Neutral Citation Number: [2018] EWHC 3469 (QB)

Case No: CO/1354/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2018

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
THE HONOURABLE MR JUSTICE JAY

- -

Between:

R (oao "MONICA")	**Claimant**
-and–	
DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**
-and-	
ANDREW JAMES BOYLING	**Interested Party**

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- -

Phillippa Kaufmann QC and Joanna Buckley (instructed by **Birnberg Peirce**) for the **Claimant**
Gareth Patterson QC (instructed by **CPS Appeals and Review Unit**) for the **Defendant**
Ben Brandon (instructed by **Slater and Gordon LLP**) for the **Interested Party**

Hearing dates: 13th and 14th November 2018

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Approved Judgment

LORD BURNETT OF MALDON CJ and MR JUSTICE JAY:

Introduction

1. This is an application for judicial review of the decision of the Director of Public Prosecutions of 20 December 2017, confirming an earlier decision not to prosecute ex-DC Andrew Boyling for the offences of rape, indecent assault, procurement of sexual intercourse and misconduct in public office.

2. Between April and October 1997, the claimant (anonymised in these proceedings as "Monica", the name by which she is known in the Undercover Policing Inquiry chaired by Sir John Mitting) and Mr Boyling were sexual partners. At the time, the claimant was an environmental activist heavily involved in the "Reclaim the Streets" protest movement. Mr Boyling had infiltrated that movement on the orders of his superiors, using the pseudonym "Jim Sutton". He met and befriended the claimant in that capacity. The claimant was completely unaware of his real identity. The parties gradually came together through mutual attraction and interest, and their relationship began (as it was in due course to end) at the instigation of the claimant. Mr Boyling successfully maintained his cover throughout this period. It was only in January 2011 and following media reports, that the claimant discovered the true position.

3. Central to the claimant's case in these proceedings is her evidence that under no circumstances would she have entered into any sort of relationship with Mr Boyling had she known the truth. The fact that she believed that he shared her core beliefs was central to her decision to enter into a relationship with him. She felt she had been abused. She made that clear emphatically during the course of her first police interview on 22 August 2016. There is no reason to doubt the strength of the claimant's feelings and that they formed the basis of the decision under challenge.

4. The narrow issue, or series of issues, for this Court is whether the Director's decision not to prosecute is legally flawed in public law terms. As we shall explain in due course, the circumstances in which this Court may properly intervene – respecting the different constitutional roles of the judiciary and the Director in the administration of justice are circumscribed.

The Background to the Director's Decision

5. The skeleton argument filed by Ms Phillippa Kaufmann QC on behalf of the claimant provides a detailed chronological narrative. Its most important features, focusing as we must on the material which was considered by the Director in December 2017, are as follows.

6. Shortly after the end of his relationship with the claimant, Mr Boyling had a sexual relationship with another woman, TEB, which lasted about 18 months. Shortly after that, he had a relationship with DIL. Both were activists involved in Reclaim the Streets.

7. In October 2011 the Metropolitan Police Service set up Operation Herne in response to complaints about the use of undercover and covert policing tactics going back several decades. The Operation Herne report dated March 2014 concluded that:

> "There is no evidence at this time to suggest sexual relationships between undercover officers and activists were ever officially sanctioned or authorised by the SDS [Special Demonstration Squad] management.
>
> However, documents suggest that there was informal tacit authority regarding sexual relationships and guidance was offered for officers faced with the prospect of a sexual relationship.
>
> …
>
> … there are and never have been any circumstances where it would be appropriate for such covertly deployed officers to engage in intimate sexual relationships with those they are employed to infiltrate and target. Such an activity can only be seen as an abject failure of the deployment, a gross abuse of their role and their position as a police officer and an individual and organisational failing. It is of real concern that a distinct lack of intrusive management by senior leaders within the MPS appears to have facilitated the development and apparent circulation of internal inappropriate advice regarding an underground police officers engagement in sexual relationships."

8. The "internal inappropriate advice" would at least include part of the internal "SDS Tradecraft Manual" of February 1995 (updated in March 1996):

> "**5.6 Sexual Liaisons**
>
> 5.6.1. The thorny issue of romantic entanglements during a tour is the cause of much soul-searching and concern. In the past emotional ties to the opposition have happened and caused all sorts of difficulties, including divorce, deception and disciplinary charges. Whilst it is not my place to moralise, one should try to avoid the opposite sex for as long as possible.
>
> …
>
> 5.6.3. While you may try to avoid any sexual encounter there may come a time when your lack of interest may become suspicious. [Gist: 'This sentence provides advice on how to deflect suspicion …'] [These] options are fraught with difficulty and you must make your own mind up about how to proceed. If you have no other option but to become involved with a weary, you should try to have fleeting, disastrous relationships with individuals who are not important to your sources of information. One cannot be involved with a weary in a relationship for any period of time without risking serious consequences."

9. In November 2015 the Commissioner settled claims brought by a number of women, including TEB and DIL but not the claimant, who had had sexual relationships with undercover police officers. A public apology was given by Assistant Commissioner Hewitt in connection with that settlement. Amongst other things, he said this:

> "I acknowledge that these relationships were a violation of the women's human rights, an abuse of police power and caused significant trauma. ...
>
> [N]one of the women with whom the undercover officers had a relationship brought it on themselves. They were deceived pure and simple. I want to make clear that the Metropolitan Police does not suggest that any of these women could be in any way criticised for the way in which these relationships developed. ...
>
> These matters are already the subject of several investigations including a criminal and misconduct enquiry called Operation Herne. Undercover policing is also now subject to a judge-led Public Inquiry which commenced on 28th July 2015. Even before those bodies report, I can state that sexual relationships between undercover police officers and members of the public should not happen. The forming of a sexual relationship by an undercover officer would never be authorized in advance nor indeed used as a tactic of deployment. If an officer did have a sexual relationship despite this (for example if it was a matter of life and death) then he would be required to report this in order that the circumstances could be investigated for potential criminality and/or misconduct."

10. Meanwhile, on 21 August 2014 the CPS announced its decision not to prosecute any officer who had formed intimate relationships in these circumstances. DIL exercised her Victim's Right to Review but in July 2016 the CPS stated that it would not reconsider its decision in relation to charging Mr Boyling.

11. The claimant's first interview, to which we have referred, was given in response to an invitation from Chief Constable Creedon, independent lead of Operation Herne. Subsequently, Mr Boyling was interviewed in connection with the claimant's allegations. He provided "no comment" answers and a brief prepared statement in which he said that he did not wish to add anything to the prepared statement he had provided under caution on 27 April 2012. We have not seen that document, but it formed part of the material that was before the CPS decision-makers in 2017.

12. On 28 February 2017 the claimant's solicitors, Birnberg Peirce, wrote to Mr Nick Vamos, Head of Special Crime and Counter Terrorism Division at the CPS, inviting him to consider the claimant's complaint in the context of the earlier decision in DIL's case not to prosecute Mr Boyling. On 4 July 2017 Mr Vamos informed Birnberg Peirce that the CPS had decided not to prosecute the interested party. He pointed out that much of the legal analysis provided in connection with the claimant's case duplicated DIL's.

13. On 19 July 2017 the claimant sought a review of that decision. Detailed submissions were sent to the CPS on 15 September; these expressly referred to the conclusions in

the Operation Herne Report and to AC Hewitt's apology. On 20 December 2017 a specialist prosecutor at the CPS notified the claimant's solicitors that "[f]ollowing a careful and fully independent consideration of all the available evidence, I have concluded that the decision not to prosecute this case was in fact correct".

