



Neutral Citation Number: [2021] EWHC 2655 (Admin)

Case No: CO/1861/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LEEDS DISTRICT REGISTRY

As at The Courthouse
1 Oxford Row
Leeds
LS1 3BG

Date: 04/10/2021

Before :

MR JUSTICE JULIAN KNOWLES

Between :

THE QUEEN ON THE APPLICATION OF
ABC
- and -
CHIEF CONSTABLE OF
DURHAM CONSTABULARY

Claimant

Defendant

Alison Gurden (instructed by **Watson Woodhouse**) for the **Claimant**
Robert Cohen (instructed by **Evolve Legal Services**) for the **Defendant**

Hearing date: 20 April 2021

Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. In this case an anonymity order under CPR r 39.2 is in place protecting the Claimant's identity. She will be referred to as ABC and her husband as XYZ. Her identity is also protected by s 1 of the Sexual Offences (Amendment) Act 1992. No matter relating to ABC shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the person against whom the sexual offences below are alleged to have been committed.
2. This is an application for judicial review with the permission of Goose J of the decision to administer a simple caution to the Claimant on 18 February 2020 for an offence of assault occasioning actual bodily harm contrary to s 47 of the Offences Against the Person Act 1861 (OAPA 1861). The decisions were taken by officers or other staff for whom the Defendant is responsible.
3. The Claimant is represented by Ms Gurden and the Defendant by Mr Cohen. I am grateful to both of them for their written and oral submissions.
4. The Claimant seeks to have the caution quashed and to have it removed from her PNC record, and other relief. Mr Cohen accepted that if I quashed the caution then any other information relating to the Claimant held by the Defendant as a result of the caution (eg biometric data) would also be expunged.
5. The Claimant applies to rely on further evidence. I grant that application (without opposition from the Defendant).
6. I deal with one preliminary point. One of the decisions challenged in the Claimant's Statement of Facts and Grounds at [4] and in her Skeleton Argument at [16] onwards was a supposed decision by the Chief Constable to uphold the caution in May 2020 after a letter before action had been written by the Claimant's solicitors. That had been preceded by a letter seeking to have the caution expunged by the Chief Constable as part of an internal procedure. As I will explain later, that process is provided for by the Ministry of Justice's Guidance 'Simple Cautions for Adult Offenders' (the Caution Guidance). No response was received to that first letter seeking to have the caution expunged. What happened was that instead of pursuing the internal complaint, the Claimant began these proceedings, and in the course of pre-action correspondence, the Chief Constable's lawyers rejected the Claimant's complaints about the caution. There was not a re-taking of the decision by the Chief Constable or on her behalf.
7. Mr Cohen was therefore right to submit that the proper focus of this case is thus on the lawfulness of the decision to administer the caution on 18 February 2020, and that the question of some separate decision by the Chief Constable could be put to one side. He did not suggest that there was an alternative remedy to judicial review that the Claimant had not exhausted.

