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

BETWEEN:

R

(on the application of

END VIOLENCE AGAINST WOMEN COALITION)

Claimant

- v -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

WITNESS STATEMENT OF XX

I, XX, of the Crown Prosecution Service, state as follows:

I. Introduction

1. I am employed by the Crown Prosecution Service. I have specialised in the prosecution of rape and serious sexual offences for a number of years, working within a dedicated RASSO unit, and as a result have attended all key specialist RASSO training courses delivered by the CPS. I have also followed with interest developments in legal guidance.

2. I make the following statement in support of the judicial review brought by the End Violence against Women Coalition ("EVAW"). I make it based on my own knowledge and belief, save where I have stated otherwise, in which case I believe the information contained in the witness statement to be true.

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II. Anonymity

3. I do not wish to be identified in these proceedings because I believe that by revealing information in this statement, which I understand may have the potential to cause serious reputational damage to the CPS, my identification could lead directly to the loss of my employment. This is particularly the case given the current culture in the CPS.

4. In the circumstances, I am only prepared to make this statement on the condition that my identity is not revealed. For that reason, I have neither directly identified myself in this written statement nor have I given information that I anticipate would lead to me being indirectly identified. In the circumstances, I have had to give more general summaries of information (including as to my role and experience) than I would have otherwise been able to do.

5. I made the decision to provide this statement notwithstanding the significant personal risk because it is clear to me that the CPS has, contrary to its public commitment to be honest and open[1], been dishonest in its repeated public denials that there has been no change in the approach to the prosecution of rape and serious sexual (RASSO) offences. I make this statement with a view to correcting those untruths and to increase understanding of how the clear change in CPS approach has contributed to the falling volume and proportion of suspects charged with rape.

III. Summary

6. There have been significant recent falls in the volume and proportion of suspects charged with rape. I understand that these changes are covered in other evidence being served in support of EVAW's challenge.

7. On an annual basis since 2008, the CPS has published the Violence Against Women and Girls Report which details performance statistics across the latest financial year in a number of distinct VAWG strands including rape cases. In 2013-14, the CPS charged 3621 suspects with rape, which represented 61.9% of all charging decisions

[1] 'Our values' published on CPS website, provided with this statement at Exhibit XX/1.

made by prosecutors in that year (the highest charge rate on record). In 2015-16, 3910 suspects were charged with rape (the highest volume on record) which represented 57% of all charging decisions made in the year. The first significant falls in the volume and proportion of suspects charged were seen during the course of 2017-18, when the total number of suspects charged with rape fell by 23.1% to 2822 and the proportion of suspects charged fell by 8.6% to 46.9%. This trend has continued in 2018-19. The VAWG Report published on 12th September 2019 confirms that the total number of suspects charged fell by 37.7% to 1758 (the lowest figure on record since annual reporting commenced) and the proportion of suspects charged fell by 12.5% to 34.4% (the lowest figure on record since annual reporting commenced).

8. Over the last three years there has been a dramatic change in the messaging delivered to prosecutors via both face-to-face training and legal guidance in the area of RASSO prosecutions which has promoted the belief that the "merits-based approach" (MBA) no longer has relevance to the application of the Full Code Test and has thereby discouraged prosecutors from charging the more evidentially challenging but Code-compliant RASSO cases which experience as prosecutors tells us are less likely to find favour with a jury. The change in approach implemented by prosecutors as a result of this new messaging has discouraged prosecutors from charging challenging cases of rape thereby directly contributing to these falls in the volume and proportion of suspects charged.

9. As I describe below, face-to-face training given to RASSO prosecutors (which I describe below as the "RASSO Roadshows") clearly endorsed the prohibited 'bookmakers approach' to charging decisions by identifying conviction targets for prosecutors which it was suggested could be achieved via the removal of hundreds of "weak" rape cases from the criminal justice system which are less likely to find favour with a jury. Detailed bespoke legal guidance assisting prosecutors with the practical application of the MBA has been removed from the internal and external facing CPS websites and from existing training and guidance materials. Furthermore prosecutors have received specific instructions to stop referencing the MBA concept in their review decisions.

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10. I have witnessed at first hand the impact of this new messaging on prosecutor behaviour which I believe has ushered in a new 'risk-averse' approach to the prosecution of rape. Notwithstanding the Director of Public Prosecution's contention in e.g. paragraphs 6 and 7 of the response to the Letter Before Action received on 24 June 2019 that the wording of the evidential test within the Code for Crown Prosecutors has reflected the MBA since the 5th edition was launched in 2010, the effect of the dramatic change in internal messaging is that many prosecutors now believe that it is no longer necessary to consider either the MBA and/or the detailed guidance that gave comprehensive substance to the MBA and which ensured that decision-making was not infected by harmful myths and stereotypes at all when applying the evidential test. I describe this change in greater detail in the following sections of this statement.

IV. The relevant tests

A. The Code for Crown Prosecutors and CPS Rape Policy

11. We are required as prosecutors to make charging decisions in accordance with the Code for Crown Prosecutors. The 8th edition of the Code [at Exhibit XX/2] was launched on the 26th October 2018 and replaced the 7th edition [at Exhibit XX/3] which had been in force since January 2013 and the 6th edition [at Exhibit XX/4] which had been in force since February 2010. A case featuring a suspect who is suitable for bail can only be charged if there is sufficient evidence to provide a realistic prospect of conviction and a prosecution is in the public interest.