The Decision under Challenge

14. The lawyer's decision was given on the basis that the case failed at the evidential stage of the CPS's Code for Crown Prosecutors. The evidence did not provide a realistic prospect of conviction. According to paragraph 4.7 of the Code, a realistic prospect "means that an objective, impartial and reasonable jury … properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged". The evidential test requires a prosecutor to second guess the conclusion of a jury on the basis of the evidence available to the Crown and what is known of the potential defendant's case. That evaluation involves the application of knowledge and expertise concerning the dynamics of a criminal trial.

15. The material before the CPS lawyer comprised "the case papers" and a range of textbook and academic sources identified at paragraph 4 of the decision. There is no issue between the parties as to what the case papers included although in one particular respect Ms Kaufmann has taken issue with what was considered.

16. The CPS lawyer concluded that there was sufficient evidence from which a jury would very likely conclude that there was a sexual relationship, that it was likely that the jury would accept the claimant's statement that she would not have entered into a relationship with Mr Boyling had she known that he was a police officer, and that it was equally likely that the jury would conclude that this was a genuine relationship based on mutual attraction. She further concluded that Mr Boyling's "behaviour, considered over the period of the deception, could be considered to be so overt that it was an active deception in all but name".

17. The CPS lawyer analysed the claimant's case systematically: first in connection with the offence of rape; then the offence of procurement; and, finally, the offence of misconduct in public office.

18. The rape allegation was governed by section 1 of the Sexual Offences Act 1956 as amended in 1976 and 1994. The CPS lawyer considered authority starting in 1888 (when rape was a common law offence), then moved forward to the period directly relevant to the facts of the present case (when the 1976 and 1994 amendments to the 1956 Act were applicable). She also considered the more recent period covered by the Sexual Offences Act 2003. She was of the clear opinion that the jurisprudence running from 1888 to 2004 established only two species of fraud that vitiated apparent consent: first, as to nature of the sexual act, and secondly as to the identity of the perpetrator, and that the instant case could not be accommodated within these categories. However, the CPS lawyer also addressed subsequent authorities "with a view to assessing whether the [2003 Act case law] can provide any wider or indirect assistance on the application of the meaning of consent". Her conclusion was that the deception underlying the relationship in issue in this case was not such as could vitiate consent, whether judged according to the understanding of the law as it was at the time of the events in question, or by reference to the statutory test found in section 74 of the 2003 Act and recent Court of Appeal decisions. The decision proceeded on the assumption that the provisions in

the 2003 Act defining consent were declaratory of the law with the consequence that they wrought no change in the meaning of consent as compared with the 1956 Act as amended.

19. The offence of procurement of unlawful sexual intercourse by false pretences or false representations was found in section 3 of the Sexual Offences Act 1956. The offence did not survive into the 2003 Act. The CPS lawyer's reasoning was that "there was very strong evidence" against the proposition that field officers were expressly directed to procure women to have sexual intercourse, by false pretences or otherwise, in order to obtain intelligence. She stated that a relationship based on mutual attraction is the "antithesis of procurement". Further:

> "54. There is nothing in Monica's account which suggests that the suspect procured her at all, let alone used false activism in order to do so. On the contrary, their relationship began as many do: slowly getting to know each other and, for Monica, it was the suspect's absence that made her heart grow fonder, not any procurement on his part. The suspect's false pretence of being an environmental activist provided nothing more than the circumstances for them to meet on sufficient occasions to foster a relationship; it was entirely incidental to the establishment of their sexual relationship.
>
> 55. Monica states that she would not have entered into a relationship with the suspect if she had known he was a police officer and in my view, a jury is likely to accept this. Her account of the relationship, particularly its brevity and the fact that it was she who ended it, does not suggest that at any stage she was so enamoured of him that she would have overlooked his occupation. However, that does not mean he procured her by his pretence. Due to the need for the false pretence to be the trigger that the person, with intent, employs to cause the woman to agree to the act of sexual intercourse, it is difficult to see in what circumstances an implied false pretence could form the basis of the offence because of the difficulty in proving mens rea. ...
>
> 57. The facts of this case are very different [from the promise of marriage cases]. The mutual agreement to embark upon a sexual relationship occurred in the context of a modern day relationship; such agreements are rarely concluded upon the determination of a clear-cut precondition from which intent to procure could be readily inferred. In this case, even if the jury found that Monica was procured into having a sexual relationship, which in my view they would not, they would be more likely than not to conclude that the suspect did not intend to procure her by his deception."

20. The CPS lawyer identified relevant authorities governing misconduct in public office. She proceeded to analyse whether the conduct in question was of such a degree as to amount to an abuse of the public's trust in the office holder. An undercover officer was bound to establish friendships with those within the target organisation. She thought it

"obtuse" not to acknowledge that officers undercover for years might develop sexual relationships; the more so in organisations whose supporters may have "modern attitudes about sexual behaviour".

21. The CPS lawyer considered that there was a wider duty, as she put it, to take into account the degree to which the actions of an undercover officer intruded into the lives of members of the public. Given the likelihood of some sexual relationships:

> "71. … in my view it is difficult to articulate after the fact, or prescribe in advance, what sort of behaviour the officer would have to display to take him outside the necessarily rather blurry edges of acceptable conduct to such a degree that his behaviour amounts to an abuse of his office."

22. She did not discount the possibility that behaviour of this sort might be regarded as criminal. But the present case did not fall into this category:

> "73. In my view a jury is more likely than not to conclude that the suspect's behaviour does not amount to misconduct in public office. This was a short-lived relationship, ended by Monica for her own personal reasons, which the evidence demonstrates was entered into for no reason other than genuine feelings on the suspect's part."

23. Furthermore, the CPS lawyer concluded that there was no realistic prospect of proving *mens rea*. Specifically:

> "74. In my view a jury is likely to conclude that there is very strong evidence that the suspect lacked the mens rea, in that he did not wilfully misconduct himself. His account in his prepared statement is supported by the weight of the evidence relating to the practice and procedure within the SDS.
>
> 75. Further, in my view, a jury is likely to conclude that the evidence provides strong support for the suspect's account that the only sources of information and advice he had access to were from within the SDS. …"

24. In the final concluding section of her letter the CPS lawyer summarised the position under these three potential criminal offences in terms of there being "insufficient evidence to provide a realistic prospect of conviction".

25. The CPS lawyer did not refer expressly to the conclusion in the Operation Herne report or to AC Hewitt's public apology. As we have said, these matters were drawn to her attention, and Birnberg Peirce's letter of 15 September 2017 formed part of what she called the "case papers". At paragraph 8.17 of the pre-action protocol letter dated 19 February 2018, it was said that the decision failed "to address, or even acknowledge" this material. On 28 February Mr Frank Ferguson, Deputy Head of the Special Crime and Counter Terrorism Division, restated the CPS lawyer's conclusions in relation to the offence of misconduct in public office, and continued:

> "We remain of the view that for the reasons set out above, a jury would be unlikely to conclude that in the particular circumstances of this case Boyling's behaviour amounted to misconduct in a public office. Our view on this matter is unaffected by any of the representations you make in your letter."

Relevant Legislative Provisions

26. Section 1 of the Sexual Offences Act 1956 provided:

> "(1) It is a felony for a man to rape a woman.
>
> (2) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape."

Given that the offence under subsection (1) was not statutorily defined, the position at common law remained relevant.

Further, by section 3:

> "(1) It is an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse in any part of the world."

27. Section 1 of the Sexual Offences (Amendment) Act 1976 provided:

> "**Meaning of 'rape' etc.**
>
> (1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if-
>
> (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse did not consent to it; and
>
> (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; and references in other enactments [including the 1956 Act] shall be construed accordingly.
>
> (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with other relevant matters, in considering whether he so believed."

Thus, for the first time the offence of rape received a statutory definition, but the meaning of "consent" did not. There is no reason to suppose that Parliament intended any change in the understanding of consent that had developed under the common law.