Background

8. The evidence is contained principally in a witness statement which ABC gave to the police on 2 January 2020; her statement for these proceedings of 10 November 2020; the statement of DC Catherine Eames of the Durham Constabulary (the officer in the case) for these proceedings dated 4 September 2020; the statement of PC Claire Bruce of 4 September 2020 (who attended on ABC with DC Eames); the statement of DI Steve Richards (who took the decision to caution ABC) of 4 September 2020; and the detention log from ABC's attendance at the police station on 31 January 2020 and 18 February 2020.
9. As I have said, ABC is married to XYZ. He is a serving police officer with a force in the North-East of England. He was previously employed as a Police Community Support Officer with a different force in the same general area.. On 18 February 2020, a caution was administered to ABC for an offence contrary to s 47 of the OAPA 1861 for throwing a glass candle at XYZ during a domestic incident on 1 January 2020 at their home. As I will explain, before a caution can be administered, the person concerned must make a clear admission that they committed the offence in question.
10. In her police witness statement, which was taken by DC Eames on 2 January 2020, ABC said that by New Year 2019/2020 her marriage to XYZ had run into difficulties and he had temporarily moved out of the family home to live with his mother nearby. On 31 December 2019 she discovered texts on his phone suggesting he was having an affair with a female colleague, W. On 1 January 2020 he came to the family home, where he and ABC ended up having sex. She said this was more forceful than usual. Whilst they were having sex XYZ made a comment which confirmed that he and W were indeed having an affair. ABC became upset and stopped having sex with him. She attempted to lock herself in the bathroom but could not do so because a pair of shoes were in the way. She said that XYZ then assaulted her by hitting her in the face several times with the shoes, injuring her nose, cheek and lip. He then went into the bedroom. ABC said she was angry by this point and tried to cut his face with a razor without success. (In her later police interview she said she had wanted to shave his beard off). He laughed at her, pushed her away and then ran downstairs. As he did so, she said that she picked up a Yankee Candle (a brand of scented candle contained in glass jar) from the window-sill on the landing and threw it at him. It hit him on the back of the head. She said she shocked herself by her actions and asked him if he was alright. He then left the house, and she locked the door and called the police to report the assault on her. She told the police that XYZ had been behaving weirdly, and she thought he had taken drugs.
11. ABC then called her sister, K, and asked her to come around. After this call ABC said she then tripped and fell down the stairs. When she came to, her sister, the police and paramedics were there. She told the police XYZ had pushed her down the stairs, but in her witness statement she admitted that this had not been true and that she had been too dazed to answer questions. The officers' body worn camera footage shows ABC was indeed in such a state. She was taken to hospital where she required stitches for her injuries and was released the following day.
12. XYZ was arrested later that day by officers on mobile patrol for drug driving and assault occasioning actual bodily harm to ABC. The arresting officers noticed an injury to his head, which he was touching, and that he had wet and dried blood on his hands. He was taken by the officers to hospital for treatment. He told officers that he

thought his wife had spiked the drink she had made for him whilst he had been at the house. He also said that the injuries to her face had been self-inflicted by her with a soap dish.

13. An officer called Marshall attended on ABC on the evening of 1 January 2020 at a neighbour's house and took down her first account. This records ABC as saying, 'We'd had consensual sex' and that (sic):

"He came out bedroom laughing and started walking downstairs. I started screaming @ him. I picked up a candle and threw it @ him. It hit him on the back of his neck. Then he left."

14. DC Eames then attended the Claimant's home address with PC Bruce on 2 January 2020. In her statement DC Eames for these proceedings described the Claimant as having been bruised and very upset. DC Eames then took a statement from ABC, as I have said.

15. In her statement of 10 November 2020, [24], ABC said that although she had told the police at the time the sex had been consensual:

"... which it was at first. I did tell the officers that he had started laughing and that I was scared. I now know that it was wrong for [XYZ] to pin me down and continue with the sex when I was screaming at him to stop."

16. She went on to say that although she mentioned to the police that the sex had been rough and that XYZ had scared her, she had been too embarrassed to say anything more at the time. She said the police subsequently referred her to a sexual assault centre.

17. DC Eames subsequently received a call from XYZ's Police Federation representative stating that he wished to pursue a complaint of assault against ABC, as he had received a two-inch cut to the back of his head from the candle, which had needed treatment.

18. On 4 January 2020 DC Eames and PC Bruce visited ABC. They informed her that XYZ had made an allegation that she had caused her injuries to herself by hitting herself with a soap dish, had spiked his coffee with cocaine on 1 January 2020 and had hit him with the candle. She denied that she had spiked his coffee with cocaine, or that she had hit herself, but accepted that she had thrown the candle at him.

