively rule on whether consent was vitiated.
- (4) In *R (F) v DPP* [2013] EWHC 945 (Admin); [2014] QB 581, the Divisional Court held on a judicial review of a decision of the CPS not to prosecute that consent was 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 victim *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. Applying the test set out above, the Divisional Court

rejected the submission that a deception of this kind could be sufficiently closely connected.

16. 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 complainant 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”

17. 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.

THE GUIDANCE AND ITS CONTEXT

18. By 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 them in determining, in any case, whether proceedings for an offence should be instituted”.

19. The Guidance itself does not form part of the Code and is not statutory. Rather, the Code provides at §§2.10 and 3.1 that Crown Prosecutors should make their decisions on prosecution in accordance with any guidance issued by the DPP. In other words, the general duties in the Code are supplemented by the Guidance addressing specific areas of prosecutorial work, and Crown Prosecutors are expected to have regard to, and to apply, the Guidance (subject always to the ability to depart from the Guidance for good reason, consistently with established principles of public law).
20. The Guidance also forms an important resource to others both as the content of the criminal law and, more specifically, the likely approach of the CPS to particular types of conduct. Because of its use by the CPS, it is also heavily relied upon by the police and solicitors advising their clients in connection with a police investigation, as well as by organisations providing general advice to the public about how to conduct their relationships: see *W/S Forstater* and *W/S Kavanagh*.
21. 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. 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. The Guidance was published by the CPS on 13 December 2024.
22. The Claimant sent the CPS a detailed pre-action letter on 24 February 2025, setting out various ways in which the Guidance was unlawful. The CPS indicated it would not be in a position to provide a response to that letter until 11 April 2025, and the parties pragmatically agreed that the Claimant should issue a claim to preserve its position on limitation and that the parties would consent to a stay of the proceedings to allow the pre-action process to be completed. The claim was issued on 12 March 2025. In the event, having sought

further time to await the judgment in *For Women Scotland*, the CPS provided its pre-action response on 9 May 2025 (“**the PAPER**”). Although the claim was largely defended, the CPS did agree to make certain changes to aspects of the Guidance, which it set out in a marked up copy of the text of the Guidance. In the meantime, the Claimant sent a further letter in the light of *For Women Scotland* on 7 May 2025, to which the CPS responded on 6 June 2025. That letter provided a further version of the Guidance with additional, minor, changes made to the text. Variations to the consent Order staying the proceedings were agreed during this period.

23. The Claimant welcomes the engagement of the CPS with the correspondence and its willingness to make some changes to the Guidance, even if they do not address the core issues between the parties. It is understood that the CPS intend to substitute the current published form of the Guidance for that with the changes made in the light of the Claimant’s proposed claim. In that light, references to the Guidance, and the challenge to it, in this Statement of Facts and Grounds are to the form as amended by the CPS on 6 June 2025. This version of the Guidance is provided in the claim bundle. This version is also that commented upon in *W/S Forstater*, along with a fuller account of the Claimant’s involvement in the preceding consultation process and the correspondence between the parties.

The Guidance

24. Particularly relevant passages of the Guidance will be addressed in the context of the Grounds of Challenge, below. However, by way of overview, the structure of the Guidance is as follows.
25. The opening section of the Guidance, and indeed its overall purpose, is explained on p.1 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” (as amended post-*For Women Scotland*) and “gender” as “gender identity”. The Guidance commences with a reminder that “prosecutors must approach cases involving an alleged deception as to sex on the basis of the specific evidence and circumstances revealed by the police investigation”.

26. The introduction is then followed by a series of definitional sections addressing and introducing terms referred to in the Guidance which vary between the scientific and the sociological: “Biological sex”, “Gender incongruence and gender dysphoria”, “Trans and non-binary persons – identities”, “Trans and non-binary persons – experiences”, “Gender Recognition Certificate”, and “Addressing trans persons – terminology” (pp.2-6). This claim raises particular concerns about the inclusion and content of “Trans and non-binary persons – experiences”.
27. The Guidance then moves to a series of sections addressing the case law on deception. “*R v McNally*” is summarised along with section 74 SOA, followed by “Application of *McNally* to trans and non-binary suspects”. The Guidance then summarises “Other case law”, including those authorities addressed above. This claim addresses the principles the Guidance takes from *McNally* and the other cases under Ground 1, below.
28. A longer section (p.9ff) headed “Evidential considerations” then commences. 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, regardless of the nature of the suspect, but then a list of issues is given which exclusively concern suspects who are trans, and/or deceptions as to gender identity. 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:

- (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?
29. Although the Claimant agrees with the CPS that the Three Stage Test somewhat overlaps, there is no issue taken with the Three Stage Test as an appropriate formulation of the effect of section 74 as interpreted authoritatively by the courts.
30. At pp.10-11, the Guidance addresses the First Stage; the Second Stage is at pp.11-14; and the Third Stage is at pp.14-15 (including incorporating by reference the factors set out in the Second Stage). The Claimant considers that the content of all three Stages is unlawful.
31. The final part of the Guidance is headed "*Public Interest considerations*" and reminds Crown Prosecutors to consider the public interest stage of the test for prosecution set out in the Code, and recalls particular considerations from the Code of possible relevance.