28. Section 142 of the Criminal Justice and Public Order Act 1994 substituted the following section for section 1 of the 1956 Act:

> "**1 Rape of woman or man**
>
> (1) It is an offence for a man to rape a woman or another man.
>
> (2) A man commits rape if-
>
> (a) he has sexual intercourse with any person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
>
> (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.
>
> (3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.
>
> (4) Subsection (2) applies for the purpose of any enactment."

29. This is the statutory provision which was in force at the time of the intimate relationship with which this case is concerned.

30. Finally, by section 1 of the Sexual Offences Act 2003, which came into force on 1 May 2004 (by Schedule 7, all the relevant sections of the 1956 and 1976 Acts were repealed with prospective effect):

> "**1 Rape**
>
> (1) A person (A) commits an offence if—
>
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
>
> (b) B does not consent to the penetration, and
>
> (c) A does not reasonably believe that B consents.
>
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
>
> (3) Sections 75 and 76 apply to an offence under this section."

31. Sections 74 to 76 provide:

> "**74 '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.

75 Evidential presumptions about consent

(1) If in proceedings for an offence to which this section applies it is proved—

(a) that the defendant did the relevant act,

(b) that any of the circumstances specified in subsection (2) existed, and

(c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that—

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a

> reference to the time immediately before the first sexual activity began.
>
> **76 Conclusive presumptions about consent**
>
> (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."

For the first time the concept of "consent" was statutorily defined. As we shall explain, section 76(2) reproduces common law concepts that have their roots in the late nineteenth century.

The Claimant's Challenge

32. The claimant advances two judicial review grounds:

(1) The Director erred as a matter of law in concluding that the interested party's deception did not vitiate consent. It follows that there is a realistic prospect that a reasonable jury would convict him of the offence of rape.

(2) The Director failed to take into account relevant considerations, and failed to address or take into account the factors and reasoning provided in the claimant's detailed review submissions, in two particular respects: (i) the interested party conducted relationships with at least three women who were part of the Reclaim the Streets movement, and (ii) the Metropolitan Police have stated publicly that intimate sexual relationships by undercover officers with those whom they were monitoring were prohibited.

33. In developing her first ground, Ms Kaufmann submitted that this court was in as good a position as the Director to rule on what was, in essence, a pure question of law. She referred us to much of the key jurisprudence on consent in rape and assault cases, including *R v Clarence* [1888] 22 QBD 23, *R v Olugboja* [1982] QB 320, *R v Elbekkay* [1995] Crim LR 163, *R v Linekar* [1995] QB 250, *R v Richardson* [1999] QB 444, *R v Jheeta* [2008] 1 WLR 2582, *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), *R(F) v DPP* [2014] QB 581 and *R v McNally* [2014] QB 593.

34. It was common ground that the state of the law at the end of the nineteenth century was that deception operated to negate or vitiate consent only in two circumstances: first, in cases of impersonation, where the defendant pretended to be the victim's husband; and secondly, in cases where the deception was as to the nature and purpose of the act. This second category applied to situations where the defendant deceived the victim into believing that the act in question was a surgical or medical procedure rather than, in the language of the age, "connection". In both types of case the victim did not consent to the act of sexual intercourse.

35. Ms Kaufmann's headline submission was that in interpreting the meaning of the word "consent" in the 1956 Act (as amended in 1994) the law should recognise that the narrowness of these categories does not reflect modern notions of freedom of choice and autonomy. They also fail to recognise, she submits, the differences between female and male decisions about sexual relationships. She suggests that the former are more considered than the latter, less affected by physical appearance and more by a range of characteristics of the potential partner. Mr Boyling's deception as to his identity, understood in this broad sense, was fundamental – he was not "hunt sab Jim" but undercover DC Boyling. Absent this key deception, no sexual relationship would have started. It follows, Ms Kaufmann submitted, that his deception served to negate or vitiate the claimant's consent.

36. Ms Kaufmann's suggested test for ascertaining the absence of consent in a deception case of this sort evolved as the oral argument progressed. Its final resting place was based on the following two propositions. The first was that the matter to which the deception related must be sufficiently serious in objective terms as to be capable as being regarded as relevant to a woman's decision-making. She suggested that the application of this objective test would exclude a lie about personal wealth or social status but include marital status. As for the present case, it could scarcely be doubted that a state-sponsored deception of this sort should be regarded as sufficiently serious. The second proposition was that consent would be absent in a case where, viewed in subjective terms, the deception went to a matter which the woman regarded as critical or fundamental to her decision-making in line with her individual autonomy. Thus, applying the second stage of this analysis to the facts of this case, it was clear on the available evidence that the claimant regarded the genuineness of the interested party's radical, street protest and/or environmental credentials as central to her wish to start a relationship with him.

37. There is no sign of this formulation in any of the authorities either before or after the passage of the 2003 Act, nor were we shown any materials that suggest that Parliament legislated on this basis. But Ms Kaufmann submitted that a proper analysis of the decision of the Court of Appeal in *Olugboja* demonstrates that the interpretation of "consent" was freed from any earlier shackles and can accommodate the formulation advanced on behalf of the claimant. She submitted that *Olugboja* decided that the issue of consent was one of fact for the jury; that a jury should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse; and that (by necessary implication) it was not a question of applying any fixed or rigid categorisations. To the extent that later Court of Appeal cases appeared inconsistent with that approach, they should not be followed. In particular, *Linekar* was a case where the categories of deception which vitiate consent were narrowly defined. Although *Olugboja* was cited in *Linekar* its core reasoning was effectively ignored. In *Elbekkay*

the Court of Appeal applied the (correct) *Olugboja* approach, and – more importantly perhaps – the post-2003 Act decisions of the Court of Appeal in *Assange* and *McNally*, and of this Court in *R(F)*, which was a challenge to a decision not to prosecute, were all on the same track.

38. Alternatively, if *Linekar* correctly represents the law in propounding two categories for the purposes of a prosecution under the 1956 Act, the impersonation category should be broadened in modern conditions to cover deceptions as to identity in this kind of situation. As it was put in oral argument, "deceptions as to identity should be released from the constraints imposed by the nineteenth century cases, and no longer seen through a prism imposed or written by men".

39. It followed that the CPS lawyer made an error of law in concluding that the circumstances of this case could not, as a matter of law, vitiate consent. In the unusual circumstances of this case, Mr Boyling's deception was operative, serious and of a critical importance to the claimant's decision to start a relationship with him.

40. Ms Kaufmann took her second ground more shortly. In relation to the offence of procurement, first, it was clear that the sexual relationship would not have started but for the false pretences (this was necessary but not sufficient to found criminal liability). Secondly, the fact the relationship may have been based on mutual attraction did not mean that sexual intercourse had not been procured by falsity. All the relevant circumstances should be considered, including those which arose at a much earlier stage in the course of events. Thirdly, if all relevant circumstances were properly considered, Mr Boyling's accompanying *mens rea* could be proved to the requisite standard because he must have appreciated that the claimant would not have agreed to the relationship had she known the truth, or he was reckless as to that fact.

41. The claimant did not pursue her original formulation of the second ground, namely that the Director failed to take into account the later relationships with TEB and DIL. She was right not to press this point because the written riposte of Mr Gareth Patterson QC for the Director is clearly correct. The lawyer was entitled to conclude on the available evidence that Mr Boyling had genuine feelings for the claimant, and the fact that he had subsequent relationships in similar circumstances does not contradict this. The CPS's letter dated 28 February 2018 confirms that these later matters were considered in December 2017 but did not affect the conclusion.