19. The Statement of Facts for these proceedings asserts the following at [7] (sic):

"The Applicant was asked by Police Constable Eames whether the sexual intercourse had been consensual, On 2nd January 2020 the Applicant responded that it had been consensual. A couple of days later, the Applicant spoke to Police Constable Eames again and informed her that the sexual intercourse had not been consensual but that she had been too scared and embarrassed to say so when Police Constable Eames first asked her on 2 January

2020. Her statement from 2nd January 2020 makes it clear that the Applicant felt that the sex was unusually forceful, and that the Applicant was crying, but [XVZ] was laughing. and pulled her up by her hair. She describes that she froze. Police Constable Eames advised the Applicant that the rape allegation would not be supported and advised her against making a formal allegation of rape.”

20. In her statement at [15] DC Eames said that the Claimant never mentioned being raped to her or PC Bruce. She said that when she was taking ABC’s statement on 2 January 2020 she said that she had specifically clarified with ABC that the sex had been consensual, albeit she said it had been rougher than usual. In her statement PC Bruce also said that ABC had said the sex had been consensual and that she had not claimed to have been the victim of any sexual offences.
21. DC Eames next made contact with the Claimant towards the end of January 2020 and asked her to attend the police station for a voluntary interview in relation to the allegation that she had thrown a candle at XYZ and injured him. She attended a police station on 30 January 2020. The detention log notes that the Claimant arrived at 12:26, and that at 12:37 her rights were administered. It records that she did not request a solicitor, and that was, ‘Cos I did it’. The interview commenced at 12:42 and terminated at 13:28. DC Eames and PC Bruce conducted the interview. In the interview the Claimant said (sic):

“He ran in and grabbed hold of us but grabbed hold of me arm and he started hitting us with the shoes in me face. The whole time he just laughed, he just laughed in me face and I've never ever in my whole life seen him like that ever. OK erm he then just ran, he turned round and he ran down the stairs. Erm I ran down the stairs after him erm on the landing there was a candle, there was two candles, I picked up a candle and as he was running down the bottom of the stairs I chucked that candle at him, it hit his neck. He said bastard or whatever and he ran and he ran out the house. I ran out of the house, I didn't run out the house, I shut the door and I locked the door. I ran back upstairs and I phoned the police and I said I'd been assaulted.”

22. Later, there was this exchange:

“Q. And then he's gone downstairs ?

A. Yeah I screamed and have like well i don't even know if I'd screamed, I know I'd screamed at some point but I think it might have been even when he'd gone. Erm he did it but laughing and then he'd ran downstairs, I'd ran down after him, picked the candle off the landing and chucked it, it didn't smash, it hit his neck and he'd said shit, bastard whatever.

Q. Did you see where the candle hit ?

A. I think it was in the neck.

Q. Because he does have a scar on the back of his head that needed gluing shut so it's hit quite high up on the back of his head

Q. Oh right okay, i didn't, to be honest.

Q. What was his reaction?

A. Erm nothing he literally just went shit or fuck or something along them lines and literally got up and ran out and I was shaking, I couldn't stop shaking.

Q. Why did you throw the candle ?

A. Because he'd hurt us, he had hurt me like never before, he's never done anything like that in his life erm so yeah I did that because he'd hurt me.”

23. The following statements by ABC in interview are also pertinent:

“Q. And you picked it [ie, the candle] up from where ?

A. On the landing.

Q. So it was on the floor ?

A. No on the window-sill, I've got two on the window sill and a vase. Erm [XYZ] was going he went, he was at the bottom of the stair, I picked up the candle and I chucked it as he was hitting the bottom of the stair.

...

Q. So would it be fair to say that the injury, the cut on the back of his head for which he sought medical attention is caused by you throwing the Yankee candle ?