12. In accordance with Paragraph 4.7 of the 8th Edition (paragraph 4.5 of the 7th Edition and paragraph 4.6 of the 6th Edition) the finding that there is a realistic prospect of conviction requires an objective assessment of the evidence which means:

"*that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged*".

13. This is a different test to that applied by the criminal court which can only convict if it is sure that the defendant is guilty.

14. Paragraph 4.8 of the 8th Edition (paragraph 4.6 of the 7th Edition, paragraphs 4.7 - 4.9 of the 6th Edition) provides very brief additional guidance as to the interpretation of the realistic prospect test. However, no specific reference is made to the MBA or to the dangers associated with applying the alternative 'bookmakers approach' to charge.

15. The CPS Policy for Prosecuting Offences of Rape dating back to 2012 [at Exhibit XX/5] clarifies that the aim of the CPS is to prosecute cases of rape effectively and that, in accordance with paragraph 5.5 "*we will not allow... myths and stereotypes to influence our decisions and we will robustly challenge such attitudes in the courtroom*".

B. A realistic prospect of conviction: the MBA

16. In the Divisional Court case of *FB v DPP* [2009] EWHC 106 (Admin) [at Exhibit XX/6] Toulson LJ provided guidance with regards to the approach that prosecutors should take when assessing whether there is a realistic prospect of conviction. The case involved an allegation of wounding with intent to cause grievous bodily harm and a decision by the prosecutor to offer no evidence based on a report about the complainant's general mental health rather than on an assessment of the reliability of the complainant's evidence in the particular case. At paragraph 50 Toulson LJ stated:

> "*There are some types of case where it is notorious that convictions are hard to obtain, even though the officer in the case and the crown prosecutor may believe that the complainant is truthful and reliable. So-called "date rape" cases are an obvious example. If the crown prosecutor were to apply a purely predictive approach based on past experience of similar cases (the bookmaker's approach), he might well feel unable to conclude that a jury was more likely than not to convict the defendant. But for a crown prosecutor effectively to adopt a corroboration requirement in such cases, which Parliament has abolished, would be wrong. On the alternative "merits based" approach, the question whether the evidential test was satisfied would not depend on statistical guesswork*".

V. The application of the merits-based approach in rape charging decisions

a) Presentations by Alison Levitt QC

17. The Principal Legal Advisor to the Director of Public Prosecutions, Alison Levitt QC, delivered a series of face-to-face training lectures, beginning in 2009, to CPS prosecutors and advocates in which she outlined in significant detail how the MBA should be applied in rape cases. A copy of speaking notes prepared by Alison Levitt QC are attached [at Exhibit XX/11]. Levitt emphasised that the MBA did not establish a different standard for sexual offences, but simply served to remind prosecutors how to approach the evidential stage of the Full Code Test in challenging cases.

18. In particular, the increased risk that myths and stereotypes impact on jury decision making in sex cases highlighted the importance of prosecutors reviewing cases based on a notional jury which was wholly unaffected by myths and stereotypes. Instead of asking what is the likelihood of conviction through a focus on the jury's likely response to issues such as a complainant's mental health or learning difficulties Levitt explained that "*we should ask ourselves what are the merits of a conviction taking into account what we know about the defence case?*". When discussing the weight to be applied to the opposing accounts of the complainant and defendant Levitt referenced the rarity of false allegations and made the point to delegates that a defendant would often have a clear incentive to lie in the course of an investigation in contrast to the complainant who did not.

19. Levitt emphasised the point that the MBA was key to delivering justice to vulnerable victims and that prosecutors must recognise the distinction between a difficult case and a weak case. She observed that sexual offenders often target vulnerable victims such as children, people with disabilities and people with chaotic lifestyles because they know it is unlikely that they will be believed by a jury. Such cases will often be challenging but that did not mean they were evidentially weak cases. It was crucial that prosecutors were striving to achieve justice for these victims and she highlighted examples of how the application of the MBA had led to convictions in cases featuring victims with physical disabilities such as cerebral palsy or learning difficulties. Levitt

stated that the CPS wanted to see an increase in the volume of rape prosecutions and that they would accept a short-term increase in the attrition rate as a result, "*first because it is morally right, secondly because it is the intellectually rigorous approach to the Full Code Test, thirdly because by clever and sensitive prosecuting we can actually change attitudes*".

b) Dedicated CPS legal guidance on the MBA

20. The face-to-face training provided by Alison Levitt QC was, until last year, complemented by dedicated legal guidance for prosecutors on the MBA which was published on the internal intranet and external CPS website [the final version of which is at Exhibit XX/12]. The development of this guidance reflected the CPS' "*determination to avoid flawed review decisions*" and it provided six pages of valuable practical assistance to prosecutors with regards to the objective evaluation of evidence including the careful consideration of inconsistencies and other potentially 'undermining' features of the case. The guidance warned against "*unquestioning acceptance*" of the truth of information put forward by the defendant and the need to remember that "*not every point made by the defence will be a good one, let alone fatal to the prosecution case*". It was necessary for the prosecutor to consider how persuasive evidence was along with its admissibility, credibility and reliability. With clear implications for rape and serious sexual offences cases where corroborative evidence is typically scarce, the guidance made it clear that prosecutors must not introduce a requirement for corroboration and that one person's word was "*often*" enough but that "*the quality of the evidence must be assessed*".

