Neutral Citation Number: [2020] EWHC 3573 (Admin)

Case No: CO/2262/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/12/2020

**Before**:

**LORD JUSTICE STUART-SMITH**

**and**

**MR JUSTICE GARNHAM**

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**Between:**

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| **The Queen (on the application of Dominic Purvis)** | **Claimant** |
| **- and -** | |
| **The Director of Public Prosecutions** | **Defendant** |

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**Philip Rule** (instructed by **Kesar & Co**) for the **Claimant**
**Ben Douglas-Jones QC** (instructed by **Crown Prosecution Service**) for the **Defendant**

Hearing dates: 19th November 2020

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 23 December 2020.

**Mr Justice Garnham:**

## Introduction

1. This is a judgment of the Court to which we have both contributed.

2. Dominic Purvis applies, with leave of Julian Knowles J, for judicial review of a decision dated 28 February 2019 of the Crown Prosecution Service ("CPS") (for which the Defendant, the Director of Public Prosecutions, is responsible) not to prosecute DC Mark Uren, an officer of the Devon and Cornwall Constabulary, for perjury, perverting the course of justice and misconduct in public office.

3. The CPS decision was taken after a judgment of the Divisional Court, dated 25 July 2018 that a previous decision not to prosecute DC Uren was unlawful ([2018] EWHC 1844 (Admin)). The Court quashed that decision and directed that the question whether DC Uren should be charged should be considered afresh by the CPS Special Crime Division.

4. By a letter dated 6 March 2019, the Claimant asked for a Victim's Right of Review ("VRR") of the decision not to prosecute. By a letter dated 11 March 2019, the CPS indicated that it was not accepted that the Claimant was a "victim" and accordingly he had no right to have the decision reviewed.

5. The decision of 28 February 2019 was taken by a senior special prosecutor, Mr Piers Arnold. Following a pre-action protocol letter from the Claimant, that decision was reviewed by a second specialist prosecutor, Mr Iain Wicks. In those circumstances, the Claimant does not pursue any complaint about his entitlement to a victim's right of review and accordingly it is not necessary for us to address the question whether Mr Purvis is a victim for the purpose of the VRR Scheme.

6. The Claimant advances five grounds of challenge, which are expressed as follows in his skeleton argument:

    (i) The decision suffers material legal error and is consequently legally flawed or wrong in law;

    (ii) The reasoning of the decision wrongly usurps the function of a jury to hear evidence and make assessments of credibility and veracity to a defence presented in answer to a prima facie case;

    (iii) The decision-maker placed wrongful or undue reliance on the audio-recorded account given outside this investigation in place of the formal interview process in this case and audio-recorded police interview under caution;

    (iv) There was a failure to consider all relevant material and/or material matters were not taken into account or properly taken into account;

    (v) The decision taken is a Wednesbury unreasonable or irrational decision and falls to be quashed. Any proper and correct consideration of the evidence and information in this case could only conclude that there is sufficient evidence of the commission of the offences or any of them.

6. Before us, the Claimant was represented by Mr Philip Rule and the Defendant by Mr Benjamin Douglas-Jones QC. We are grateful to Counsel for their assistance.

## Background

7. The background to this case is fully set out in the judgment of the Divisional Court of 25 July 2018. Neither party had sought to suggest that there was any error in the history that Court summarised, and we adopt it. Because that history is material to the issues we have to consider, we set it out in extenso here:

> "1. In October 2015 Dominic Purvis (to whom we shall refer as "the claimant") was convicted of offences of sexual assaults upon children, making and distributing indecent images of children, and breach of notification requirements. He is currently serving a sentence of imprisonment for those offences. He made a formal complaint to the Devon and Cornwall Constabulary about the conduct of an officer involved in the investigation of those offences, DC Mark Uren. He seeks judicial review of the decision of the Crown Prosecution Service ("CPS") not to prosecute DC Uren for offences of perjury and/or misconduct in a public office. This is the judgment of the court, to which we have both contributed.
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> 2. The criticisms of DC Uren's conduct relate in particular to his dealings with an adult witness to whom one of the young victims of the claimant's offending had made a relevant complaint. In submissions to this court, the witness was referred to as "JH". We will continue to refer to her in that way.
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> …
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> The facts:
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> 4. On 12th February 2014 DC Uren saw JH, and took from her a statement of her evidence. As is often the case, he did so in manuscript. When he had done so, JH read the statement and signed it as correct. JH referred in her statement to two relevant events, the dates of which were said to be "Thursday 2nd June 2013" and "Friday 03rd June 2013".
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> 5. In accordance with usual practice, DC Uren sent the manuscript statement to the relevant police department (the Criminal Justice Unit: "the CJU") so that it could be typed up. The typescript reproduced the dates stated in the manuscript original.
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> 6. On 19th March 2014 JH telephoned DC Uren to tell him that she had made a mistake about the dates. In a statement which she later made describing this telephone call, JH said that she had initially told DC Uren that the events occurred on 4th and 5th June 2013, but had subsequently realised that the correct

dates were 4th and 5th July 2013. She asked DC Uren to adjust her statement.

7. In response to that telephone call, DC Uren changed the two relevant dates in the manuscript original witness statement. He did so by striking through the word "June" and inserting the word "July". He placed a small "x" in the margin adjacent to each of those two alterations.

8. The trial of the claimant began on 27th October 2014. Prosecuting counsel was not attended by any representative of the Crown Prosecution Service ("CPS"). DC Uren was actively involved in assisting prosecuting counsel with a range of matters at court, including a number of matters which should have been dealt with by a representative of the CPS if one had been present.

9. On 30th October 2014, prosecuting counsel spoke to DC Uren about JH, who had not yet been called to give her evidence. A statement later made by prosecuting counsel indicates that during this conversation, DC Uren told him that he had altered the original statement by replacing "June" with "July". Counsel, quite rightly, told DC Uren that he should not have altered the original statement and should have taken a further statement from JH. Because the original statement had been altered, he suggested that DC Uren should himself make a statement, setting out what he had done. Prosecuting counsel, again quite rightly, informed defence counsel of this. Both counsel saw the original manuscript witness statement and saw that it had been amended by changing "June" to "July".

