review is unlikely to be needed because a finding of unreasonableness necessarily entails a finding of wrongful and unlawful discrimination in exactly the manner complained of in this case.

Such a conclusion only reinforces the broader point that judicial review is best conceived harmoniously, with no sharp distinctions between the various grounds of review. Similarly, the principles of statutory and regulatory construction are not meaningfully different: the presumption of legality must necessarily obtain and hold for all aspects of administrative action. The court must interpret Regulations so as to be lawful and reasonable and it must not sharply distinguish interpretation from common law principle, for fear that we will see more decisions that threaten to artificially set the common law into conflict with legislative intention.

MICHAEL FORAN

Address for Correspondence: School of Law, University of Strathclyde, Glasgow, G1 1XQ, UK.
Email: michael.foran@strath.ac.uk

CONSENT IN RAPE: FACT, NOT LAW

WHERE a man is accused of rape, the effect of section 1(1) of the Sexual Offences Act 2003 is that a man rapes a woman if (a) he intentionally penetrates her; (b) she does not consent to the penetration; and (c) he does not reasonably believe that she consents. Where there has been violence or coercion, requirements (b) and (c) present few problems. It is otherwise when what appears from the outside to have been a normal sexual transaction is alleged to have been non-consensual. Such cases are problematical because, quite apart from the general issues of any case that involves word on word, it may be difficult to establish the extent and certainty with which the woman manifested lack of consent; and whether that lack of consent was adequately conveyed to the defendant.

No such difficulties existed in *Lawrance* [2020] EWCA Crim 971. From the exemplarily clear route to verdict that Mr. Justice Jeremy Baker provided to the jury we know exactly what they found to have passed between the victim [V] and the accused [L]. V told L that she did not wish to risk becoming pregnant, and asked him to repeat his previous assurance that he had had a vasectomy. L said that he had. That was a lie. They had intercourse without contraceptive protection, and V became pregnant. L was charged with rape. In commonsense, and in the ordinary use of language, there might seem to be only one answer to the question whether V had consented to the intercourse. V had made it clear that intercourse could only take place on condition that L had had a vasectomy, and L could not have believed otherwise. Consent that is only given on the basis of a condition that is not fulfilled is not consent at all. However, the Court of

Appeal (Criminal Division) (Lord Burnett C.J.; Cutts and Tipples JJ.) decided that the law as to "consent" obtained by fraud required them to find that V had as a matter of law consented to the intercourse, and quashed L's conviction. That outcome demands close attention to the origins and present state of a law that was seen as excluding an obvious factual conclusion.

It all goes back to *Clarence* (1888) 22 Q.B.D. 23. C had intercourse with his wife when, unknown to her, suffering from gonorrhoea. He was held not to have committed an assault under section 20 or 47 of the Offences Against the Person Act 1861, she, as a wife, having consented to the act of intercourse; but the Court for Crown Cases Reserved extended its analysis of consent equally to rape. A woman was to be taken as consenting even when a fraud was practised on her. As Wills J. put it at p. 27, as in the law of contract consent obtained by fraud is still consent. The only exceptions were to be found in two already-existing decisions: *Flattery* [1877] 2 Q.B.D. 410, where the defendant persuaded his victim to intercourse by telling her that he was performing a surgical operation; and *Dee* (1884) 14 L.R. Ir. 468, where the defendant could only obtain intercourse by pretending to be the victim's husband. The law was summarised by Stephen J. (at p. 44) as only recognising fraud "as to the nature of the act itself or as to the identity of the person who does the act".

The law remained in that state until the 2003 Sexual Offences Act. Although the court said in *Lawrance* that "There is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003" (at [42]), with appropriate deference it is impossible to agree. If the draftsman had wished to maintain the old law he would not have relegated the terms in which it was expressed to the subordinate role that they play in section 76 of the 2003 Act (on which see below), and the contention is inconsistent with the broad terms of the analysis of Sir John Thomas P. in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (esp. at [79]–[81]).

The Act did not so much change the *meaning* of consent as move from the limited categories of the earlier law to a generalised definition or, more correctly, description. The question then became one of fact and not one of law. The Act achieved that by simply saying in section 74 that a person consents if he agrees by choice, and has the freedom and capacity to make that choice. If the woman imposes a condition on her consent, the man by not respecting that condition has deprived her of effective operation of the right to choose that the statute gives her. As Lord Judge C.J. put it in *R(F) v DPP* [2013] EWHC 945 (Admin), [2014] Q.B. 581, at [26], where the woman insisted on withdrawal before ejaculation and the man broke that condition, "she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly, her consent was negated". There is, however, a puzzling

and unhelpful nod to the Victorian law in section 76(2) in that it is "conclusively presumed" that a complainant did not consent in, effectively, the two cases admitted by Stephen J. in *Clarence*: (a) deceit "as to the nature and purpose of the relevant act" or (b) consent obtained by impersonating a person known to the complainant. Section 76, as a conclusive presumption, must be strictly construed (*Assange*, at [85]) and, correctly, the section was not directly applied in *Lawrance*; but, as will be submitted, its language seriously affected the decision in this case.