21. The guidance was clear that the MBA did not establish a different test to the Code test and was instead "*merely the approach we must take in applying the Code test*". The guidance was also clear that the application of the MBA does not involve suspending judgement but "*it does require prosecutors to take objective decisions that are fair and reasonable*".

VI. CPS linking the high jury acquittal rate in rape cases to the impact of rape myths and stereotypes on jury decision-making

22. The VAWG Reports confirm that the long-term trend has been for the proportion of rape trials resulting in an acquittal to be higher than the proportion resulting in conviction, and that jury acquittals have always constituted the most significant reason for unsuccessful outcomes in rape cases prosecuted by the CPS, ranging from 44.74% of unsuccessful outcomes in 2009-10 to a peak of 63.68% of unsuccessful outcomes in 2014-15.

23. It is clear from a review of past VAWG Reports that for a sustained period of time prior to 2015, the CPS routinely linked high acquittal rates in rape cases to the impact of rape myths and stereotypes on jury decision making and the need to address them with the assistance of partner agencies. At no time was it suggested that the high acquittal rate reflected inappropriate CPS decision making at the point of charge. At page 33 of the 2009-10 VAWG Report [at Exhibit XX/13] it is stated: "*The greatest number and proportion of unsuccessful outcomes were due to jury acquittals at just under 45%. This indicates the need for more multi-agency work with partners to address public awareness and challenge myths and stereotypes within and outside the CJS*". At page 25 of the 2010-11 VAWG Report [at Exhibit XX/7] it is stated that: "*Although convictions after trial rose slightly, jury acquittals have increased - out of all reasons for unsuccessful outcomes, those resulting from acquittals rose from just under 45% in 2009-10 to just under 48% in 2010-11. The rise in jury acquittals tends to suggest that more work may be needed with partners to address public awareness and challenge myths and stereotypes, which have traditionally led to high jury acquittal rates in sexual cases.*" The 2011-2012 VAWG Report [at Exhibit XX/8] states at page 28, "*the rise in jury acquittals continues to suggest that more work may be needed with partners to address public awareness and challenge myths and stereotypes, which have traditionally led to high jury acquittal rates in sexual offence cases*". The 2012-13 VAWG Report [at Exhibit XX/9] references a rise in the proportion of unsuccessful outcomes due to jury acquittals and states: "*more work may be needed with partners to raise public awareness and challenge myths and stereotypes, which have traditionally led to high jury acquittal rates in sexual offence cases*". The 2013-14 VAWG Report [at Exhibit XX/10] references another rise in the proportion of unsuccessful outcomes due to jury acquittal and states: "*more work is*

planned in 2014-15 (as outlined linked to the National Rape Scrutiny Panel below) with partners to address public awareness and challenge myths and stereotypes, which may have led to high jury acquittal rates in sexual offence cases".

VII. Evidence regarding the application of the Code in CPS decision making

A. Appeals Review Unit (ARU) of Victims' Right to Review (VRR) Area reviews in 2015

24. In 2013 the CPS introduced the Victims Right to Review scheme which allows, in specified case categories including RASSO cases, victims to seek a review of a decision not to charge, to discontinue or otherwise to terminate proceedings. The scheme allows for a review at local level followed, assuming the complainant remains unsatisfied, by a further review by a prosecutor working within the ARU. In 2015 the ARU report identified a number of cases where RASSO cases should have been charged but in fact a decision to take no further action (NFA) had been taken by area prosecutors and the report highlighted learning points arising from some of these overturned cases.

25. I first became aware of the existence of this report because the common themes [at Exhibit XX/14] were identified to prosecutors during the compulsory RASSO Refresher training (a set of training which took place in 2016, prior to the RASSO Roadshows and which I describe in more detail below). The document summarising common themes refers to a common theme emerging in almost every CPS Area in the past year as well as the previous report of:

"*A failure to consider the overall credibility of the complainant's version of events and to attach far too much credence to the account of a suspect, even where:*

i. The suspect's account is implausible; and

ii. There is evidence supporting the complainant's account".

26. The document goes onto say "*there often appears to be a readiness to make a decision not to prosecute based on minor discrepancies in a complainant's account and, this, coupled with a failure to case-build sometimes gives the impression of*

prosecutors more focussed on finding reasons not to prosecute than a positive willingness to build a strong case".

27. The document further goes on to highlight additional themes arising from the review of cases in specific CPS Areas which included:

    a. a failure to consider CPS Rape and Child Sexual Abuse policies;

    b. dismissing allegations on the basis of one word against another;

    c. too much reliance on suspect's account;

    d. discontinuing where there was strong circumstantial evidence;

    e. failure to consider relevant case law;

    f. too much reliance on relatively minor discrepancies in the complainant's account; and

    g. over reliance on counsel's advice.