10. At about 11.30am that day, DC Uren made a manuscript statement in which he referred to his telephone conversation with JH. He stated that she had told him she had made a mistake, and that the correct dates were 2nd and 3rd July 2013. He said that he had "adjusted her statement" and resubmitted it to the CJU.

11. Later the same day, DC Uren made a further witness statement, this time in typescript, which he gave to prosecuting counsel. This statement was made of his own initiative, and not as a result of any suggestion made by counsel. DC Uren stated that in the telephone conversation, JH had told him that "the 02nd of July 2013 was wrong, the correct date was Thursday 04th July 2013" and that "the 03rd of June 2013 was an incorrect date, the correct date was Friday 05th July 2013. I adjusted the statement accordingly". He continued:

> "On my statement provided at approximately 1130 hours on Thursday 30/10/14 I detailed that JH had stated the dates were 2nd and 03rd July 2013, this was a mistake by

> myself. The correct dates should have been as detailed above (04th July 2013 and 05th July 2013)."

12. When giving that typed statement to prosecuting counsel, DC Uren also gave him the original manuscript witness statement of JH. This had now been further altered at the material points by striking through "2nd" and inserting "4th", and by striking through "03rd" and inserting "05th". Thus the manuscript statement which had originally shown the relevant dates as 2nd June and 3rd June 2013, now showed those dates as 4th July and 5th July 2013.

13. JH attended court to give her evidence on 3rd November 2014. It was then that she made the statement, to which we have referred, giving her account of her telephone conversation with DC Uren.

14. Both prosecution and defence counsel were understandably concerned about these events, and rightly raised them with the learned trial judge. The decision was taken that there should be a *voir dire* in which DC Uren would give evidence to the judge, in the absence of the jury, explaining the relevant events. DC Uren accordingly gave evidence on oath. He told the judge that he had only altered the manuscript witness statement of JH on one occasion, when he had altered the dates from 2nd and 3rd June to 4th and 5th July respectively, and believed that he would have sent a photocopy of the amended witness statement to the CJU for typing. He denied that there had been any intermediate stage at which the witness statement had been amended to show the dates of the 2nd and 3rd July 2013. He maintained that denial even when it was put to him, in cross examination, that both counsel had seen the statement in that form.

15. That evidence had the effect of placing both counsel in the position of witnesses of fact as to the precise sequence of events concerning the amendments to JH's statement. As a result, the trial (then in its fifth day) could not continue. The jury was discharged. The claimant was retried at a later date, and was convicted of the offences to which we have referred.

16. As a result of the collapse of the first trial, and of a report submitted by prosecuting counsel, the matter was referred to the Professional Standards Department of the Devon and Cornwall Constabulary on 7th November 2014. At about the same time, by a letter dated 6th November 2014, the claimant made a formal complaint about the conduct of DC Uren, alleging that he had tampered with evidence and committed perjury. The investigation carried out by the Professional Standards Department found no record that any amended version of JH's witness statement had been submitted by DC

Uren to the CJU or to the CPS. However, the report compiled by the investigating officer noted that it was not uncommon for documents sent to the CJU not to be received by the CPS, and concluded that there was "no reliable way that it can be verified" whether DC Uren had submitted the amended witness statement to the CJU.

17. The report of the investigating officer recorded that DC Uren had sole responsibility for all aspects of the complex investigation into the claimant, which had generated a large amount of evidential material, and that he had undertaken extra work and responsibilities which contributed to his not being thorough in taking a further witness statement from JH when she informed him of the mistake as to dates. The investigating officer took the view that DC Uren's actions were mistakes rather than misconduct, and had been contributed to by the exceptional pressures he encountered during the enquiry and through the trial. The report, dated 1st December 2014, concluded with the following:

> "I recommend that [the claimant's] complaint against the police is upheld in respect that DC Uren failed to follow correct procedure when amendments are made to witness statements and that the information he provided to the court was misleading, but this was not an intentional or malicious act to pervert the course of justice.
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> I recommend that DC Uren should be referred to formal procedures under the Police (Performance) Regulations 2012 . His performance fell far below what is expected, making repeated mistakes, the consequences have been serious, and will still be scrutinised in the forthcoming new trial."

18. DC Uren was subsequently served with a formal notice of investigation in accordance with the 2012 Regulations. The Independent Police Complaints Commission ("IPCC") directed that a local investigation be carried out by the Devon and Cornwall Constabulary. In the course of that investigation, DC Uren submitted a written response to the allegations against him, in which he no longer maintained that he had only altered the manuscript witness statement of JH on one occasion, changing both the month and the dates at the same time: he said that, although that had previously been his honest belief, he now believed that he had erroneously only changed the month from June to July after JH's telephone call in March 2014, and had at that stage left the dates unaltered as the 2nd and 3rd. He therefore accepted that in this respect his evidence on the *voir dire* had been factually incorrect, though he emphasised that he had not intended to mislead the court. He accepted that he should not have amended the original statement in the way he

did, and that he should have taken a further statement from JH. He added that he wished to make clear –

> "… that my intention when changing the dates in the statement was only to alter the statement to reflect the true and accurate evidence of the witness. There was no advantage to the investigation for the dates provided by the witness to be anything other than what she recollected."

19. The investigating officer, in a report dated 5th November 2015, noted that DC Uren no longer disputed that he had made further alterations to JH's witness statement at court, but maintained he had no recollection of doing so. The investigating officer observed that the further alterations had been made following a conversation with prosecuting counsel, and therefore in the knowledge that the alteration previously made had not been correct procedure. The investigating officer concluded:

> "To then make further alterations to the original witness statement of JH by altering the numerical dates illustrates a deliberate act in the knowledge that to do so was incorrect procedure and I conclude was done with a motivation to avoid personal and "professional embarrassment" with no regard to the integrity of the evidence. DC Uren's assertion that he was "professionally embarrassed" suggests a conscious thought process and is at odds with his statements of having no recollection of making the second alteration.
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> During the *voir dire* it was specifically put to DC Uren by [defence counsel] that he had made a further alteration to JH's witness statement on 30th October 2014, only four days previously. I do not consider his account is credible that he had no recollection of this when he gave his evidence to the court. He was asked about this point a number of times and remained resolute he had only altered her statement on one occasion around March 2014. DC Uren maintained this until his written response dated the 9th April 2015. I conclude that DC Uren lied to the court whilst under oath.
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> Also during the *voir dire* DC Uren gave evidence that he had submitted a copy of JH's witness statement with the date alterations to the CJU. I concluded following an examination of every item of additional evidence submitted to the CJU that this was also a lie whilst under oath."