42. As for the contention that the Director failed to take the public statement of Assistant Commissioner Hewitt into account, Ms Kaufmann was highly critical of the suggestion that it would be "obtuse" not to acknowledge that relationships of this nature would take place, and that women in these organisations tend to have "modern attitudes". Aside from what is said to be the insulting language, Ms Kaufmann submitted that it did not address the real question here, which is whether sexual relationships crossed a "red line". She submitted on the basis of AC Hewitt's apology and the Tradecraft Manual that there was clear evidence that this conduct was proscribed, and that it was not a matter of discerning whether the interested party's conduct took him "outside the necessarily blurry edges of acceptable conduct" to such a degree as to amount to an abuse of office. Ms Kaufmann submitted that either the public apology was ignored, or that if it was taken into account the decision was perverse. Finally, Ms Kaufmann submitted that these errors infected the conclusion on *mens rea*.

The Case for the Defendant and the Interested Party

43. Mr Patterson and Mr Ben Brandon (for the interested party) submitted that the deception involved in this case was not such as could negative consent for the purposes of rape. The lawyer made no error of law. To the extent that her conclusions, echoing those of the earlier and different decision maker, called for the evaluation of the evidence, they could not be faulted. Mr Brandon had an alternative submission. He submitted that the 2003 Act "fundamentally changed the law on consent, so that cases which could not have been successful under the common law resulted in convictions". In oral argument he submitted that it would breach article 7 of the European Convention on Human Rights (prohibition against retrospective change of the criminal law) to take into account subsequent developments in the understanding of consent because the interested party could not reasonably have foreseen them. In the event, it will not be necessary to decide these issues.

Discussion

Judicial Review of Prosecutorial Decisions

44. The circumstances in which this Court will intervene in relation to prosecutorial decisions are rare indeed. The principle of the separation of powers leads, as Sir John Thomas PQBD (as he then was) put it in *L v DPP* [2013] EWHC 1752 (Admin) at [7] to the adoption of a "very strict self-denying ordinance".

45. An authoritative statement of this principle, and its application to cases of this type, was given by Lord Bingham of Cornhill in *R (Corner House Research) v SFO* [2009] 1 AC 756 in the following passages:

> "30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: *R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136* , 141; *R v Director of Public Prosecutions, Ex p Manning [2001] QB 330* , para 23; *R (Bermingham) v Director of the Serious Fraud Office [2007] QB 727* , paras 63–64; *Mohit v Director of Public Prosecutions of Mauritius [2006] 1 WLR 3343* , paras 17 and 21 citing and endorsing a passage in the judgment of the *Supreme Court of Fiji in Matalulu v Director of Public Prosecutions [2003] 4 LRC 712* , 735–736; *Sharma v Brown-Antoine [2007] 1 WLR 780*, para 14(1)-(6). The House was not referred to any

> case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.
>
> 31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*)
>
> "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms.
>
> 32 Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

46. We distil the additional propositions from the authorities and the principles underlying them:

(1) particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: *L* at [32].

(2) a significant margin of discretion is given to prosecutors *L*: at [43].

(3) decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.

(4) it is not incumbent on decision makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment.

47. Lord Bingham recognised that prosecutorial decisions may be corrected for error of law, and a rare example of such a case was cited to us. In *R(F) v DPP* the claimant, who did not wish to become pregnant, consented to her husband having sexual intercourse with her on the basis only that he would withdraw before ejaculating. During intercourse he stated that he would not do so. He ejaculated before she could object or

do anything about it, and she became pregnant as a result. The Director's decision not to prosecute was quashed by this Court because the decision-maker had misconstrued "consent" within section 74 of the 2003 Act. This was a question of legal analysis rather than of evidential evaluation. We will need to return to this authority because Ms Kaufmann relies on it in support of her overarching submission on her first ground. What it demonstrates is that prosecutorial decisions are not immune from challenge in a sufficiently clear-cut case.

Ground 1

48. The CPS lawyer's approach was to consider the position under the Sexual Offences Act 1956 and at common law before addressing whether the case law under the Sexual Offences Act 2003 might assist the claimant's case in what was said to be a wider or indirect way. We will do the same even though it was an approach which, at least arguably, may have been unduly favourable to the claimant. It assumed that the 2003 Act did no more than restate and clarify the meaning of "consent" rather than alter or advance it. Although that assumption may be correct any prosecution would have to be under the 1956 Act as amended. There is no decided case which holds in terms that the 2003 Act has made no difference to the notion of "consent". There is a possible indication in *Assange* that the 2003 Act has made a difference, and there must at least be room for the argument that the abolition of the offence of procurement may have widened the scope of the offence of rape.

49. In the context of the common law and the 1956 Act, was the CPS lawyer correct in concluding that "there is a clear and consistent line of authority that only two frauds are capable of vitiating consent, fraud as to the nature of the sexual act and fraud as to the identity of the perpetrator (impersonation of husband or partner)", as she put it? In our view, this was undoubtedly the position at common law before the 1956 Act came into force, and on our understanding, Ms Kaufmann does not advance any contrary proposition in relation to the period between 1956 and before *Olugboja* was decided in June 1981.

50. In *R v Dee* [1884] 14 LR Ir 468 the Court for Crown Cases Reserved in Ireland decided that a woman who consented to sexual intercourse in circumstances where a stranger was impersonating her husband did not give a valid consent in law, and that defendant was therefore guilty of rape. The principle was clearly explained by Palles CB in the following terms:

> "I think it follows that … an act done under the *bona fide* belief that it is another act different in its essence is not in law the act of the party. That is the present case – a case which it is hardly necessary to point out is not that of consent in fact sought to be avoided for fraud, but one in which that which took place never amounted to consent. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only, and of this the prisoner was aware. As well put by Mr Curtis, what the woman consented to was not adultery but marital intercourse. … Compare the case now with *R v Flattery* [1877] 2 QBD 410, a decision subsequent to any of those relied on by the prisoner. In it the act to which the consent was given,

> one of medical treatment, was different in nature from the act committed, and on this difference in nature the case turned. … I cannot entertain any doubt that the violation by a stranger of the person of a married woman is, in the view of that law, as it is in morality, an act different in nature from the lawful act of the husband. If this is so, *R v Flattery* rules this case."

51. The narrowness of this principle is demonstrated by the decision of all 13 members of the Queen's Bench Division on a case stated by the Recorder of London in *R v Clarence* [1888] 22 QBD 23 where, by a majority of 9 judges to 4, it was held that a man who did not tell his wife that he was suffering from gonorrhoea did not commit an offence under either sections 20 or 47 of the Offences against the Person Act 1861. By express parity of reasoning, had the defendant been charged with rape no offence would have been committed.

52. The leading judgments in *Clarence* were delivered by Wills and Stephen JJ. Both rejected the generality of the proposition that fraud vitiates consent. The absence of consent principle was specifically limited - as it was in *Dee* – to cases of fraud as to the nature of the act or as to the identity of the agent (per Stephen J at 44-45). This was because:

> "I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery." [per Stephen J, at 44]

Furthermore, the application of any broader principle would bring cases of bigamy and seduction within the scope of rape, would generate "very subtle metaphysical questions" (per Wills J at 29), and would give rise to both conceptual and practical difficulties as to where to draw the line. The claimant does not shy from the proposition that all bigamous marriages (discounting the perhaps theoretical cases where the status would not matter to the non-bigamous party) would involve the commission of countless sexual offences. To our minds the practical difficulties adverted to by Wills J must be confronted in connection with a false representation from one party that he or she is not married or perhaps even in a long-term relationship. There are many who would draw the line unequivocally at sleeping with someone who was married or committed to another.

53. Cases decided over the next ninety years or so did not broaden the common law in any material respect. For the claimant, the sea-change was brought about by the decision of the Court of Appeal in *R v Olugboja*. The facts of that case were that two young men met two young women at a club, offered to take them home but instead drove them to a bungalow. They refused to go in and began walking away. The women were followed and one of them was dragged into a bedroom. The other, the complainant in the case, was told by the defendant that he was going to have intercourse with her. She asked him to leave her alone. Sexual intercourse then took place in circumstances where the defendant did not use or threaten force, and the complainant did not scream or struggle. The issue was whether coerced acquiescence of the sort exemplified in that case amounted to consent.