28. Some of these learning points were highlighted to prosecutors in the compulsory RASSO Refresher training discussed below.

B. HMCPSI Thematic Review of CPS Rape and Serious Sexual Offences (RASSO) units

29. This report [at Exhibit XX/15] was published in February 2016. I first became aware of its existence when Review findings were referenced in the RASSO Refresher course delivered to all RASSO prosecutors during 2016 [slides at Exhibit XX/16]. The Review references the fact that inspectors reviewed a sample of 89 relevant cases and discovered that there were 9 cases where the Code test had not been applied correctly at the point of charge.

30. At paragraph 4.19 the report states:

"There is evidence from a limited number of Areas that some lawyers apply the MBA far too vigorously and cases are charged which do not have a realistic prospect of

conviction. Inspectors were made aware of times when the MBA has been viewed as separate to the Code for Crown Prosecutors rather than an integral part of it; this can result in poor decision making, an increase in unsuccessful outcomes and ultimately a poor service to victims... all Areas need to ensure that the guidance on the MBA is understood and applied properly across the specialist teams".

31. There was no suggestion in the Review that the MBA no longer served a useful purpose and indeed an example of the MBA being applied appropriately by prosecutors was identified in a case study within the Review where myths and stereotypes in relation to the style of dress, consumption of alcohol and the complainant voluntarily accompanying the defendant to a private area were all ignored by the prosecutor and a conviction secured. The issue was that MBA guidance needed to be "*understood and applied properly across the specialist teams*" and one of the recommendations arising from the Review was that: "*All RASSO lawyers undergo refresher training including the role of the MBA in the context of the Code for Crown Prosecutors*".

C. Levitt commentary on the MBA in Rook & Ward

i) Importance of the MBA

32. In 2016, two years after she had departed the CPS, Alison Levitt QC co-authored chapter 17 of Rook & Ward Sexual Offences Law & Practice (5th edition) entitled "Prosecuting Rape and Serious Sexual Offences - CPS Policy and Decision-making" with ex-Deputy Chief Crown Prosecutor Tim Thompson [Exhibit XX/17]. The commentary repeats much of what Levitt had told prosecutors in 2009, confirming that, "*it is now settled that prosecutors will adopt the MBA in all cases*", and the rationale for the MBA is discussed at length at paragraph 17.06.

33. Levitt highlights that rape myths and stereotypes "*continue to present obstacles to the successful prosecution of rape*" and makes the point that this fact presents a dilemma for prosecutors when determining whether a jury is more likely than not to convict. She refers to the fact that experience has highlighted to professionals working in the criminal justice system that juries have been reluctant to convict in "difficult cases" where for example there has been a delay in reporting or the complainant is

intoxicated. If prosecutors allowed the potential impact of these myths to impact upon the decision to charge it would be "*not only intellectually unsatisfactory but may contribute to the problem, in that it reinforces some of these unfounded beliefs*". She concedes that the MBA is "*not uncontroversial*" with some critics claiming that approaching cases in this way defies common sense and leads to prosecutions that are unlikely to succeed. Levitt goes on however to mount a powerful defence of the MBA pointing out that it prevents prosecutors from applying a different standard to rape cases than to other categories of case and that predictions based on past performance are "*inescapably flawed*" on account of the fact that a jury does not give reasons for its decision.

34. Levitt reiterates the importance of the MBA in relation to ensuring justice for vulnerable victims and suggests that "*a system which does not seek justice for the vulnerable not only offends against the provisions of the Human Rights Act 1998 but also runs counter to the beliefs and values of those who work within it and is plainly difficult either to justify or explain*". She points out that research has shown that rapists seek out vulnerable people such as those with mental health difficulties or physical disabilities "*on the basis that it is easier to commit offence against them, they are less likely to report the behaviour and less likely to be believed if they do*". She highlights examples of the successful use of the MBA by prosecutors in cases where convictions would previously have been "unimaginable" such as the case of *Watts* [2010] EWCA Crim 1824 where the victim suffered from mental health difficulties and had previously made false allegations to the police.

ii) Potential "oversteering" of prosecutors with regards to the MBA

35. At the end of the section (paragraph 17.16) Levitt makes reference to there being "*evidence that some oversteering may have taken place since the judgment in FB*" and the possibility that "*some prosecutors seem to have interpreted the [MBA] guidance as meaning that all complaints should result in prosecution even when this involves ignoring flaws in the case*". Levitt does not reference her evidence base for this comment within the chapter but given that she had left the CPS two years before my assumption is that it was influenced, at least in part, by the findings arising from the

HMCPSI Review. Levitt went on to confirm that action had been taken by the CPS to address the problem, stating, "*further guidance has been issued which reminds prosecutors that the MBA does not require them to suspend logic or judgment but merely to make decisions which are fair and reasonable*" and she provides a link to the prosecutor guidance [at Exhibit XX/12].

VIII. RASSO Refresher Training in 2016

A. Training issued to prosecutors to guard against the erroneous application of the MBA

36. All rape specialist prosecutors and advocates were required to complete face-to-face RASSO refresher training in 2016, prior to the RASSO Roadshows which I discuss in the following section. One of the key aims of the training course [slides at Exhibit XX/16] was identified as "*ensuring an overall consistent approach across the CPS in relation to the handling of rape and serious sexual assault cases and the application of the Code*".