The investigating officer accordingly recommended that the claimant's complaint be upheld, and that there was a case for DC Uren to answer for gross misconduct in four respects: altering the original witness statement of JH in March 2014 in a manner which was contrary to procedure; further altering the

> witness statement at court on 30th October 2014, in a manner which again was contrary to procedure; lying on oath during the *voir dire* by saying that he had only altered the original witness statement on one occasion, in March 2014; and lying on oath during the *voir dire* by giving evidence that he had submitted a copy of the amended statement to the CJU.
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> 20. A misconduct hearing pursuant to the 2012 regulations was held in April 2016. The function of such proceedings is not primarily punitive, but to set standards for police service and to be open and transparent in doing so. In a report dated 13th April 2016 the panel recorded that DC Uren had always maintained that he altered the witness statement in order properly to reflect the evidence of JH, though he admitted he should have made the changes by another method. He said that he had made the "x" marks in the margin of the witness statement with a view to asking JH to sign the alterations. The panel found him to be a credible witness on that specific point, and generally. The panel went on to record that DC Uren had admitted to them that he altered the original witness statement on two separate occasions and admitted that he had made statements which were untrue, but denied that he had made them knowing them to be untrue. He admitted that he was guilty of misconduct, but denied the allegation of gross misconduct. The panel accepted that at the material times DC Uren was in a "highly challenging position" as a result of the busy and difficult time at court. The panel found that DC Uren had not made statements which he knew to be untrue and found that DC Uren had not been dishonest in giving evidence. It concluded that the appropriate disciplinary action was to impose management advice."

8. It is also material to note the following passages from the judgment of the Divisional Court in which the Court considered the Defendant's decision as to whether the evidential test had been met for the suggested offences.

9. At paragraph 75 and 77, the Court said:

> "75...The Reviewing Lawyer had found that there was sufficient evidence to charge DC Uren with perjury. She had also found sufficient evidence to charge him with misconduct in a public office, though it might be said that her principal reason for that decision was that there was evidence of perjury. She stated her view that lying on oath and/or failing to deal properly with witness statements "cannot ever be done with reasonable excuse or justification". She was therefore satisfied that it was more probable than not that, if prosecuted, DC Uren would be convicted of one or both of those offences...
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> 77.With all respect to the Reviewing Lawyer, her decision-making was in our view flawed. Our reasons for taking that

> view are as follows. First, the Reviewing Lawyer was entitled to consider DC Uren's motivation, but she did so only in relation to his motivation for altering the witness statement, not for making (and repeating) a false statement about what he had done. She failed to address that important question despite her observations that the reference to professional embarrassment implied that DC Uren knew at the time what he was doing. The implication of that observation was that this was not a case of muddle and error: it was a case of a police officer telling a deliberate lie."

10. At paragraph 82 and 84, the Court said:

> "82 As to the fourth ground, we agree with Mr Rule that the Reviewing Lawyer fell into error when she dismissed any possibility of a successful prosecution for the offence of doing acts tending and intended to pervert the course of justice. On such a charge, the prosecution must prove, amongst other things, that the accused did acts which tended, and were intended by him, to pervert the course of justice. The motive of the accused may of course shed light on his intention; but the offence may be committed even if the accused's motive was to achieve what he believed to be a just result. There is a distinction between the course of justice—which in this case undoubtedly was perverted, as the trial had to be stopped and the claimant retried at a later date—and the ends of justice—which DC Uren has said he did not intend to pervert. The Reviewing Lawyer appears not to have considered that distinction, and appears to have dismissed any thought of prosecution on such a charge despite the clear evidence that DC Uren had deliberately acted in a way which he knew to be contrary to proper procedure and which brought a Crown Court trial to an abrupt halt…
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> 84 In the circumstances of this case, the Reviewing Lawyer in our view could not properly dismiss any prospect of a successful prosecution for such an offence as abruptly as she did. Having identified the adverse findings of fact which on the available evidence could be made against DC Uren, and having concluded that the evidential test was satisfied in respect of charges of perjury and misconduct in a public office, she fell into error of law in discounting a third charge solely on the basis that DC Uren acted as he did "in essence to avoid an injustice". She should have focused on the course of justice rather than the ends of justice, and should have undertaken a more careful analysis of the findings which a jury could properly make as to his motive and intention."

11. The Court ended its judgment by making clear that the Defendant should make a fresh decision as to the merits of the case:

> "86 We emphasise that we have been concerned with a review of the decision taken by the Reviewing Lawyer on the basis of the evidence before her. We have well in mind Mr Douglas-Jones' forceful submission that the further evidence which is now available, in particular the evidence given in the disciplinary hearing which post-dated the Reviewing Lawyer's decision, could lead to a different conclusion about the evidential stage of the Code. However, it is not for us to say what the fresh decision will be. That being so, we refrain from expressing any further view about the merits of the various factors (both for and against prosecution) which we have identified in our discussion.
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> …
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> 88 We therefore quash the decision of the Reviewing Lawyer dated 11 September 2015 and direct that the question whether DC Uren should be charged with any, and if so what, offence or offences be referred to the Special Crime Unit so that a fresh decision can be made."

## The Fresh decision

12. Section 3(2)(a), of the Prosecution of Offences Act 1985, imposes on the Defendant an obligation to conduct all (non-exempt) prosecutions following a police investigation. Section 10 of the Act requires the Defendant to issue a Code for Crown Prosecutors, providing guidance on general principles to be applied by them in determining whether proceedings should be instituted

13. Section 4.6 of the Code requires that the "evidential stage" of the Full Code Test be passed. That provides:

> "Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.
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> The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. It 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. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."