A. Well yeah I mean I was quite shocked when I'd heard it had actually hurt him because I didn't realise that a candle like would hurt somebody like that because it didn't smash but hey ho

Q. But you're admitting the offence of assault on him ?

A. Yes I am.

Q. He hasn't given you any authority ?

A. No, I hit that candle, yes I chucked that candle

Q. Is there anything else that you want to add ?

A. Erm no.”

24. That was the end of the interview.

25. In her statement at [11] DC Eames says:

“[ABC] fully admitted throwing a Yankee Glass candle jar at her husband [XYZ] as he ran down the stairs to exit the house because he had hurt her like never before.”

26. She was not asked in interview whether she was acting in self-defence, or why she had thrown the candle at XYZ. The detention log records, ‘The outcome of the interview denies offences’. It also notes at 13:48, ‘Voluntary Attendee record has been closed under the outcome Investigation Complete — Out of Court disposal’. This was recorded by PC Eames.

27. ABC was informed by DC Eames that she would be required to attend ‘Checkpoint’, a Durham Constabulary programme of restorative justice. The Claimant felt that the officers were not supporting her as they were more focused on the allegations XYZ had made against her than her own complaints against him. She was concerned that XYZ might manipulate her allegations against him, and she said that because of this she agreed to the Checkpoint referral.

28. The Claimant was due to attend her first Checkpoint referral on 12 February 2020, but was unable to do so as her child was unwell. She made contact with Checkpoint and was notified that she was not eligible. The Claimant made contact with DC Eames, who requested that she attend the police station and accept a caution instead.

29. The decision to caution ABC was taken by DI Richards, who was DC Eames’s senior officer with whom she consulted. In her statement at [12] DC Eames said:

“12. Given that [ABC] had fully admitted causing the injury to her husband and that she did not have any previous convictions and was therefore of good character and also because [ABC’s] marriage had broken down I felt that a CHECKPOINT referral would be an appropriate disposal. In my view this would have allowed [ABC] to avoid a criminal conviction and allow her to access counselling and support. However, this referral was rejected by Inspector Andrew Crowe who is the lead manager for the CHECKPOINT Scheme. I therefore discussed this with my Supervisor DI 2214 Richards who stated that he would contact Inspector Andrew CROWE to appeal this decision. However, this again was rejected given the seriousness of the incident in its entirety. I was therefore advised that [ABC] could be cautioned for the assault which seemed the next obvious solution, again, given the fact that she had fully admitted the offence.”

30. In his statement at [14]-[22] DI Richards said:

“14. My rationale in reaching this decision to caution was that an allegation of assault had been made by [XYZ] who had provided an account during interview. The injury described was in my view enough and appropriate to the offence of assault occasioning actual bodily harm. [ABC] had made a full admission to the offence accepting that her actions had caused the injury. In the circumstances described there was no question that the act of throwing the candle was done in the context of self-defence. Indeed, the candle had been thrown following the alleged assault on her as [XYZ] was moving away from her and with his back to her. There was no history of domestic abuse in the relationship and [ABC] had no previous cautions or convictions.

15. I was therefore of the view that there was enough evidence to provide a realistic prospect of conviction and that public interest was met in seeking to issue a simple caution rather than go down the route of prosecution.

16. After these events I have been informed by legal services that the rationale for issuing the caution had been challenged. Furthermore, correspondence from the solicitor representing [ABC] has stated to Durham Police that in the days following this incident [ABC] made an allegation of rape to DC Eames.

17. It is the position of DC Eames that [ABC] never made such an allegation during the police investigation and that this allegation only came to light in correspondence from her solicitor.

18. Police have an obligation to record offences in line with the National Crime Recording Standard. As this information from the solicitor represents third party confirmation by a professional acting on behalf of the victim a crime of rape has been recorded. Enquiries have been ongoing to arrange contact with [ABC] via her solicitor to seek confirmation of this allegation and to gain an account. [ABC] has indicated by email that she does not wish to support this investigation however she stated that she was willing to discuss this matter further.