CHALLENGES TO POLICY

32. The Guidance is a non-statutory policy promulgated by the DPP for the purpose of guiding Crown Prosecutors when taking decisions as to whether to authorise prosecutions in particular cases. The Claimant accepts that its judicial review of the Guidance should be assessed by reference to the guidance of the Supreme Court in *A* (above).

33. In *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, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that 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. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others”.

34. 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) of *A*.

35. It is this type of error in the Guidance which the Claimant alleges in Ground 1.

36. However, 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."

37. Whether a case falls within category (iii) is to be considered in context, by reference to the intended audience of the policy, the likelihood of separate advice being sought on the application of the policy (c.f. the position of the police considering the Home Office guidance at issue in *A*), and the nature of the picture the policy in question presents. For example, in *R (MXK) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin), emphasis was placed by Chamberlain J at §73 on his reading of the policy that it was “*at best, misleading in that it fails to identify the sole purposes for which they may examine and detain a person with limited leave to enter or remain in relation to an NHS debt – and in doing so gives the impression that the permitted purposes are broader*”. Even where the policy explicitly affords discretion to the decision-maker, where it would only be applied by officials within the relevant authority it may still have been intended to be a detailed description of the applicable legal duties such as to engage *A*: e.g. *R (Timpson) v Secretary of State for Work and Pensions* [2022] EWHC 2392 (Admin) at §223 *per* Cavanagh J.
38. It is this category (iii) type error which is the subject-matter of Ground 2.
39. When considering the Guidance, the Court should adopt an objective approach, having regard to the document’s purpose and underlying objective, and an overly-technical approach to interpretation should not be adopted: e.g. *R (CPH) v Secretary of State for the Home Department* [2025] EWHC 848 (Admin) at §133. The meaning and interpretation of the Guidance, and any policy document, is an objective legal matter for the Court: *Mandalia v Secretary of State for the Home Department* [\[2015\] UKSC 59](#); [\[2015\] 1 WLR 4546](#) at §31 *per* Lord

Wilson and 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.

GROUNDS OF CHALLENGE

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

40. The legal test applicable to a deception capable of vitiating consent for the purposes of section 74 SOA is whether the deception “*was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it*”: *Lawrance* at §41. The Guidance correctly recognises that to be the applicable test in the sections headed “*Other case law*”, in “*Evidential considerations*” and in the heading to the First Stage. In the case of a deception as to sex, that deception changes the sexual nature of acts which would otherwise be, in a physical sense, the same: *McNally* at §26.

41. 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*” (pp.10-11). 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*”, thereby 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.

42. 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.
43. Gender identity is a subjective belief of the individual in question, based in that individual’s personal view as to what their gender is at any given point in time. Such beliefs are to be respected, and may attract legal protection in various contexts, such as under Articles 8, 9 and 10 ECHR and as the protected characteristic of belief in the Equality Act 2010. But, in contrast to a person’s sex, they are not facts and, again in contrast to their sex, they are not closely connected to the performance of the sexual act.
44. It is clear from *McNally*, and unsurprising, that a deception as to the sex of the suspect does (or at least can) meet the legal test articulated authoritatively in *Lawrance*. However, it is equally clear that the validity of the philosophical beliefs of the suspect – however important they may be to the complainant – are not legally relevant. *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*” in activism: §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.
45. Thus, the conflation in the Guidance where a complainant chooses to have sex with a person whose “*sex and gender are both male*” is wrong in law. The sex of the suspect plainly is relevant because sex with a man and sex with a woman

are sexually different acts. In contrast, the gender identity of the suspect carries no connection to the sexual act, not least because that identity exists only in the mind of the suspect, and because it forms no part of the sexual act.