14. Following the Divisional Court judgment, the Defendant reconsidered the application of that test to the case against DC Uren. On 28 February 2019, Mr Piers Arnold wrote to the Claimant saying:

> "I have conducted a full and careful review of all the evidence in this case and have concluded that there is insufficient evidence to provide a realistic prospect of convicting DC Uren of perjury, perverting the course of justice or misconduct in public office. Accordingly, no further action will be taken against DC Uren."

15. He provided no further reasons for that decision in his letter. For the purpose of this hearing, however, both the court and the Claimant were provided with a copy of a document entitled "Defendant's IGMW2" ("IGMW2"). That document set out Mr Arnold's reasoning at some length.

16. In a subsequent letter, dated 11 March 2019, Mr Arnold said that he did not accept that the Claimant was a victim and that it was not the practice of the CPS to provide detailed reasons in cases where the VRR procedure was not applicable. He added "my decision was taken, as indicated in my previous letter to you, on the basis there is insufficient evidence to provide a realistic prospect of conviction."

17. On 6 May 2019, the Claimant's solicitors wrote a pre-action protocol letter to the CPS. Mr Iain Wicks replied on behalf of the CPS on 23 May 2019 ("Mr Wicks' letter"). He explained that:

> "…without conceding his status as a victim, it appeared to me now to be appropriate to set out in detail the basis of my colleague's decision not to authorise charges in this case. Whilst we remain of the view your client is ineligible for VRR as a "victim" as defined we recognise that at present you have not had the benefit of an explanation for the decision that has been reached. I would therefore propose to set out my colleague's reasoning in the paragraphs which follow. This will enable you to consider the decision on its merits, and to arrive at a view as to whether you would wish to continue to press your arguments as to the decision itself as a claim."

18. Mr Wicks went on to make clear the substantive parts of his letter "are based upon the review by Piers Arnold, and therefore set out his reasoning and his conclusions. They also reflect my own independent analysis of the evidence, and I therefore have adopted his explanation."

19. In consequence, Mr Wicks' letter incorporated both his reasoning and that of Mr Arnold as set out in IGMW2. It was the view of both parties before us that the court could have resort to both that document and Mr Wicks' letter of 23 May 2019 to ascertain the Defendant's reasoning. It was the conclusion of both Mr Arnold and Mr Wicks in respect of each the three potential charges, perjury, perverting the course of justice, and misconduct in public office, that there was insufficient evidence to provide a realistic prospect of convicting DC Uren. For the greater part, the reasoning of Mr Arnold and Mr Wicks is identical. We consider below where there appear to be

material differences. (When referring to IGMW2 and Mr Wicks' letter of 23 May 2019 collectively, we describe them as the "decision documents".)

## The Standard of review

20. It is common ground that a decision not to prosecute is amenable to judicial review. As Kennedy LJ explained in *R v DPP* [1995] 1 Cr App R 136, three potential grounds of challenge are recognised; namely the application of an unlawful policy, a failure to act in accordance with settled policy in the Code for Crown Prosecutors or associated guidance, and a decision to which no reasonable prosecutor could have arrived.

21. The Court will, however, be slow to find such grounds made out. As Mr Wicks observes in his letter, that reluctance has been expressed a number of different ways by the Court. The exercise of the jurisdiction is "sparingly exercised" (*R v DPP ex parte C* [1995] 1 Cr App R 136 at 140), "very rare indeed" (*R (Pepushi ) v Crown Prosecution Service* [2004] Imm AR 549, para 49), a "highly exceptional remedy" (*Sharma v Brown-Antoine* [2007] 1 WLR 780, para 14(5)), "very rarely" exercised (*R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635, para 63), exercised "only in very rare cases" (*S v Crown Prosecution Service* [2015] EWHC 2868 (Admin), [2016] 1 WLR 804).

22. Whilst it right to say that each of those expressions is a descriptor rather than a definition of the circumstances in which the Court will act, they serve to underline the need for the Court to respect the fact that the task of deciding when, and when not, to prosecute is primarily one for the prosecuting authority and the court's function is one of review.

23. In R (*FB) v DPP* [2009] EWHC 106 (Admin), Toulson LJ summarised the jurisprudence on judicial review of decisions not to prosecute. He said:

> "52…In summary, judicial review of a prosecutorial decision is available but is a highly exceptional remedy. The exercise of the court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution's case in the usual way through the criminal court) but is still exceptional. The reason for this was stated by Lord Bingham C.J. in *Manning* at [23]:
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> > ''In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone

> the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting an effective remedy would be denied.''
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> 53. There is an assumption underlying this passage (with its reference to the exercise of an informed judgment) that a prosecutor can ordinarily be expected to have properly informed himself (within the limits of what is reasonably practical) and asked himself the right questions before arriving at a decision whether or not to prosecute."

24. With that in mind, we turn to consider each of the five grounds.

## Discussion

### Ground 1- The legal ingredients

25. The heart of the Claimant's case on Ground 1 is the argument advanced by Mr Rule that the Defendant did not identify correctly the legal ingredients of the potential perjury and perverting the course of justice charges and failed properly to apply the appropriate tests to the facts of this case. No complaint is made under this heading in respect of the third offence, misconduct in public office.

*Perjury*

26. Pursuant to s.1 of the Perjury Act 1911 ("the 1911 Act");

> "If any person lawfully sworn as a witness…in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury…".

27. Accordingly, to be guilty of the offence of perjury i) the person concerned must be sworn as a witness in judicial proceedings; ii) he must wilfully make a statement; iii) that statement must be material to the proceedings; and iv) that statement must be one which he either knows to be false or does not believe to be true.

28. It is plain, and acknowledged by the CPS in the decision documents, that DC Uren was "lawfully sworn as a witness in judicial proceedings", namely the voir dire. A person wilfully makes a statement if he does so deliberately rather than inadvertently or by mistake. It is not suggested that DC Uren's statement to the Judge in the voir dire was anything other than deliberate. The precise date on which the witness statement had been amended was plainly material to those proceedings. It was plainly capable of influencing the Judge at the voir dire on the issues before him then, which were directly concerned with ascertaining the circumstances in which the amendments had been made.

29. The crucial question therefore was the fourth element of the statutory test; did DC Uren know his statement was false or alternatively did he not believe it to be true?