54. The trial judge summed up on the basis that the question of consent was one of fact for the jury to decide in a common-sense way, applying their own experience and knowledge of human nature. The case advanced on behalf of the appellant was that this was a misdirection. He relied on a line of cases extending over more than 100 years which suggested that the type of threat needed to vitiate consent was limited to threats of violence to the victim or a near relative. Here there were none. Dunn LJ, giving the judgment of the Court, disagreed, and affirmed the trial judge's direction. In particular:

> "They should be directed that consent, or the absence of it, is to be given its natural ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent. … They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and, in particular, the events leading up to the act and her reaction to them showing their impact on her mind. [at 332A-D]"

55. Ms Kaufmann submitted that the effect of *Olugboja* is that the issue of consent is reduced in all cases of rape to a straightforward examination of the woman's state of mind at the critical time, and the factors operating upon it. She said that this authority is inconsistent with an approach which relies on narrow categories or classes of case. Aside from her analysis of the case, she drew attention to academic literature contending that it brought about a new approach.

56. We are unable to accept Ms Kaufmann's submissions on *Olugboja*, and for this straightforward reason. Although the Court of Appeal stated at the outset of its judgment that the issue of law raised by the appeal was whether "it is necessary for the consent of the victim of sexual intercourse to be vitiated by force, the fear of force, or fraud; or whether it is sufficient to prove that in fact the victim did not consent" [at 325H], the facts of *Olugboja* had nothing to do with fraud, and cases such as *Dee* and *Flattery* were not cited. This was because they were irrelevant. The issue in *Olugboja* was whether the absence of an overt threat of force, or of any obvious resistance by the victim, meant that the judge's formulation was too wide. The evidence was that the victim did not consent because the situation in which she found herself was hostile, and the defendant knew that because he had created it. The directions recommended by Dunn LJ were crafted for that type of case and not with deception about status, underlying beliefs or philosophy etc. in mind.

57. The original argument advanced on behalf of the claimant, which was refined to the two-stage approach we have summarised above in paragraph 36, was that this decision supported a simple test directed at the state of mind of the complainant. If the deception was decisive in securing agreement to sex, that would be sufficient to vitiate consent. Miss Kaufmann recognised the difficulty with that approach because there are, no doubt, many who regard characteristics which most would say are superficial as decisive in choosing sexual partners. The broad language of the passage we have quoted, taken out of context, can be woven into support for the broad original submission. It provides no support for the two-stage test contended for.

58. We were shown Professor Jennifer Temkin's book, *Rape and the Legal Process*, 2nd Edition. She suggests that *Olugboja* "is radical in that it appears to seek to overturn the old approach of the common law altogether". Her summary of the position at common law, set out in seven propositions, does not cover cases of fraud. She also points out that *Olugboja* has received a mixed welcome by academics. In a wide-ranging paper published in Legal Studies in 1996, *Appreciating Olugboja*, Professor Simon Gardner suggests that this case is now the leading contemporary authority on the subject, articulating a view of consent which "looks to the victim's own perception of her interests". However, later cases such as *Linekar* have hewn more closely to older values "such as determinacy and the wish to treat like cases alike". Professor Gardner expressly recognises that the facts of *Olugboja* entailed pressure of a non-specific kind. He also acknowledges that extending this authority to other situations such as deception and mistake would involve extrapolation. He suggests that the law has not yet arrived at a universal treatment of the issue of consent which exhibits "dialectical consistency". Interesting and valuable as these commentaries are, and no doubt there are many more, they do not provide real assistance in resolving the issue of law before us.

59. Ms Kaufmann also relied on *Elbekkay* which was decided in September 1994. The facts of that case were a variant of *Dee* save that the impersonation was of the victim's partner, and not spouse. Section 1(2) of the Sexual Offences Act 1956 was limited to cases involving the impersonation of a husband. The judgment of the Court of Appeal was delivered by McCowan LJ. Having reviewed *Dee* and the decision of the High Court of Australia in *Papadimitropolous v R* [1958] 98 CLR 249 (where the deception was as to marital status), he cited the test in *Olugboja* and wholly agreed with the ruling of the trial judge who had concluded that there could be no fundamental difference between fraud in relation to a husband and a regular partner:

> "It would be wholly contrary to modern attitudes and values at which the law should seek to reflect where possible. **It would also very seriously curtail or interfere with the right of women to choose, understanding the true facts, whether to participate or not in the act of sexual intercourse**." [emphasis supplied]

McCowan LJ added:

> "[W]e think it would be extraordinary for us to come to any other conclusion in 1994. How could we conscientiously hold that it is rape to impersonate a husband in the act of sexual intercourse, but not if the person impersonated is merely, say, the long-term, live-in lover, or even in the modern idiom, the 'partner' of the woman concerned?
>
> The vital point about rape is that it involves the absence of consent. That absence is equally crucial whether the woman believes that the man she is having sexual intercourse with is her husband or another." (page 7)

60. The sentence we have highlighted assists the claimant's argument but only when it is considered in isolation. The issue for the Court of Appeal was whether the common law should be extended to cover non-married partners, notwithstanding the terms of section

1(2) of the 1956 Act, in a situation which was otherwise on all fours with *Dee*. The *ratio* of the decision was that there was no reason in the modern age to insist on the fact of marriage when the impersonation negated consent. Section 1(2) was declaratory of one aspect of the common law relating to consent. But Parliament was not taken to have set in stone the limits of fraud as to the identity of the perpetrator of the act. Properly understood, this was a modest and incremental extension of the common law, not a major advance. Given that the principle applied by the Court of Appeal – "the right of the women to choose, understanding the true facts" – is so embedded in these particular facts, we do not consider that *Elbekkay* advances the claimant's argument.

61. Six weeks after *Elbekkay* came the decision of the Court of Appeal in *Linekar*. The facts were that a woman, who was working as a prostitute, consented to sexual intercourse but only on the basis that she was paid but did not insist upon advance payment. The defendant had no intention of honouring his promise to pay. The defendant's appeal against conviction was allowed on the basis that his fraud did not touch his identity or the nature and purpose of the act.

62. Morland J, giving the judgment of the Court, reviewed *Flattery*, *Dee*, *Clarence* and *Olugboja*, as well as the Fifteenth Report of the Criminal Law Revision Committee on Sexual Offences dated December 1984, which recommended that it was for Parliament expressly to state which cases of consent obtained by fraud should amount to rape. The Court concluded:

> "In our judgment, it is the non-consent to sexual intercourse rather than the fraud of the doctor or choir master that makes the offence rape. Similarly, that ingredient is not proved in the husband impersonation cases because the victim did not consent to sexual intercourse with the particular man who penetrated her. We venture to suggest that at common law it is immaterial whether the penetrator is impersonating a husband, a cohabitee or a lover, as is supported by the Criminal Law Revision Committee …" [at 255G-H]

Pausing there, it seems that the Court was unaware that this last point had recently been determined in *Elbekkay*. Further:

> "In our judgment, applying those dicta [in *Dee*] to the facts of the present case, here there was consent by the prostitute to sexual intercourse, consensus quoad hoc. There was consent by the prostitute to sexual intercourse with this particular appellant consensus quoad hanc personam. The so-called 'medical cases', such as *Flattery* … are examples of no consensus quoad hoc. The husband impersonation cases are examples of no consensus quoad personam." [at 257B-C]

63. The claimant points out that on the facts of *Linekar* the identity of the defendant was irrelevant to the woman's consent. The case was not about wider questions of sexual autonomy: for the woman, the only issue was whether the man would pay. However, *Linekar* expressly limits the principle of fraud and absence of consent to the two categories expounded in the earlier cases, and abstains from extending it into areas which would have troubled Wills and Stephens JJ.