37. The training highlighted the HMCPSI finding that in 10% of cases reviewed that the Code test had not been applied correctly. The training repeated key messages contained within the MBA legal guidance namely that the MBA outlined the approach that prosecutors should adopt when applying the Code Test but that it was not a different test to the Code and did not require prosecutors to suspend judgment but merely to take objective decisions which are fair and reasonable.

B. Evidence of erroneous NFAs

38. The Refresher training course also referenced findings arising from the 2015 ARU report referenced above. Delegates were told that the ARU had identified examples of area prosecutors applying flawed logic when making decisions to NFA rape cases in some situations because they had failed to follow the MBA. Examples of failings which were highlighted in the Refresher training course included:

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a. failing to consider the overall credibility of the complainant's account and attaching too much credence to the suspect's account even where it was implausible or where there was evidence to support the complainant's account;

b. failing to consider CPS rape and CSA policy;

c. reviews making reference to myths and stereotypes;

d. child victims deemed to be liars by prosecutors because they told a lie at school about something trivial;

e. inappropriate emphasis placed on the credibility of the complainant rather than the credibility of the allegation;

f. references to the complainant being sexually active and this being undermining; and

g. viewing as undermining a complainant who continues to associate with a suspect.

39. The Refresher course went on to reference how vulnerable victims are targeted by offenders and the importance of prosecutors understanding victim reactions to rape including the impact of trauma.

40. As such, following the RASSO Refresher training, it was my understanding that (consistent with all of the studies and previous training I had received) the CPS would continue to apply the MBA as a useful tool.

IX. The RASSO Roadshows

A. Course rationale

41. In 2016 and 2017, only very shortly after the Refresher training described above, at which the importance of correctly applying the MBA had been addressed in detail (in accordance with the recommendations in the reports set out above), the Director of Legal Services Gregor McGill and the Director's Legal Advisor to the Director of

Public Prosecutions Neil Moore jointly delivered further training sessions to all RASSO trained prosecutors across England and Wales which provided guidance as to the appropriate application of the Code Test in RASSO cases. The sessions were referred to as the RASSO Roadshows and I was in attendance at one of the regional events.

42. It is standard practice in the CPS for detailed training materials to be provided for legal training and I was therefore extremely surprised to find that the only training materials provided to delegates for the Roadshow was a mock case study [at Exhibit XX/18] running to four pages and a mock charging decision running to two pages [at Exhibit XX/19]. The case study and charging advice documents detail a case involving allegations of sexual assault made by a 15 year old female student against her 42 year old teacher. The mock case study highlights evidential difficulties including the complainant providing inconsistent evidence with regards to the details of the alleged assaults, where they took place and when they took place. In the mock charging advice the prosecutor dismisses the significance of all potential evidential difficulties and concludes that "*applying the merits based test I find there is a realistic prospect of conviction*". No reference was made by the course tutors to the mock case study or charging advice during the Roadshow that I attended, but I assume the purpose was to provide delegates with an example of flawed legal analysis leading to a charging decision which was not Code-compliant. In the absence of any training materials setting out the key learning points for the course, I took a detailed note of the training course which I have revisited prior to making this statement.

43. The key message of the training was that prosecutors were currently charging too many rape cases and McGill emphasised the significance of performance data to support this argument. He stated that in 2011-12, 45.3% of rape cases had gone to trial, whereas by 2015-16, this figure had risen to 58.3%. He then stated that the fact that an increased number of rape prosecutions were going to trial proved that the CPS was prosecuting a greater number of weak cases. He stated that in 2011-12, 52.4% of rape cases resulted in a conviction after jury trial but that the figure had fallen to 45% in 2015-16. The fall in the conviction after jury trial rate was significant, he said,

because if we were prosecuting the right cases "*we would be winning more cases than we are losing*". Linking what has always been a high jury acquittal rate in rape cases to inappropriate decision making on the part of prosecutors was in sharp contrast to longstanding corporate messaging, which had emphasised the significance of the impact of rape myths and stereotypes on jury decision making (see paragraph 23 above).

44. McGill and Moore proceeded to argue that the MBA had caused confusion for prosecutors and was being used by some to "*explain away the inexplicable*" (McGill) and "*as a broom to sweep away evidential problems*" (Moore). Referring to his personal experience of review decisions seen in his capacity of Director of Legal Services McGill said he had seen a number of poor decisions in RASSO cases which had "*lost sight of the Code Test*". He believed that this had happened because prosecutors were "*feeling the pressure of putting rape cases through the system*" as a result of the training they had received in relation to the MBA including the face-to-face training delivered by Alison Levitt QC.

45. No reference was made by either speaker to the 2016 HMCPSI thematic review findings [Exhibit XX/15] or to previous training and guidance issued by the CPS in response to it including the RASSO Refresher training which had emphasised the importance of avoiding the erroneous application of the MBA. Moore did repeat Alison Levitt QC's quote from Rook & Ward referencing the possibility of "*oversteer*" and argued that it was now necessary to "*correct the oversteer*".