30. For the Claimant, Mr Rule argues that the Defendant erred in law in the way they went about determining whether there was sufficient evidence of the offences, and in particular, wrongly confused considerations of mens rea with separate issues of mitigation or motivation. It was wrong, he says, to assess the evidence as being required to prove "dishonesty" or "wilful dishonesty".

31. For the Defendant, Mr Douglas-Jones contends that neither Mr Wicks nor Mr Arnold confused mens rea with mitigation or motivation. He says they both accurately identified the essential elements of the offences and correctly found that if there was not sufficient evidence to provide a realistic prospect of satisfying a jury so that it was sure that DC Uren had lied (deliberately been untruthful) then there would not be a realistic prospect of a conviction against DC Uren in relation to perjury. They proceeded to assess DC Uren's possible motives for lying in order to ascertain whether there was a realistic prospect of proving that he had (deliberately) lied. Having done so, they concluded that he may have lied but that there was not a realistic prospect of a jury being sure that he lied. Thus, the evidential stage was not satisfied.

32. Mr Douglas-Jones says that Mr Arnold and Mr Wicks used language such as "deliberate" and "wilfully dishonest" in the context of their analyses of whether there was a realistic prospect of a jury being sure that DC Uren perjured himself because he "knew the statement to be false or did not believe it to be true". It is clear, he says, that the expressions were used to explain the decisions, not because of any error in understanding what the essential elements of the offences were.

33. As noted above, the decision under challenge in this case is expressed in two different documents, IGMW2 and Mr Wicks' letter of 23 May 2019. Section D of IGMW2, entitled "the law", accurately sets out, at paragraph 116, s.1 of the 1911 Act. Paragraph 117 reads "The word "wilfully" in this context means deliberately, not inadvertently or by mistake". Mr Wicks does not reproduce that paragraph in the letter of 23 May 2019; however, it is clear that he was adopting Mr Arnold's analysis. At paragraph 134, Mr Arnold says this: "In order to prove this offence it would be necessary to show that DC Uren made a statement material in the proceedings which he knew to be false or did not believe to be true". That is reproduced at paragraph 7.1 in Mr Wick's statement. It follows that we can conclude that both Mr Wicks and Mr Arnold's decisions included an accurate definition of the offence of perjury.

34. Mr Arnold identifies the central question that arose at paragraph 139 in a passage echoed by Mr Wicks at his paragraph 7.6:

> "The central question in this case is whether it could be proved that DC Uren *wilfully* made that statement in the voir dire, knowing it to be false or not believing it to be true. In other words, was he being deliberately dishonest when he told the court that he had made the alteration on only one occasion, or was his assertion on this point an honest mistake?"

35. In our judgment that is the crucial passage. The first sentence in that description of the offence accurately captures the statutory definition in s.1 of the 1911 Act. Both Mr Arnold and Mr Wicks emphasize the word "wilfully" by italicizing it. In the sentence that follows they both provide what it is evident they regard as a re-statement of that

central question: "In other words, was he being deliberately dishonest … or was his assertion on this point an honest mistake?". However, crucially, that re-statement omits the second part of the expression in the first sentence "knowing it to be false or not believing it to be true" (emphasis added). Critically, it treats the word "wilfully" as qualifying the state of knowledge rather than the making of the statement. The statutory test is now expressed as being whether DC Uren was "deliberately dishonest".

36. The only alternative to deliberate dishonesty being contemplated by Mr Arnold and Mr Wicks was honest mistake. But the second part of the statutory test requires the decision-maker to ask, in addition, whether the Defendant did not believe the statement to be true. The significance of the point is that, on the Defendant's formulation of the statutory question, the choice is between a deliberate lie and an honest mistake, whereas the statute permits a third possibility. That third possibility is that the maker of the statement did not know it was false, but neither did he positively believe it to be true. In other words, the formulation of the test adopted by Mr Arnold and Mr Wicks excludes the possibility that DC Uren made the statement recklessly, without thought at all, or not caring whether or not the statement was true.

37. In our judgment, this is not just a technical omission. The testing of the evidence in both IGMW2 and Mr Wicks' letter is carried out by considering whether deliberate lie or honest mistake was the most likely explanation for the evidence given for DC Uren. But, in our view, the possibility that DC Uren gave his answers at the voir dire without thought, without caring whether they were right or wrong, is a very real one. He was reminded by defence counsel that he and prosecuting counsel had initially seen the witness statement amended as to month and not as to day. Yet he continued to maintain that he had amended it only once. In our view, if that was not a deliberate lie, it was at least possibly an answer given without thought and without a belief that it was true. If that is a possibility, then it was one the defendant failed to consider, and the decision not to prosecute for perjury is flawed in consequence.

38. That that is a possibility is apparent from the paragraphs that follow in Mr Wicks' letter. Thus, for example, in the next paragraph of his letter, paragraph 7.7, Mr Wicks writes:

> "Although the statement in question does not actually have to be false for the offence to be made out, so long as it can be shown that the defendant did not believe it to be true, in this case it is clear that what DC Uren said in the voir dire was false; i.e. it is not in dispute that he did make an alteration to the witness statement of (JH) on more than one occasion. He accepted the point unequivocally in the disciplinary hearing. The only question therefore is whether he wilfully lied about this point in the hearing or made a mistake."

39. In the opening sentence of that paragraph, Mr Wicks correctly recognises the third possibility, namely that DC Uren did not believe the statement to be true. However, having pointed out that PC Uren acknowledged that the statement in the voire dire was false, he says that in consequence the *only question* is whether he wilfully lied or made a mistake, disregarding the third alternative.

40. Mr Wicks goes on to consider, at paragraphs 7.8 and following, the significance of the fact that the only issue at the time of the voir dire was the timing of the amendments of JH's statement. He considers in detail the possibility that DC Uren deliberately asserted under oath something which he must have known could be contradicted by the accounts of counsel. But he says nothing about the possibility that DC Uren was reckless as to whether or not the statement was true.

41. At paragraph 7.11 and following, Mr Wicks considers DC Uren's motive for lying in court. Proof of motive is not necessary for an offence of perjury, but it may be of forensic relevance if the question being considered is whether a witness deliberately lied. However, it is of less forensic relevance, if the issue is whether the witness failed to give any thought to whether or not the statement, he was making, was true.