64. Ms Kaufmann submitted that if *Olugboja* and *Linekar* cannot be reconciled we should follow *Olugboja*, which came first in time. There are a number of difficulties with that submission, not least that *Linekar* was not decided *per incuriam*, none of the *Young v Bristol Aeroplane* exceptions apply (and in any case we are not sitting in the Court of Appeal), and *Olugboja* was not, as we have explained, a fraud or deception case at all.

65. In our judgement, there is a consistent line of authority under common law and the Sexual Offences Act 1956 – including but not limited to *Flattery, Dee, Clarence* and *Linekar* – which supports the proposition stated by the CPS lawyer that "only two frauds are capable of vitiating consent"; and there is no authority which indicates or suggests otherwise.

66. The next question, as the CPS lawyer correctly identified, is whether cases decided under the Sexual Offences Act 2003 provide "any wider or indirect assistance".

67. In *R v Jheeta*, the victim complied with the defendant's instructions, given in text messages where he was posing as a police officer, to the effect that she should have sexual intercourse with him. These offences were committed either side of the coming into force of the 2003 Act; and, in relation to the pre-May 2004 period, they were charged as procurement under section 3 of the 1956 Act and not as rape. The Court of Appeal was not invited to consider the safety of those convictions. As for the post-May 2004 offences, these were charged as rape under the 2003 Act, and the issue was whether the conclusive presumption in section 76(2)(a) applied. It was held that it did not, because there was no deception as to the nature or purpose of the intercourse. The facts were extraordinary. The appellant had pleaded guilty on the advice of counsel who had taken a view of section 76(2)(a) which turned out to be wrong. But that was not the end of the matter because there was clear evidence that the complainant had been pressurised into having sex with the appellant in circumstances which properly called into question whether there was real consent on a number of occasions. In the course of his judgment Sir Igor Judge P (as he then was) noted the prosecution argument at [20]:

> "Here, the appellant's purpose was to deceive the complainant into having sexual intercourse with him in order to alleviate or remove the problems which she, having been deceived by him, believed she faced. The result was that she submitted to intercourse because of those extraneous pressures. These submissions broadened from the narrow consideration of section 76(2)(a) of the Act into the wider question of consent as defined in section 74. The appellant's actions deprived the complainant of her freedom to choose whether or not to have intercourse with him. He pleaded guilty on the basis that at least on some occasions her freedom to choose was constrained by his actions."

68. Sir Igor analysed the cases of *Flattery* and *Linekar* for the purpose of ascertaining the true scope of section 76(2)(a). Applying those authorities to this subparagraph had the effect of limiting its proper application, which – given that it applied a conclusive presumption – was an unsurprising conclusion. At [27], *Linekar* was addressed without adverse comment in the specific context we have just identified, but at [28] he added:

> "With these considerations in mind, we must return to the present case. On the written basis of plea the appellant undoubtedly deceived the complainant. He created a bizarre and fictitious fantasy which, because it was real enough to her, pressurised her to have sexual intercourse with him more frequently than she would otherwise have done. She was not deceived as to the nature or purpose of the intercourse, but deceived as to the situation in which she found herself. In our judgment the conclusive presumption in section 76(2)(a) had no application, and counsel for the appellant below was wrong to advise on the basis that it did. However, that is not the end of the matter." [Paragraph 28 at 2591D-E]

69. Had it been the end of the matter, the convictions for rape would have been quashed. But applying the well-established approach to cases involving pressure or coercion falling short of threats of violence, the convictions were upheld. We do not consider that *Jheeta* advances the claimant's argument.

70. *Assange* was a case which concerned, so far as material to this claim, dual criminality in an extradition context. He was wanted for four offences in Sweden, the second of which was described as 'sexual molestation'. The particulars were that on 13/14 August 2010, in the home of AA, Assange deliberately molested her "by acting in a manner designed to violate her sexual integrity. Assange, who was aware that it was the expressed wish of AA and a prerequisite of sexual intercourse that a condom be used, consummated unprotected sexual intercourse with her without her knowledge". It was suggested that either he did not wear a condom or removed it during intercourse. The issue was whether a woman's consent to sexual intercourse only on the basis that the defendant would wear a condom meant that if he did not do so that could amount to rape in domestic law. The Divisional Court considered consent by reference to section 76 of the 2003 Act (the conclusive presumption) and section 74. Following the approach in *Jheeta,* the Divisional Court held that section 76 had no application. Sir John Thomas P (as he then was) giving the judgment of the court, continued:

> "86. In our view, therefore, s.76 has no application. The question of consent in the present case is to be determined by reference to s.74. The allegation is clear and covers the alternatives; it [is] not an allegation that the condom came off accidentally or was damaged accidentally. It would plainly be open to a jury to hold that, if AA had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003, whatever the position may have been prior to that Act.
>
> 87. It might be said that Mr Assange's conduct in having sexual intercourse with AA without a condom … was deceptive. Assuming it was deceptive, then in our view it was not deceptive

as to "the nature or quality of the act". … It seems to us … that s.76 should be given a stringent construction, because it provides for a conclusive presumption. The issue of the materiality of the use of a condom can be determined under s.74 rather than under s.76.

88. It appears to have been contended by Mr Assange, that if, in accordance with the conclusion we have reached, the deception was not a deception within s.76 (a deception as to the nature or quality of the act or a case of impersonation), then the deception could not be taken into account for the purposes of s.74. It would, in our view, have been extraordinary if Parliament had legislated in terms that, if conduct that was not deceptive could be taken into account for the purposes of s.74, conduct that was deceptive could not be. There is nothing in R v B that suggests that. All the court said at paragraph 21 was:

> "All we need to say is that, as a matter of law, the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 in relation to the sexual activity in this case."

89. The editors of Smith & Hogan …regard it as self-evident that deception in relation to the use of a condom would "be likely to be held to remove any purported free agreement by the complainant under s.74". A very similar view is expressed in Rook and Ward on Sexual Offences; (4th edition) at paragraph 1.216. Moreover, *Jameel* makes clear the limited scope of s.76. The complainant was deceived in a manner which did not go to the nature or purpose of the act; s.76 was therefore of no application (see paragraph 28). The evidence in relation to the fabricated scheme was sufficient, in the court's view, to negative consent for the purposes of s.74 (see paragraph 29).

90. In our view s.76 deals simply with a conclusive presumption in the very limited circumstances to which it applies. If the conduct of the defendant is not within s.76, that does not preclude reliance on s.74. R v B goes no further than deciding that failure to disclose HIV infection is not of itself relevant to consent under s.74. R v B does not permit Mr Assange to contend that, if he deceived AA as to whether he was using a condom or one that he had not damaged, that was irrelevant to the issue of AA's consent to sexual intercourse as a matter of the law of England and Wales or his belief in her consent. On each of those issues, it is clear that it is the prosecution case she did not consent and he had no or no reasonable belief in that consent. Those are issues to which s.74 and not s.76 is relevant …

91. Thus, if the question is whether what is set out in the EAW is an offence under the law of England and Wales, then it is in

> our view clear that it was; the requirement of dual criminality is satisfied."

(The reference is paragraph 87 of the quotation to "nature or quality of the act" is an error. Section 76 refers to "nature or purpose of the relevant act".

71. Thus, in *Assange* the Divisional Court held that the possible deception did not relate to the nature or purpose of the act for the purposes of the conclusive presumption. In line with earlier authority the meaning of those words in section 76 was given the restricted meaning of the common law. But it was relevant to the wider question of consent and to the alleged offender's reasonable belief in consent. The ratio of the judgment is that the types of deception capable of negating consent are wider than the narrow deceptions considered in *Dee*, *Clarence* and *Linekar* – authorities that were cited to the Divisional Court – and which are reflected in section 76. There are two ways of explaining *Assange*. One is that section 74 of the 2003 Act changed the law (here, we note the last sentence of [86] and generally [88]); the other is that the underlying common law understanding of the nature of consent has continued to develop.