46. Both speakers suggested that the MBA added nothing to the Full Code Test which already urged prosecutors to adopt an objective approach to the evaluation of evidence. They wanted to "*get rid*" of the MBA terminology and specifically stated that they no longer wanted to see prosecutors make reference to the MBA in any charging or review decisions. McGill went on to claim that it was his view that prosecutors working for the ARU had become "*too willing*" to overturn decisions taken by area prosecutors to NFA rape cases on account of the MBA and he intended to speak to ARU prosecutors with a view to changing their approach. No reference

was made during the Roadshow to the 2015 ARU report which had highlighted evidence of prosecutors erroneously refusing to charge rape cases.

B. Advice to prosecutors - "a touch on the tiller" and removing 350 'weak' cases from the system

47. In describing the change of approach that was required from RASSO prosecutors McGill stated he did not want to see us "*go back to the 1990s*" but instead identified the need for a "*touch on the tiller*". Once again, he relied heavily on performance statistics to justify his arguments and stated that "*if we took 350 weak cases out of the system our conviction rate goes up to 61%*". McGill indicated that he thought that an overall conviction rate of 61% or 62% was a level that he would ideally like to see achieved by the CPS in rape cases. He stated, "*we will support you in making more NFA decisions*".

48. McGill and Moore then proceeded to provide advice on the fair evaluation of evidence in RASSO cases, much of which contradicted that previously provided to prosecutors. McGill said he had seen a number of reviews where the complainant was referred to as a credible witness but he stated that a credible complainant was "*not enough*" to justify charge. Moore said it was unhelpful for a prosecutor to pose the question "*who has the greatest incentive to lie*", because this assumed that the complainant was telling the truth and "*some complainants lie for a number of reasons*". Moore suggested that prosecutors were too ready to discount inconsistencies in the complainant's evidence on account of the impact of trauma and there was a need to consider other potential reasons for the inconsistencies including the possibility that the complainant was not telling the truth. Moore criticised prosecutors who in non-recent RASSO cases were attributing undue weight to the existence of "*irrelevant*" evidence which simply served to corroborate background facts such as the location and timing of the incident rather than the offence itself.

X. Amendments to existing legal guidance and RASSO training materials

A.. Removal of bespoke MBA legal guidance from internal and external facing websites

The messages delivered in the Roadshows were reinforced by the changes that were subsequently made by the CPS to legal guidance and training materials for prosecutors. The bespoke MBA guidance [Exhibit XX/12] which provided valuable practical guidance as to how to approach the Code was removed from the external and internal facing web pages on 3 November 2017 (according to the CPS' letter of 17 July 2019).

B. Edits to the RASSO Induction training course

49. Following the delivery of the RASSO Roadshows, separate face-to-face RASSO training for prosecutors has continued, including the delivery of the RASSO Induction Course for prosecutors. This two-day face-to-face training course is currently mandatory for all prosecutors joining a RASSO Unit and prosecutors are not permitted to work on RASSO cases until such time that they have completed the course. Following the delivery of the RASSO Roadshows I am aware that the CPS continued to deliver this course to new prosecutors but, as set out in the CPS's letter of 17 July 2019, to ensure consistency with the new messaging, all explicit reference to the MBA along with the vast majority of the associated explanatory content was removed from the Induction Course materials.

.XI. Impact of the RASSO Roadshows and new messaging on prosecutor behaviour

A. Reaction to the Roadshows

50. Whilst opinion on the merits of the Roadshow training among colleagues was mixed, the clear consensus was that it signalled a significant change in the CPS approach to the prosecution of RASSO cases. The clear endorsement of the 'bookmaker's approach' to charge came as a particular shock to me and a number of other delegates. Given the recent previous training we had received on the appropriate application of

the Code Test (most notably the Refresher training) it was noteworthy that the speakers failed firstly to explain why this additional course was necessary, or secondly to reference the ARU evidence which suggested that an opposite problem existed: namely that some prosecutors were erroneously making NFA decisions.

51. As a prosecutor who found the MBA and associated guidance to be extremely helpful in dealing with the issues presented by challenging RASSO cases I was left confused by the suggestion that it no longer served a useful purpose and was adequately covered by a few short lines within the Code. It was immediately clear to me that this new messaging could have serious adverse implications for victims of rape seeking access to justice, particularly those whom Alison Levitt QC had identified as being the most vulnerable.

52. It is normal practice to discuss decision making with your fellow RASSO prosecutors and since the training was delivered I have had many conversations with colleagues in relation to both individual cases under review and the approach to RASSO prosecutions more generally which have served to highlight the direct impact that the Roadshow training and changes to the guidance has had on CPS decision making in this area. Many colleagues have positively embraced the 'bookmaker's approach' to charge, commenting that, as a result of the Roadshow training, they believe they no longer have to consider the MBA at all and feel empowered to stop the prosecution of more 'difficult' cases which, based on their previous experience, have little prospect of resulting in a successful outcome at trial, such as so called 'student rape cases' involving alcohol or cases with little or no corroborative evidence available to support the complaint made. When I have had these discussions, colleagues have suggested that the new approach introduced by the Roadshow training will ultimately benefit victims because, by following the MBA, we have been unnecessarily subjecting victims to the trauma of trials in challenging cases where on account of jury prejudice we can anticipate a jury acquittal from the outset.