42. At paragraph 7.18, Mr Wicks considers the significance of the possibility that DC Uren heard what prosecuting counsel said on 30 October 2014 but failed to absorb it or understand it. At paragraph 7.23, Mr Wicks notes that:

> "The issue around (JH's) statement was one of a number of matters that he was grappling with at court on 30 October 2014, in the highly pressurised environment of a serious criminal trial in its opening stages and all the work that was required to enable the prosecution to proceed on schedule. There was no CPS caseworker or anyone else to assist him in the various tasks requiring urgent attention, the most immediately pressing of which, in DC Uren's mind, was looking after a visibly distressed child witness at court. He was aware that the issues around the taking of (JH's) statement needed addressing, and he made a complete mess of attempting to do so in the two witness statements he made that day."

43. Mr Wicks notes the number of errors in the statements and suggests that provides an indication of DC Uren's mindset at the time. He goes on, at paragraph 7.25 to say that "It is however perfectly plausible that … the issue concerning his handling of (JH's) statement did not appear to DC Uren to be anything like as significant as it was to become…". Then at paragraph 7.26 and following, he acknowledges that it is possible that DC Uren lied. But at paragraph 7.29 he says it is also reasonably possible that his evidence was honest but mistaken. He ends his analysis at paragraph 7.30:

> "*In order to convict DC Uren of perjury it would be necessary to prove beyond reasonable doubt that he lied at the voir dire.* I am satisfied that no reasonable tribunal could be sure on the evidence available that he did so. I would expect a reasonable jury confronted with the full circumstances in which DC Uren's evidence was given, to find themselves in the position I find myself in after a full review of all the material in this case including all the audio recording of his evidence at the disciplinary hearing: unable to reach a clear confident conclusion as to whether he lied or simply made a mistake." (Emphasis added)

44. It is apparent from that analysis that Mr Wicks, like Mr Arnold before him, did not apply that part of the test set out in s.1 of the 1911 Act that requires consideration of whether or not DC Uren believed what he said to be true. To that extent the decision not to prosecute for perjury is flawed.

*Perverting the course of justice*

45. Perverting the course of justice ("PCJ") is a common law offence (*Verones* [1891] 1 Q.B. 360, CCR; *R v Andrews* [1973] Q.B. 422, CA.) The offence is committed where a person:

    (i) acts or embarks upon a course of conduct,

    (ii) which has a tendency to, and

    (iii) is intended to pervert,

    (iv) the course of public justice.

46. A positive act, whether of concealment or distortion, is required. Inaction is insufficient: (*Headley* [1996] R.T.R. 173, C*A* (failing to respond to a summons); *Clark* [2003] EWCA Crim 991; [2003] R.T.R. 2*7*; *Jabber* [2006] EWCA Crim 2694 (§ 28-5).

47. In *R v Sinha* [1994] 7 WLUK 34, [1995] Crim. L.R. 68, the Court of Appeal held that it was sufficient to make good the charge that the Defendant intended to mislead the court in any of the proceedings which might ensue.

48. In the decision documents, Mr Arnold and Mr Wicks concluded that that intention to pervert could not be proved for the same reason that perjury could not be proved; it could not be established that DC Uren "deliberately lied, intending to mislead the court" (paragraph 167 of IGMW2 and paragraph 7.34 of Mr Wicks' letter). They agreed that everything DC Uren did prior to the voir dire needed to be taken into account. They alighted, in particular, on the alterations to JH's statement on 19 March and 30 October 2014 which, they were content to assume, did have a tendency to pervert the course of justice. However, neither were satisfied that it could be shown that by making these amendments DC Uren intended to pervert the course of justice. Both Mr Arnold and Mr Wicks concluded their examination of the perverting charge in the following terms:

> "7.42 To summarise these points, it seemed quite possible that DC Uren simply failed to register the gravity of the action that he took at this stage of the proceedings. The conversation he had with Mr Moorhouse about the changes made to (JH)' statement may well have felt far less significant to him than it was subsequently to become in the light of developments over the next few days. It is possible that his overriding aim of making sure that the statement correctly reflected (JH's) account outweighed any concerns, or any clear thought on his part, over the way that this was achieved. A combination of factors – a rushed attempt to resolve the issue quickly, a failure to

> appreciate the significance of what he had done and what he had been told by Mr Moorhouse, and the pressure that he was under as a result of all the other tasks requiring his attention at the time – all of these factors may have resulted in DC Uren doing something so foolish and inappropriate that it is tempting to regard his act in hindsight as motivated by something more sinister than simple incompetence.
>
> 7.43 However, it would be clear to any reasonable jury considering the point that the alteration made to (JH)'s statement by DC Uren on 30 October 2014 was not made out of dishonest intent for one very simple reason: the alteration that DC Uren made to (JH)' statement on 30 October accurately reflected the true position, i.e. that which (JH) had told him reflected her recollection of what really happened. DC Uren's act in altering the statement this second time is open to serious accusations of professional incompetence and impropriety, but the suggestion that he made this alteration with the intention of perverting the course of justice makes little sense in the light of the particular alteration made."

49. Mr Wicks concluded:

> "7.44 For all these reasons Mr Arnold concluded that there was insufficient evidence to provide a realistic prospect of convicting DC Uren of perverting the course of justice. I have considered Mr Arnold's rationale and have concluded that his reasons and conclusions are correct."

50. It is common ground before us that DC Uren's conduct in the answers he gave in the voir dire and his actions in amending JH's statement did have a tendency to pervert the course of justice because they did in fact have that effect; the trial had to be aborted and a retrial ordered (see for example paragraph 166 of IGMW2). The central issue therefore is whether that course of conduct was *intended* to pervert the course of justice.

51. Mr Rule argues that the Defendant erred in law in his approach to determining whether there was sufficient evidence of the offence. In particular, he says that here too they wrongly confused considerations of mens rea with separate issues of mitigation or motivation. It was wrong to assess the evidence as being required to prove "dishonest intent" or "wilful dishonesty". He argues that the defendant also confused "the ends of justice" with the course of justice.