72. For the purposes of the challenge to the Director's decision, it is unnecessary for us to say which of these explanations is correct. The question is whether (assuming that decisions on the 2003 Act are material) the development covers the circumstances in play. The claimant does not say that section 74 of the 2003 Act changed the law because her reliance on subsequent jurisprudence is predicated on the premise that it did not. What may be derived from *Assange* is that deception which is closely connected with "the nature or purpose of the act", because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act. Whilst this may represent a relatively modest extension of the way in which the law examines "consent" in the context of sexual offending it does not support what would be the profound change in approach to consent advanced on behalf of the claimant.

73. In *R(F)* this Court concluded, applying *Assange*, that the underlying facts, if proved, could support a conviction for rape. Consent was given on the basis that the alleged offender would withdraw before ejaculation. The prosecutor determined that, as a matter of law, the facts could not support a conviction for rape. The decision was quashed. None of the pre-2003 Act cases was cited. As Lord Judge CJ explained:

> "26. In law, the question which arises is whether this factual structure can give rise to a conviction for rape. Did the claimant consent to this penetration? She did so, provided, in the language of s.74 of the 2003 Act, she agreed by choice, when she had the freedom and capacity to make the choice. What *Assange* underlines is that "choice" is crucial to the issue of "consent" … The evidence relating to "choice" and the "freedom" to make any particular choice must be approached in a broad common-sense way. If before penetration began the intervener had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because "penetration is a continuing act from entry to withdrawal" (see s.79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his

> control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly, her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape."

74. The claimant submits that on this formulation there are no categories or constraints; merely the application of broad common sense. It is arguable that the premise of *R(F)* is that section 74 brought about a change in the law, but on the footing that it did not, we repeat what we have just said about *Assange*. Although there was no deception as to the nature and purpose of the sexual act, the deception was closely connected with it. The case does not provide support for the substantial leap contended for by the claimant.

75. Finally, in *McNally* 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 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. Leveson LJ gave the judgment for the Court of Appeal. He considered *Assange* and *R(F)* but none of the earlier cases. The submission on appeal was that a deception as to gender was tantamount to one as to age, marital status, wealth or HIV status. In rejecting that submission, Leveson LJ said this:

> "24. … First and foremost, *R v B* was not saying that HIV status could not vitiate consent if, for example, the complainant had been positively assured that the defendant was not HIV positive: it left the issue open. As Mr McGuinness for the Crown contends, the argument that in *Assange* and *R(F)* the deceptions were as to the features of the act is not sustainable: the wearing of a condom and ejaculation are irrelevant to the definition of rape and are not 'features' of the offence and no such rationale is suggested. In the last two cases, it was alleged that the victim had consented on the basis of a premise that, at the time of the consent, was false (namely, in one case, that her partner would wear a condom and, in the second, that he would ejaculate outside her body).
>
> 25. In reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent. In our judgment, Lord Judge's observation that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad common sense way" identifies the route through the dilemma.
>
> 26. Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common

> sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception."

76. The Court of Appeal referred to deception concerning "wealth" because the appellant had submitted that a person who lied about his or her wealth and thereby induced someone to have sex, who otherwise would not have done, could not vitiate consent. In applying Lord Judge CJ's approach, it is clear that the Court was holding that the deception did not relate to the nature or purpose of the act (in the sense in which that phrase was understood at common law or for the purposes of section 76(2)(a) of the 2003 Act), but did relate to the sexual nature of this activity. To the extent, therefore, that the common law was being extended (rather than section 74 being interpreted), that extension was modest.

77. In her decision, the CPS lawyer analysed the decisions of the Court of Appeal dealing with section 74 and deception. For present purposes, she identified cases which relate directly to the sexual act and where the deception puts the sexual health of the complainant at risk; and those which strike at the heart of the complainant's sexuality, which she characterised as a deception "as to the fundamental identity of the perpetrator." In the CPS lawyer's view, *McNally* could be analysed as an identity or impersonation case, given the centrality of an individual's sexuality to her or his identity, and we would agree.

78. The CPS lawyer recognised, as is the case, that there is no defined list of circumstances which, for the purposes of section 74, are capable to vitiating consent. Applying the broad common sense approach that is said to derive from *McNally* (in fact, its origin is Lord Judge CJ in *R(F)*), she was of the view that none of the interested party's deceptions was "comparable" to the deceptions found to vitiate consent in the 2003 Act case law. By this she meant that the deceptions were not comparable to or analogous with those that directly related to the sexual act, put the victim's health at risk as a consequence of it, or related to a fundamental aspect of the identity of the perpetrator.

79. The claimant does not suggest that the CPS lawyer misapplied the law in the sense that there is a decision binding on us that she either ignored or misunderstood, or whose reasoning applied by clear and obvious analogy to the facts of this case. The submission is that the authorities dictate a governing principle or approach to absence of consent ("broad common sense"), and an implicit, two-stage test, with an objective and a subjective element.

80. 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 their common sense and experience of life. For that reason, when considering the governing principle or approach it is necessary to examine how it has been applied by the courts to date. It has never been applied to deceptions which are not closely connected to the performance of the sexual act, or are intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation. Furthermore, in terms of Ms Kaufmann's postulated twofold test, the objective element is nowhere to be discerned in the authorities and sits uneasily with

notions of autonomy and freedom of choice, which are inherently subjective matters. Moreover, there is no decided case where the suggested subjective element is expressly set out.

81. In our judgment, the suggested subjective element is a very significant extrapolation from statements of principle made in specific and different contexts. For example, in *McNally* the victim's freedom of choice was robbed by the defendant's deception, but the *ratio* of the case was that, as a matter of common sense, there was all the difference in the world between sexual activity with a boy and similar activity with a girl.

82. There may be subtle metaphysical distinctions, to borrow from Wills J, between "identity", "attributes" and "qualities". There is obviously force underlying the contention that many embark upon sexual relationships for reasons unconnected with or at least well beyond the physical attractions of the intended partner. That is a reflection of human nature and the reality that different things are important to different people. But we would not want to adopt the stereotypical view advanced on behalf of the claimant that men and women are necessarily different in this respect. In our view, the CPS lawyer was correct in approaching her decision on the basis that the claimant's case involves not just a step but a leap in the way in which consent is interpreted. In our judgment, she was entitled to reach the conclusion that "consent" could be not interpreted by a court in a way which undertook that leap applying, as she put it, "current legal principles".

83. The test suggested on behalf of the claimant also skirts around all the difficulties that concerned Wills and Stephens JJ, as well as later commentators and reporters, about where to draw lines and differentiate between deceptions which negate consent for these purposes and those which do not. Whilst many would agree, for example, that deception surrounding wealth should be filtered out at the claimant's first, objective, stage, there can be little doubt that for many, the financial standing of a potential sexual partner is very important indeed. By contrast, few (if any) could doubt the fundamental deceit of a married person entering into a bigamous marriage, which would lead to almost all bigamists being guilty or rape and other sexual offences as well. That is a step which, in our view could only be achieved by Parliament, not least because the maximum sentence of bigamy is seven years' imprisonment and for rape life imprisonment.