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B. CPS area documents evidencing a change in approach to the prosecution of rape

53. Documents generated by individual CPS areas and or departments which are published on the internal CPS intranet system assist in evidencing the change in approach to the prosecution of rape that has taken place as a result of the messaging delivered. In a note detailing a quarterly meeting between Gareth Morgan, RASSO District Crown Prosecutor in CPS South East, and Detective Inspectors from Sussex Police at Brighton Police Station on 23rd August 2017 [Exhibit XX/21], it is noted in the "*summary of key points discussed*" section at point 3, "*discuss how more robust charging decision post training on the merits based approach should see less cases being charged*".

54. On page 1 of the CPS Mersey-Cheshire area newsletter dated March 2019 [Exhibit XX/22], which is designed to provide key updates to area RASSO prosecutors, a link is provided to legal guidance, and directly underneath the link the following comment is recorded, "*(although please note the merits based approach is no longer applicable- the content has been removed)*".

C. Staff responses to the CPS briefing for RASSO teams on the Letter Before Action

55. In July 2019, CPS management circulated a briefing for RASSO teams which referenced the Letter Before Action sent by EVAW and the CPS response to it [Exhibit XX/23]. The response from staff to the briefing is informative. The briefing states that EVAW's proposed claim for judicial review "*is entirely without merit*" and that "*the fundamental point is that there has been no change of policy or practice because our decisions on whether or not to prosecute are – and always have been – based on whether the Code test is met*". In explaining the withdrawal of the MBA guidance and the subsequent delivery of the RASSO Roadshows the briefing references the findings of the HMCPSI Inspection in 2016 including that the MBA was "*sometimes viewed as separate to the Code, rather than an integral part of it*" and the recommendation that, "*all RASSO lawyers undergo refresher training including the role of the merits-based approach in the context of the Code for Crown Prosecutors*". The RASSO Roadshows were, according to the briefing, delivered in

order "*to ensure we were providing the most helpful support for RASSO teams*". The briefing goes on to identify factors other than the increasing NFA rate to explain the fall in volume of rape charging decisions.

56. A number of colleagues with whom I have had direct contact in recent weeks have reacted with incredulity to the claims made by CPS management within this briefing, which was widely regarded as a cynical attempt to get prosecutors 'on message' following the launch of the LBA. One colleague who was shocked by the denial of a change in approach suggested it was impossible that the individual who had written the briefing had attended a Roadshow with the same content as she had. Another colleague suggested that management had their heads in the sand, and equated the credibility of their position denying a change in approach to those who, notwithstanding the evidence, continue to deny the existence of climate change. Another prosecutor with whom I spoke was positively angered by the briefing, which he described as "*an insult to my intelligence*".

XII. The CPS' response to the Letter Before Action

57. I have been asked to comment on some of the claims made by the CPS which are contained within the response before action dated 24 June 2019.

A. Denial of change of approach

58. At paragraph 20 of that letter the CPS states:

> "*There has been no change of policy and the practice remains to apply the Code test. Accordingly both proposed grounds are misconceived. Moreover the policy and practice is not to apply the so-called 'bookmaker's test'. The limited changes made to the CPS Legal Guidance do not reflect any underlying change to policy or significant change in practice and were simply intended to seek to ensure that the Code test is properly applied*".

59. It is my experience that these statements are untrue. The RASSO Roadshows described above clearly endorsed the bookmaker's approach to the prosecution of RASSO cases and prohibited prosecutors from referencing the MBA in their review decisions. This training was reinforced by the removal of bespoke MBA guidance

from prosecutor legal guidance and by substantial changes to existing legal training materials. The inevitable result of these changes was for prosecutors to raise the evidential bar for charge in rape cases such that those more challenging case types, which based on previous experience are less likely to find favour with a jury, became less likely to be charged. Prosecutor colleagues have confirmed that they no longer believe that the MBA needs to be considered when making charging decisions and have adjusted their approach accordingly. I have referenced documentation in this statement which evidences the same.

B. Evidence base for the RASSO Roadshows

60. In its response the CPS also provides the misleading impression that the RASSO Roadshows were delivered in response to the findings of the HMCPSI Thematic Review and were necessary despite refresher training having been delivered to prosecutors. At paragraph 24, the CPS references the finding of the HMCPSI Thematic Review that in some cases the MBA was being applied too vigorously and the recommendation that RASSO lawyers undergo refresher training in relation to the role of the MBA in the context of the Code for Crown Prosecutors. At paragraph 25, it is said:

"*following on from the Review and despite training having been rolled out, in September 2016 at a CPS Senior Leadership Group Meeting a decision took place in relation to decision making in RASSO cases. This followed consideration of a document drafted by the Director of Legal Services, Gregor McGill. It was agreed, at the Senior Leadership Group Meeting, that training should be provided to ensure the correct application of the Code. This was because of a misunderstanding by some Prosecutors as to the merits based approach and, in particular, whether it represented a different test from that set out in the Code or at least a gloss on the Code test. Such a concern echoed that of the earlier Review.*"

61. However, this response fails to mention that a mandatory refresher course was delivered to all RASSO prosecutors in 2016 [Exhibit XX/16], as I have explained previously in this statement (see paragraphs 36-40 above), which specifically referenced the findings and recommendations of the HMCPSI Review. The response does not reference the fact that the Induction Course [Exhibit XX/20] also provided detailed guidance around the appropriate application of the MBA.