Prior to *Lawrance*, two cases decided by judges of high authority in criminal law had addressed the issue of consent in the straightforward terms of section 74: *Assange*, where the woman imposed a condition that the man should wear a condom; and *R(F) v DPP*. The evidence as to the agreement by choice that is required by section 74 must be approached in a broad commonsense way (*R(F)*, at [26]); and, that evidence in both cases showing that the pre-conditions that the women had imposed had not been fulfilled, the women had not consented.

Then came *R. (Monica) v DPP* [2018] EWHC 3508 (Admin), [2019] Q.B. 1019. B, an undercover police officer, infiltrated a group of environmental activists. At her initiative he had a sexual relationship with M, a member of the group. After she had terminated the relationship M discovered that B had been a police officer; said that had she known that she would never have had intercourse with him; and sought to have B prosecuted for rape. However deplorable the background history, on those facts it would be difficult to establish, at least to the level required for a criminal prosecution, that at the time of the intercourse M did not consent to it; and much less that B did not reasonably believe that she consented. The Divisional Court did not take that approach, but allowed itself to be led into an extensive survey of the law on consent, which culminated in their holding, at [72], that "what may be derived from *Assange* is that deception which is closely connected with 'the nature or purpose of the act' because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating" consent under section 74.

That restriction of the relevant deception of the woman to deception as to the nature and purpose of the act, resurrecting the language of the pre-2003 law, has no basis in *Assange*, where indeed Sir John Thomas P. at [86] specifically rejected an attempt to import the language of section 76 into an analysis under section 74. The restriction had a devastating effect when applied in *Lawrance*. The lie about fertility was not closely connected to the nature or purpose of sexual intercourse because, unlike the women in *Assange* and *R(F)*, V agreed to sexual intercourse without imposing any physical restrictions. The deception practised on her related not to the physical performance of the sexual act, but to the risks or consequences associated with it (*Lawrance*, at [35]–[37]). The artificiality of that distinction needs no emphasis. A woman will insist, as in *Assange*, on the use of a

contraceptive to avoid sexually transmitted disease, but also to avoid pregnancy: the latter being the reason for V's pre-condition in *Lawrance*.

This frankly shocking outcome resulted from the court not treating the issue simply as one of fact, as the 2003 Act provides and as was accepted in *Assange* and in *R(F)*; but seeking to control the jury's assessment of whether the victim had indeed consented by imposing rules of *law* limiting the types of deception that could be taken into account by the jury when considering that question. And unfortunately the only rules of law that came to hand were the rules adopted in *Clarence*. The Court of Appeal sought to support its position by expressing concern, at [34], echoing Wills J. in *Clarence*, at the potentially broad reach of a law based fully on consent in cases where for instance the man lies about his political opinions or his wealth, or is the non-paying client of a sex-worker, or an undisclosed bigamist. As already noted in relation to the facts in *Monica*, in such a case, where the importance that the woman attaches to various matters at the time of intercourse may have to be a matter of inference or assumption, it may be difficult simply as a matter of evidence to bring the case within the 2003 Act. And there may be cases where that condition appears to the outside observer to be trivial, so that there is reluctance to find that it was in seriously meant. That may have been in the mind of Sir Brian Leveson P. when he said in *McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593, at [25]: "*In reality,* some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent" (emphasis supplied). But if a woman's pre-conditions to intercourse are clear, as they were in *Assange*, *R(F)* and *Lawrance*, the man disregards those conditions at his peril. Any condition whatsoever, if found to have been seriously intended as a precondition to intercourse, should vitiate consent if deception is practised by the defendant to create the false impression that the precondition is fulfilled. And that is as it should be.

RICHARD BUXTON

Address for Correspondence. Email: rjbuxton@btinternet.com

NUISANCE, PLANNING AND HUMAN RIGHTS: THROWING AWAY THE EMERGENCY PARACHUTE

THE idea that forms of legal control should not overlap has a considerable history. In the tort of negligence, for example, judges have long been fond of saying that the duty of care should not extend to situations covered by, for example, contract law, procedural law, financial regulation and human rights. Similar issues arise in the tort of nuisance, particularly potential overlaps with environmental regulation, especially planning controls.