19. [ABC] was visited by officers on 01 September 2020. She has now provided victim confirmation in respect of the alleged rape. Her allegation states that she was raped by [XYZ] on 01 January 2020 and also on another previous occasion. [ABC] maintains that while this was not disclosed to Police in her initial encounters with officers or in her statement, it was disclosed to DC Eames in the days following her statement being provided. [ABC] will not provide a full account to Police nor is she in support of any additional investigation into this matter.

20. [K], the sister of [ABC] has also been spoken to as it has been stated that she was present when [ABC] made the disclosure to DC Eames. She has confirmed that she was present when the officers visited and heard some of the conversation. She recalls conversation regarding the sexual activity that took place however is unsure of whether a rape allegation was made.

21. I understand that DC Eames has provided information in relation to this matter as has PC Bruce who was involved in the early stage of this investigation. Both officers have informed me that an allegation of rape was not made to them at that time.

22. I have discussed the matter with Susan Splevins who is an Independent Domestic Violence Advocate working with Harbour. I am informed that her case notes would indicate that she was in contact with [ABC] on 17 March 2020 who had asked for advice on how to progress the sexual offence allegations. Mrs Splevins informs me that on this date she consulted DC Eames for advice and then text [ABC] to inform her that she could speak with DC Eames about these matters. This is obviously sometime after [ABC] will state that she had made DC Eames aware of these matters and also some time following her interview for the assault on [XYZ].”

31. On 18 February 2020, the Claimant attended the police station. The detention log notes that she arrived at 15:27. At 15:37 it is noted:

“To be cautioned Person is not being interviewed because Previously interviewed and not accepted in to Checkpoint. Caution now to be administered as alternative disposal.”

32. At 16:07 there is the following entry from DS Walton:

“DP to be cautioned for s47 assault The matter resulted from a domestic related matter and the DP has fully admitted her guilt. The offence has been committed in circumstances whereby the DP has been informed of her partners infidelity. This has resulted in her throwing an object at the victim resulting in injury. There are no aggravating circs to this matter. The DP has admitted the matter and would have been ordinarily dealt with via diversion scheme The DP has no previous offending history and there is little likelihood of re-offending A caution is suitable and proportionate in these circs.

33. The caution was administered at 16:21 by PS Teare and the caution form was signed by ABC a few minutes later. She was offered a copy of it but declined to take it. The form contains a series of declarations by the person to be cautioned that they understand what a caution is, the circumstances in which it might be disclosed, and what other potential consequences there might be.

34. In her Statement of Facts and Grounds, [12], there is the following:

“The Applicant has stated that she felt coerced and manipulated into accepting the simple police caution by Police Constable Eames who had not supported her allegations against [XYZ]. The Applicant felt that she had]no other alternative but to accept the caution.”

35. In her November 2020 statement for this judicial review the Claimant gave the following account ([5]-[9]):

“5. It has been suggested that I threw a candle at my estranged husband, [XYZ], as he was running down the bottom of the stairs away from me.

6. It is correct that [XYZ] was in front of me on the stairs but I had no idea where he was running to and I guess I just panicked, as he had used a pair of shoes to assault me just moments before.

7. The layout of my property is such that access is gained from the rear door through the kitchen. I do not use a front entrance and in fact I do not have a front door, only patio doors leading off the front room, which are not used and have furniture in front. I exhibit at [---] a number of still images of my property taken from the body worn camera footage showing the exterior and interior of the property.

8. The stairs down from the first floor have a small landing half way down to the ground floor. There is a window on the landing and the candle was on the windowsill. The stairs lead only to the ground floor where there is a utility room to the left and the kitchen on the right. If you turn right at the bottom of the stairs into the kitchen you can either turn left into the front room or right into the main kitchen area, towards back door.

9. When [XYZ] ran down the stairs I had no idea, in that moment, as to whether he was actually leaving the house. He could have quite easily gone into the front room or into the kitchen to grab a weapon. It all happened so fast I have no idea what I was thinking. I was in a state of distress following the assault upstairs and was petrified.”