52. Mr Douglas-Jones responds that there was no such error. Language such as "deliberate" and "wilfully dishonest" was used in the context of the defendant's analyses of whether there was a realistic prospect of a jury being sure that DC Uren did an act tending *and intended* to pervert the course of justice. It is clear, he says, that the expressions were used to explain the decisions, not because of any error in understanding what the essential elements of the offences were.

53. There is, it might be thought, an obvious difference between the mental element required for perjury and for perverting the course of justice. As discussed above, perjury is made out by proof that the person concerned wilfully makes a statement "which he knows to be false or does not believe to be true." Perverting the course of justice requires conduct which is intended to pervert.

54. In *R v Cotter* [2002] 2 Cr App R 29, the Court of Appeal was considering an appeal against conviction for conspiracy to pervert the course of justice. The basis of the prosecution case was that the appellants had fabricated an attack on C which they subsequently reported to the police as being a genuine and racist assault. The appellants contended that their conduct was not sufficient to found a charge of perverting the course of justice and the trial judge had misdirected the jury in relation to the necessary mens rea of the offence. The focus of the case was on the question whether it was sufficient that a report had been made to the police.

55. Latham LJ, with whom Goldring J and HHJ Mettyear agreed, concluded that the appellants' conduct could properly be described as an act perverting the course of justice. The false representations made to police officers were capable of being taken seriously and were likely to result in a criminal investigation. Such an investigation amounted to "a course of justice". At paragraph 33, Latham LJ said:

> "...If an allegation is made which is capable of being taken seriously by the police so as to institute a criminal investigation with the possible consequences to which we have referred with intent that it should be taken seriously by the police we consider that that is properly described as an act perverting the course of justice."

56. Mr Rule says the same analysis applies here. DC Uren intended that the court should take seriously his actions in amending the statements and answering the questions as he did. But in our judgment, there is a critical difference: it was plain in *Cotter* that the Defendant intended that the police should take seriously the allegation and act upon it. The question for the court was whether it was enough that the action he intended should follow was a police investigation rather than legal proceedings. In the present case, the Defendant concluded that there was no realistic prospect of establishing that DC Uren intended that anything should flow from his actions; a jury was likely to conclude that his actions were the result of incompetence, muddle and a failure to appreciate the significance of what he had done. It follows that we reject the interpretation put on *Cotter* by Mr Rule.

57. Later in 2002, the Court of Appeal heard *AG's Reference No 1 of 2002* [2002] EWCA Crim 2392. The question that arose there was "Whether the common-law offence of perverting the course of public justice is committed where false evidence is given or made, not to defeat what the witness believes to be the ends of justice, or not to procure what the witness believes to be a false verdict."

58. The Court gave the following answer, at [26]:

> "…Whether or not [the offender's] motive in making the false statement which she undoubtedly made, and in persuading the witness M to make the false statement which he undoubtedly

> made, was, at first sight, a laudable one of protecting the elderly neighbour; and whether or not, if that was the motive, that bore upon her intention in making those false statements, were eminently, as it seems to us, matters for consideration by the jury. The fact that a police officer had made a false statement and had persuaded a lay witness to make a false statement and had, in the course of interviewing a suspect, made a false statement to him, were, as it seems to us, each capable of giving rise to the inference that there was the necessary intention to pervert the course of justice…"

59. It follows from that decision that a laudable motive does not necessarily undermine an inference of the necessary intention. But, as Mr Douglas-Jones correctly submits, that was not the question before the Defendant and is not the issue before us. The Defendant's officers had to consider whether there were realistic prospects that the jury would draw that inference on the facts of this case, and they decided there were not.

60. In those circumstances we see no error of law in the test the Defendant applied in considering the potential perverting the course of justice charge or in deciding not to prosecute.

**Ground 2 - Usurping the function of the jury**

61. In reaching their decision, Mr Arnold and Mr Wicks referred to the investigation by DS Liz James on behalf of the Devon and Cornwall Constabulary's Professional Standards Department, and the Professional Standards misconduct hearing, conducted between 11 and 13 April 2016.

62. Mr Rule argues that the reasoning that follows wrongly usurps the function of a jury to hear evidence and make assessments of credibility and veracity. He says that, wrongly, assumptions were made as to the inferences to be drawn and the findings to be made by a jury on the evidence in the statement of prosecuting counsel, Mr Moorhouse. He says that there is no basis for excluding the possibility that the jury would not make every finding in favour DC Uren. It would be open to a reasonable jury to find it was sure that DC Uren was aware of his action in altering the witness statement when he testified on the voir dire that he was not.

63. He argues that, rather than accepting that DC Uren had forgotten and overlooked the fact that he made the alterations, the jury might properly rely on the following:

    (i) DC Uren's testimony was given on the next sitting day of the trial;

    (ii) The fact that no more than 4 days had passed between his having made a second alteration and his statement to the Court;

    (iii) The clear evidence of prosecuting counsel that DC Uren was told he had acted wrongly and should not have made the first alteration, and a reasonable expectation that he would take note of that given its importance;

(iv) The expectation that any police officer who has received the appropriate training would understand that making an amendment to an original witness statement in this manner would be inappropriate, even without being warned; and

(v) The fact that DC Uren had had to go to the extent of making not just one but two formal witness statements about the first alteration.

64. Mr Rule points out that DC Uren's claims that he did not recall being warned that he had done wrong; did not recall that he had made the second change; and that he had spoken to Mr Moorhouse on 28 not 30 October 2018. He says that only if a jury concluded, after considering all the evidence, that it was a reasonable possibility that DC Uren could have simply forgotten and been unaware of his actions when he answered the questions at the voir dire could the allegation of perverting the course of justice be met. In the circumstances there was no proper basis for concluding that a jury would be unable to reject such a claim It was an error to approach the charging decision on the basis that a jury would necessarily consider the question on the factual basis DC Uren advances, whereas the jury would be capable of making its factual findings of credibility, accuracy and veracity in evaluating its verdicts.