46. For the avoidance of doubt, it is not the Claimant's case that a suspect asserting a trans identity is necessarily legally 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, because stating such information could be expected to inform a complainant who understands the term that their sex is the opposite to how they are presenting. 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 given, a reference to being trans is potentially relevant only because it is likely to be revelatory of a person's sex and thereby within the scope of the *Lawrance* test. More generic references to gender identity (or being non-binary) are not revelatory of anything concerned with the sexual act.
47. The answer of the CPS, given in the PAPR at §§26-28 and in the Guidance itself under "*Application of McNally*", 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. It is, of course, true that none of the decided cases address this factual situation or specifically rule on the issue of gender identity; but it is no answer of principle to the problem the Guidance is creating.
48. What the case law does unambiguously make clear is a test which cannot be met by reference to gender identity, and the legal irrelevance of other forms of the suspect's belief about him or herself. The Guidance, and the PAPR, signally fails to explain at any point how a suspect's asserted gender identity could ever, in any case, be said to be sufficiently closely connected to the sexual act itself.

49. The clarity of the legal test applicable under section 74 – binding on both the CPS and the Administrative Court – is justified by, amongst other matters, reference to rule of law principles. If, as the CPS asserts, gender identity may qualify as a condition of consent, whose breach may vitiate that consent, then the question of whether it has done so will be for a jury to decide. This will require a jury to assess the proximity between the sexual nature of an impugned act and a concept (gender identity) without an agreed or useful definition, itself the subject of an ongoing political debate.
50. Even where a jury unanimously accepts the evidence against a defendant in such an allegation, the outcome would remain unpredictable; the verdict would be determined according to whether jury members believed in, or were prepared to accept the existence of, gender identity. Those who reject such a belief would automatically reject the Crown’s argument. Those who were unsure about the belief would be unable to make the assessment of proximity. Adherents to the belief may or may not accept the Crown’s argument, depending on what status and importance they afforded gender identity. The decision would be made on the basis of matters of personal philosophical belief which should be extraneous to the jury’s deliberations. The law, having allowed a wholly foreseeable subversion of the trial process by making a verdict contingent on a political consensus among the jury, thereby requiring them to reach their decision on something other than evidence, would be unable to cure it through any judicial direction. Both defendant and complainant would be the subject of trial not by the law, but by political morality, anathema to common law principles and to those embodied in, for example, Article 7 ECHR and the requirement for an independent and impartial tribunal in Article 6 ECHR. The test identified by the courts and affirmed by the Court of Appeal in *Lawrance* avoids this unprincipled risk.

51. The fundamental distinction between gender identity as a belief and sexual activity as an expression of sexuality was similarly noted by the Supreme Court in *For Women Scotland* at §204, in which the Court was considering whether the protected characteristic of sexual orientation in the Equality Act 2010 (defined by reference to sexual orientation towards those of the same sex, the opposite sex or both) was using the word “sex” to include those with a gender recognition certificate which recognises their “affirmed gender” in place of their sex. The Court rejected such an interpretation – as it did consistently across the Equality Act – and observed that “*People are not sexually oriented towards those in possession of a certificate*”.
52. In at least one place, the amended Guidance appears to agree (p.11), given that it now states in unambiguous terms that a person who said that they would only have sexual relations with a person in possession of a gender recognition certificate was not imposing a condition sufficiently closely connected with the sexual act. The Claimant agrees with this, but it is entirely unclear how that passage could be retained in the Guidance consistently with the repeated assertions elsewhere of the relevance of gender identity. The Guidance is not only wrong in law, but internally incoherent.
53. 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

54. The Guidance is precisely the kind of policy to which category (iii) of §46 of A is intended to apply. The Guidance has been promulgated by the DPP, purporting to explain the legal framework in which Crown Prosecutors, his own staff, carry out their functions. Under the Code, and public law principles, Crown Prosecutors are expected to follow the Guidance. As staff of the CPS, Crown Prosecutors would be expected to take direction from the DPP and would not be expected to seek their own independent legal advice on the meaning and effect of the Guidance.
55. However, and distinct from Ground 1, the drafting of the Guidance 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 A. The Claimant has throughout approached the meaning of the Guidance on an objective basis, as the Court must.
56. The Claimant recognises that 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 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”.*
57. 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 not an encapsulation of principles found in any case law of England and Wales, contrary to the introductory wording.

58. Moreover, the nature and purpose of the Guidance underscores the problem with it; a Crown Prosecutor seeks to extract the applicable legal principles to a particular type of case dealt with by it. That exercise 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 as to the content of the criminal law.
59. Under “*Evidential considerations*” 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 in which the Guidance says particularly weighty ones. 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.
60. The errors in the First Stage section have been addressed under Ground 1 and are not repeated.
61. The Second Stage concerns whether the complainant was deceived in relation to the relevant condition (which must, on the law, be sufficiently closely connected with the sexual nature of the relevant act). The Claimant takes no issue with the formulation of the general paragraphs prior to the bullet points in this section, save for the persistent equating of sex with gender identity in the portmanteau formulation used throughout.