84. The claimant's arguments were advanced on the basis that "consent" was a common law concept which the courts are free to develop. That is not strictly speaking the case, at least since the absence of consent formed part of the statutory definition of rape following the Sexual Offences (Amendment) Act 1976, further amended by the Criminal Justice and Public Order Act 1994 and then reframed by the 2003 Act. Whilst there can be no doubt that when the concept first appeared in a statute, Parliament was doing no more than reflecting the common law. But the interpretation of the concept of consent is no longer a free-standing common law exercise. It is a matter of statutory interpretation. The relevant statutory definition of rape for the purposes of this claim is that introduced in 1994 but the point holds good whether that definition or the more recent 2003 definition is in play. We have been shown no admissible aids to statutory construction which support the expansive definition of consent advanced on behalf of the claimant; and for reasons we have explained we do not consider that existing authority provides any support either.

85. Statutes are "always speaking" so that there may be "updating construction" including where there have been changes in social conditions or in the way society views matters: see *Bennion on Statutory Interpretation* 7th ed. Ch.14 and e.g. *R v Ireland* [1998] 1 AC 147 per Lord Steyn at 158, *Owens v Owens* [2017] EWCA Civ 182 per Sir James Munby P. at [39], *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 per Lord Slynn at p. 35 and Lord Nicholls at p.45, *R (Quintavelle) v Secretary of State for Health* [2003] 2 AC 687 at [9]. But there is no warrant, in the application of that principle of statutory construction, to travel along the path so attractively laid out by Ms Kaufmann. On the contrary, in our judgement it would be wrong for such a fundamental change in the understanding of consent to be brought about by judges rather than the legislature. It has long been accepted that the courts should not create new common law offences. But the principle goes further. As Lord Reid said in *R v Knuller (Publishing Printing and Promotions) Ltd* [1973] AC 435 at 457 H:

> "In upholding the decision in *Shaw's* case, we are, in my view, in no way affirming or lending any support to the doctrine that the courts still have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment."

86. The claimant's case is founded on the proposition that dicta in the cases to which we have referred should be extrapolated to establish a new understanding of consent for the purposes of rape and all sexual offences. That would inevitably result in the criminalisation of much conduct which, hitherto, has fallen outside the embrace of the criminal law. Whether sitting, as we are, at first instance in judicial review proceedings, or on appeal, such a step would not accord with principle.

87. For all these reasons, the claimant's case must fail on her first ground.

Ground 2

88. The leading authority on the meaning of "procure" or "procurement" under the Sexual Offences Act 1956 is *R v Broadfoot* [1977] 64 Cr App R 71. This was a case on section 22 and not section 3 of the 1956 Act, but that is immaterial. The defendant attempted to recruit two women to work in one of his massage parlours. They were unwilling to perform the relevant services, and charges were brought on two counts of attempting to procure a woman to become a prostitute. Cusack J, giving the judgment of the Court of Appeal, suggested two definitions of this verb or of its gerund "procuring":

> "'to procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.'
>
> 'procuring' [is] the bringing about of a course of conduct which the girl in question would not have embarked upon spontaneously of their own volition."

89. The CPS lawyer accepted that the deception necessarily involved in Mr Boyling's deployment was active, and presumably continuing, and that the claimant would not have entered into a relationship had she not been deceived. The lawyer thought that there was no act of procurement. The deception went to the circumstances which led

the parties to encounter each other rather than the act of sexual intercourse with which section 3 of the 1956 Act is concerned. Her reasoning was also along the lines that by the time a sexual relationship was on the cards, and that was months later, its trigger was not any procurement on the part of Mr Boyling but mutual attraction. The proposition that mutual attraction is "the antithesis of procurement" perhaps overstates the position, but as we have said decisions of this sort should not be read with a fine toothcomb.

90. The claimant cannot point to a decided case which treats this, or any similar, factual structure as amounting to the offence of procurement under section 3. In *Broadfoot* there was an immediate, direct physical and temporal connection between the *actus reus*, the attempted procurement, and the unwelcome activity that was in contemplation. If the facts of *Linekar* amounted to an offence under section 3, the same would apply; and we may make the same point about *Jheeta*. On the facts of the instant case, Mr Boyling did not create the circumstances which led to the encounter in the first place; he was responding to the orders of his superiors. In any event, on the facts of the present case it is difficult to see how the procurement for the purposes of section 3 could be bringing about the initial encounter – at that stage, no sexual relationship was in contemplation. By the time the relationship was about to start, it is hard to identify the *actus reus* of the offence, beyond stating that the deception was a continuing part of the background. But that is not tantamount to saying that the interested party was taking steps to secure a particular result.

91. In our judgment, the CPS lawyer was entitled to conclude that the *actus reus* of the offence would not, on balance, be established, but she also concluded that there were considerable difficulties in proving *mens rea*. In her opinion a jury would find it difficult to accept that the interested party intended to procure at least one act of sexual intercourse (and for these purposes, it would surely have to be the first act) at the relevant time: i.e. shortly before it took place. Plainly, the requisite intention could only be proved by inference, and at paragraph 56 of her decision the CPS lawyer provided a good example of a case where the inference could safely be drawn: the making of false promises of marriage to procure sex. Overall, the CPS lawyer was entitled to form the evaluative judgement that a jury would be unlikely to draw the necessary inference on these facts. This is precisely the sort of assessment upon which this Court applies a strict self-denying ordinance.

92. It follows that the first limb of the claimant's second ground must be rejected.

93. As for the second limb (misconduct in public office), Ms Kaufmann's submission is that the CPS lawyer either ignored AC Hewitt's apology or, if she did take it into account, reached a perverse conclusion. The law was correctly stated in the decision, in particular the decisions of the Court of Appeal in *Attorney-General's Reference (No. 3 of 2003)* [2005] QB 73 and *R v Chapman* [2015] 2 Cr App R 10. The key issues here were whether Mr Boyling wilfully neglected to perform his duty or wilfully misconducted himself to such a degree as to amount to an abuse of the public's trust in the office holder. The requisite level of seriousness was as set out by Lord Thomas CJ in *Chapman*.

94. The claimant is critical of the way in which the CPS lawyer expressed her belief that sexual relationships would be very likely in the environment of this protest group (see paragraph 20 above). But we are here to correct errors in the context of the evaluation

of evidence and likely outcomes of criminal proceedings. We acknowledge, even if it were the case that *some* relationships of this sort are likely to form, it by no means follows that the threshold of seriousness is incapable of being surmounted. More to the point, it is right that the CPS lawyer did not directly mention AC Hewitt's public apology in the decision letter but appeared to place greater weight on the Tradecraft Manual.

95. The nature of the claimant's challenge requires, in our view, to be identified with precision. Although advanced as a failure to consider material considerations, this is in truth a pure irrationality challenge and an attack on the merits of the CPS lawyer's decision. AC Hewitt's apology was not a "material consideration" properly so called (see *Findlay v Secretary of State for the Home Department* [1985] AC 318, at 334) and *R (oao DSD) v Parole Board* [2018] 3 WLR 829 (at paragraphs 134-145); it was part of the corpus of evidential material that was available to the lawyer in deciding whether the evidential test was fulfilled.

96. AC Hewitt's apology was considered by the CPS lawyer but she was not obliged to refer to it expressly. The apology was imprecise as to the contemporaneous material, if any, that informed AC Hewitt's assessment. It did not speak directly of what the position was in 1997. In any event, the CPS lawyer was entitled to place greater weight on the Tradecraft Manual. This did not expressly interdict the formation of sexual relationships, although it enjoined field officers to attempt to make these short-lived and disastrous. The conclusion could properly be drawn that not all sexual relationships were prohibited, and the lawyer drew attention to the features of the instant case which in her view placed it lower down the scale of seriousness. How a jury would, or might, interpret the manual and evaluate the seriousness of this case was a matter for her judgement. We make the same observation in connection with her finding that *mens rea* would be unlikely to be proved.

97. It follows that the second limb of the claimant's second ground must also be rejected.

Conclusion

98. On close consideration there is no merit in the grounds and challenge. This application for judicial review must be dismissed.