65. Referring *to R v Sadighpour* [2013] 1 WLR 2725 at 2731, at §§ 35-36; *R v Mateta* [2014] 1 WLR 1516 at § 23 and *R v Joseph* [2017] 1 WLR 3153, 3176 at §§ 127-136, Mr Douglas-Jones responds by pointing out that an appellate court may assess the prospects of a defence succeeding by reference to a record of evidence heard by a tribunal and the decision of that tribunal, even though that evidence might be inadmissible in the Crown Court. Referring to *R v L et al* [2013] 2 Cr App R 23 at § 28 and *R v GS* [2019] 1 Cr App R 7 at § 68, he submits that even where evidence has not been tested, where a decision has been made by a competent authority vested with the responsibility for investigating particular issues, it is "unlikely" that a prosecutor would disregard a concluded decision of such an authority when exercising the prosecutorial discretion.

66. He says prosecutors must assess evidential sufficiency by reference to material in which a suspect's defence is disclosed. Where that material comprises a record of tested evidence it will necessarily carry significant weight. Frequently, such evidence will not be admissible in criminal proceedings but it must not be ignored by a CPS reviewing lawyer if it is a tool by which the quality of the defence may be assessed: the Court of Appeal Criminal Division frequently assesses the strength of defences overlooked at the Crown Court by reference to tested and non-tested evidence in First-tier Tribunal decisions and by reference to competent authorities' findings (which are inadmissible in the Crown Court but invaluable as barometers of the merits of defences).

67. In our judgment, Mr Douglas-Jones' approach is correct. The Defendant's officers had to be satisfied that there was a realistic prospect of conviction. They had to consider what the defence case might be. They had to make an objective assessment of the evidence, including the impact of any defence DC Uren put forward. To do that they were bound to consider the explanations DC Uren had offered at various times for his conduct. They were entitled to consider how that evidence fared when tested in cross-examination in the disciplinary proceedings. They could have regard to the fact that the panel had a legally qualified chair, a lay member and a senior police

officer member. They were entitled to have regard to how the disciplinary panel viewed that evidence in assessing how a jury might approach a similar task.

68. We remind ourselves that the Defendant is the primary decision maker, and that judicial review of a prosecutorial decision is a highly exceptional remedy. In our judgment, it is plain that the Defendant did not usurp the jury's function as alleged, but instead properly considered all the available evidence to reach an objective conclusion on the question whether there were realistic prospects of conviction on each charge. Ground 2 must fail.

**Ground 3 - Undue reliance on DC Uren's audio-recorded account**

69. Mr Rule argues that Mr Arnold and Mr Wicks placed undue reliance on an audio-recorded account given by DC Uren outside the police investigation and should have confined themselves to the formal interview process in this case and the audio-recorded police interview under caution. The former was not evidence that would go before a jury. He says CPS guidance made plain that it is not proper to leave such matters to internal regulation and employment sanctions. An internal disciplinary procedure is no substitute for criminal prosecution for serious offences. The reasonable findings to be made as to the credibility or credence to be given to a suspect's account of his intention or understanding are matters properly to be left to the jury.

70. In our judgment, this is simply a refinement of Ground 2 and no stronger than that ground. The Defendant's officers were entitled to consider any potentially relevant material in reaching a decision about the prospects of conviction. They were concerned with the substance of the allegations and the possible responses to those allegations, not the particular form in which that material happened then to be available.

**Ground 4 - Failure to consider all relevant material**

71. Mr Rule argues that the Defendant failed properly to take into account the following relevant material:

(i) The transcript or audio recording of the police interview conducted by DS James of DC Uren in relation to these matters;

(ii) The final report and conclusions of DS James in light of her investigation, hearing DC Uren's explanation, and her conclusions;

(iii) The witness statement of prosecuting counsel Mr Moorhouse;

(iv) Any Trial Report submitted by Mr Moorhouse;

(v) The full and complete disciplinary record of DC Uren;

(vi) The witness statement of defence counsel Ms Kelly Scrivener;

(vii) The potential motivations for the lying that result from an improper purpose rather than that DC Uren claims to have been motivated by;

(viii) The fact that there was not any step to reveal, disclose or admit the second alteration at the time of trial or in the voir dire itself.

72. Had any of this material been properly considered, it is said, it was capable of making a material difference to the assessment made.

73. Mr Douglas-Jones responds that it can be demonstrated that Mr Arnold and Mr Wicks did in fact consider all of the information. He goes on to point out that there were no admissible inculpatory statements in interview which were capable of affecting the outcome of the decision. DS James' report was merely an investigator's report of events, which in any event, was considered by Mr Arnold. Neither the witness statements of Mr Moorhouse and Ms Scrivener, nor any opinion of Mr Moorhouse, could have shed further light on the state of mind of DC Uren, in light of the agreed evidence. No matter in DC Uren's disciplinary record would be admissible via any s.101 Criminal Evidence Act 2003 gateway. None was capable of tending to show guilt. On the other hand, the 30 witness statements which speak to his exemplary character and police service would be admissible and directly relevant to mens rea.

74. Again, in our view, Mr Douglas-Jones' arguments are to be preferred. There is no basis upon which to conclude that the Defendant's officer disregarded any relevant evidence.

## Ground 5 - An irrational decision

75. Mr Rule argues that the decision-maker failed to consider DC Uren's previous misconduct record which included an incident when DC Uren altered an exhibit numbers in a typed, signed witness statement of a witness in a criminal trial. But, in our judgment, that evidence would have been inadmissible in criminal proceedings. He says the Defendant relied upon untested excuses of the suspect, not amounting to any defence in law. In our judgment, the Defendant was entitled to take account of DC Uren's potential explanations, particularly when they had been tested in the disciplinary hearing.

76. In our judgment the decisions not to prosecute for perverting the course of justice and misconduct in public office are not *Wednesbury* unreasonable, irrational or otherwise unlawful.

## Conclusion

77. This application succeeds to the extent that we hold that the decision not to charge DC Uren with perjury was flawed in that it failed to consider whether the statement was made without a belief that it was true.

78. It is not for us to reconsider the evidence and come to a conclusion as to whether, in those circumstances, there were realistic prospects of a prosecution. Instead, since we are not in a position to exclude that as a real possibility, the matter must go back to the Defendant, yet again, to reconsider in the light of the judgment of this Court.