62. However, a number of the bullet points given in the Second Stage as factors relevant to deception are not lawful formulations. In particular:
- (a) In the second bullet point, 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 as to whether they were deceived as to a relevant condition.
 - (b) "*Whether there has been gender reassignment treatment*" is a misleading retention, particularly in circumstances where the CPS has otherwise agreed to delete references to gender reassignment treatment as relevant to deception as to sex (p.12) and to clarify that a condition that a person has a gender recognition certificate would not meet the *Lawrance* test (p.11).
 - (c) Although the "*degree to which the sex*" of the suspect is "*apparent*" is relevant, the degree to which the "*trans or non-binary identity*" is apparent is not. The core relevance, of sex, is obscured.
 - (d) "*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*". 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.

- (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.
63. 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, 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 (cf p.12). 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*" 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.
64. 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 iterations 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.
65. 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 suspect reasonably believed that his 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*” are legally irrelevant, even to the reasonable belief of the suspect.

66. 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*” (pp.3-4) are properly to be considered as inculpatory or exculpatory, or to explain precisely to what Stage of deception analysis the life ‘experiences’ of the suspect are said to be relevant. For example:

- (a) The statement that “*Many people who have transitioned may not regard themselves as trans, but simply as a man or a woman*” appears to be a reference to the extent of the suspect’s self-deception, particularly given that the CPS conceded in the PAPR that every sane and capacitous person can be presumed to know their birth sex (at §§22(iv)-23). This could only ever be relevant to the Third Stage.
- (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*” – even if factually accurate, which it is not – is a fundamentally misleading presentation of an avowed deception as to sex not, in some way, ‘counting’.
- (c) The reference to a person who is seeking a gender recognition certificate “*may think it necessary to conceal their sex*” 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.

- (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 are or are akin to a person who is biologically intersex. The conflation is misleading.
67. The overall picture given in this “*experiences*” section of the Guidance is that factors which are on a proper analysis inculpatory of a suspect in the context of deception as to sex are being presented to the reader as though they were exculpatory, and points entitling the suspect to be shown sympathy. This is wholly inappropriate. In no other category of suspect in rape and serious sexual offence cases does the CPS invite sympathetic consideration to be given to the suspect’s “*experiences*” as relevant to whether the offence has been committed. It is fundamentally degrading to the right of the victim to have sexual offending by deception robustly prosecuted, without fear or favour. If the Guidance is in this respect anticipating consideration of the public interest test (pp.15-16), 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 explain or mitigate the appellant’s deceit of the three complainants, or his assaults on two of the complainants or the threat to kill one of them. All of the experts accepted, and it is obvious, that the fact that a person has gender dysphoria does not mean that such a person would deceive complainants into being penetrated by a dildo. It is apparent from all the information before the Court that the fact that the appellant has gender dysphoria has caused real difficulties for the appellant. The fact, however, that the appellant has gender dysphoria does not mitigate the appellant’s actions in deceiving the three separate complainants into being penetrated without their consent.”

68. Further, the Guidance’s references to the position of those who are “*intersex*” – more properly those with disorders of sex development (“DSDs”)

betray the legal and practical confusion evident throughout. DSDs are rare conditions involving chromosomes, genes, hormones and/or reproductive organs, including genitals, meaning that a person's internal and/or sexual organs or secondary sexual characteristics do not fully develop. The very rare instances of those with DSDs are, correctly, introduced by the Guidance under the heading "*Biological sex*" (p.2), 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. DSDs are a matter of biological fact; unlike gender identity, it is not an aspect of subjective belief: see further W/S Forstater. Yet the Guidance then references those with DSDs 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*". This further underlines the incoherence of the Guidance: (i) the experiences of those with a DSD have nothing whatsoever to do with the experiences of trans and non-binary persons; (ii) those with a DSD do not have any "*inherently complex*" presentation of their "*gender*", nor their sex (since having a DSD does not literally mean that a person is "intersex": between the sexes) and the conflation is nonsensical; and (iii) it may be true that those with some DSDs may have difficulty in communicating that fact to a partner, but this is not the same as having difficulty communicating their sex, or that it amounts to deception as to sex since specific DSDs affect either males or females (for example, a woman with Mayer-Rokitansky-Kuster-Hauser syndrome is born without a vagina or uterus: this may be difficult and sensitive to explain but not disclosing it is not deception about sex, because she is female) 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.

69. 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 *A*.

CONCLUSION

70. For the reasons set out in this Statement of Facts and Grounds, and in the accompanying witness evidence and documents, the Court is invited to grant permission and, in due course, to allow the claim.

71. The Claimant will seek the following relief:

- (1) The Guidance be quashed;
- (2) Alternatively, declaratory relief;
- (3) Costs; and
- (4) Such other relief as the Court considers appropriate.

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4 July 2025