62. Moreover, when explaining the rationale for the Roadshows the tutors did not reference the findings or recommendations of the HMCPSI Review. No reference was made by the tutors to the RASSO Refresher Course and why the content of that course had been insufficient to address their concerns about the way some RASSO prosecutors were applying the Code test. Similarly, no reference was made by the tutors to the bespoke MBA guidance or to the RASSO Induction Course and why these products were not sufficient to address the concerns. The only evidence provided for the contention that prosecutors were not applying the Code appropriately in RASSO cases was the deeply flawed statistical analysis as outlined in paragraphs 43 and 47 above.

C. Removing the MBA to address confusion and to improve compliance with the Code

63. In paragraphs 31 and 34 of their response to the LBA the CPS further contends that the Roadshows and the changes made to guidance were intended to reduce confusion among prosecutors and to improve compliance with the application of the evidential test within the Code. As noted above it is not clear what the evidence of this confusion was post delivery of the RASSO Refresher course and post release of the bespoke MBA guidance, aside from the flawed statistical analysis which is consistent with a 'bookmaker's approach' to charge. The impact of prohibiting reference to the MBA and removing the detailed guidance on its appropriate application has led many prosecutors to believe that the principles of the MBA no longer have application and so the effect has in fact been to undermine Code compliance in RASSO cases.

D. The Code as an adequate expression of the MBA.

64. At paragraph 9 the CPS highlights the changes made in 2010 in the 6th Edition of the Code (evidential test) which it states: "*reveal a far clearer reference to the essentials of what has become known as the merits based assessment*".

65. The implication is that the wording of the Code provides prosecutors with substantial and sufficient guidance as to how to apply the MBA. The reality, which was recognised by the organisation for many years prior to the delivery of the Roadshows and the subsequent edits to training materials and guidance, was that RASSO

prosecutors require detailed input on the subject of appropriately applying the MBA to RASSO charging decisions because it is these cases which are most regularly associated with myths and stereotypes and where there is a particular danger that the low conviction rate can impact upon the prosecutor's approach to the concept of a realistic prospect of conviction.

66. It is my view that the alarming decline in prosecution volumes is due at least in part to the removal of the MBA from guidance and training on the application of the Code.

E. Further points arising from the CPS' approach

67. I have also been asked to comment on the contents of a letter letter written by Max Hill, Director of Public Prosecutions to Sarah Green and Rachel Krys (co-directors of EVAW), Karen Ingala Smith (CEO NIA) and Heather Harvey (Research and Development Manager NIA) which is dated 18 February 2019. Two points in that letter do not arise in the CPS's response to the letter before action and I have been asked to provide my response here.

i) Demand-led prosecutions and outcome targets

68. In the letter the DPP states at paragraph 2 *"CPS prosecutions are demand-led and we are not working to outcome targets".* Firstly, as has been reported since the publication of the most recent VAWG report[2], whilst police referrals to the CPS have fallen, CPS charging decisions have fallen at almost double the rate since 2014. Furthermore, whilst the CPS clearly relies upon the police to provide a file which allows for consideration of charges it is my experience that the CPS influences levels of police demand via the approach its prosecutors take to the prosecution of these offences. A number of experienced investigators in my local area have expressed their belief that prosecutors have raised the threshold for charge which has served to discourage them and their colleagues from referring more challenging cases to the CPS.

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[2] 'Rape prosecutions in England and Wales at lowest rate in a decade' Guardian 12th September 2019

69. I am not aware of any current local or national outcome targets for RASSO prosecutions but the DPP's denial that the organisation works to outcome targets overlooks the fact that the RASSO Roadshows explicitly identified both conviction rate and conviction after trial rate targets for rape and highlighted existing conviction rates as providing evidence for the contention that too many rape cases were being charged by prosecutors such that it was necessary to remove 350 'weak cases' from the criminal justice system.

ii) Disclosure improvements as an explanation for falling volumes

70. In the letter the DPP states at paragraph 2 "*we recognise that the improvements we are seeking to make in relation to file quality and disclosure have directly impacted upon prosecution volumes*". It is my experience that the high profile collapse of a number of rape cases on account of disclosure failings in early 2018 has led to an increased police and CPS focus on disclosure and, in particular, on the examination of digital media communications. This development has increased the amount of time it typically takes for an investigation and charging decision to be completed in a rape case and this will be contributing to falling volumes but in my view it is unlikely that this development alone provides a full explanation for the falls observed. As I have explained above, I believe the fact that the CPS has raised the evidential bar for charge in rape cases as a result of the Roadshows and abandonment of reference to the MBA and associated guidance is a key explanatory factor behind the falling volume and proportion of rape cases charged.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed ...

Dated ...