36. In due course the Claimant instructed solicitors, and on 17 April 2020 they wrote to the Chief Constable requesting a review of the caution and for disclosure of the interview tape and the caution form. Another letter was also sent the same day complaining about the decision to take no further action against XYZ for the assault on her, and indicating she would be exercising her Victim’s Right to Review with the CPS. The caution letter concluded:

“There have been a number of failings and concerns that have arisen during this investigation, such will be addressed in separate correspondence. However, due to tight timescales we request that the Caution is expunged and data deleted immediately. It is submitted that the Caution was not given lawfully or in accordance with PACE. [ABC] was acting in self-defence and therefore could not be said to have made a full and conscious admission.

However, the more dominant issue is that she was the victim of domestic abuse, a caution should not have been offered because a caution is always an alternative to charge and it would never have been in the public interest to charge her if the Full Code Test was applied.”

37. A letter before action was then sent on 7 May 2020. This challenged the lawfulness of the caution on the grounds, in summary, that the officer did not comply with the Caution Guidance) in that:
- a. she was a victim of a domestic assault;
 - b. she had raised a defence of self-defence;
 - c. she was induced into accepting the caution having been previously told that she would receive a Checkpoint referral.
38. Under the heading ‘The Issues - Grounds for Judicial Review’ the letter concluded:
- “On the basis that Durham Constabulary officers who administered the caution erred in law due to a failure to follow the Ministry of Justice Guidance on Adult Simple Cautions. [ABC] asserts that
1. the decision of the DC Eames that the matter was such that a caution could be administered for an offence of Actual Bodily Harm was irrational;
 2. that the administering of the caution by DC Eames or the Custody Sergeant amounted to procedural irregularity;
 3. the actions of these Durham Constabulary Officers were illegal in that she did not satisfy the Ministry of Justice Guidance.”
39. The letter demanded that the caution be expunged and if it was, then no judicial review claim would be made.
40. The Defendant’s legal department did not reply to the request of 17 April 2020 to expunge the caution but replied to the letter before action. In a letter dated 18 May 2020 in which they rejected the Claimant’s complaints and denied that the caution was unlawful. The letter said at [2], [9]-[11]:

“2. I must inform you that it is denied that the caution administered to {ABC} was unlawul. That caution was administered in accordance with all relevant policy and in the light of a clear admission by [ABC].

...

9. In the course of being interviewed under caution your client accepted:

- a. That she had not sought a lawyer because she had ‘done it’.
- b. That she had thrown a candle at her husband as he was running down the stairs and leaving the house.
- c. That she thought the candle hit his neck.
- d. That the candle probably caused his injuries to the back of the head.

10. Taken as a whole these comments amounted to a complete admission of having committed the offence of assault occasioning bodily harm. It follows that the assertion in your letter before claim that “[ABC] denied the offence and had acted in self-defence’ is not accurate. In actual fact [ABC] had expressly admitted the offence.

11. Moreover, the suggestion that your client had raised a defence of self-defence is unpersuasive. In order for there to be any question of self-defence it would be necessary to show that your client apprehended imminent unlawful force would be used against her. The fact that [XYZ] was leaving the house and that your client threw a candle at his back is completely inconsistent with the existence of a belief that imminent force would be used against her.”

41. Paragraph 13 stated that no action had been taken against XYZ because the assessment had been made that there was insufficient prospect of conviction.

42. Paragraph 17 of the Defendant’s response stated that:

“It is not correct that the decision failed to adhere to the MOJ guidance:

- a. your client had admitted the offence;
- b. she had done so freely and without inducement;
- c. She had not raised an allegation of domestic violence which could properly give rise to further action by the police.”

43. The Claimant's grounds for seeking judicial review challenged the decision to refer her to Checkpoint; the decision to administer a caution; and the refusal to uphold the caution. Goose J refused permission in relation to the referral because it was academic, but granted permission on the other grounds.

Submissions

The Claimant's submissions

44. On behalf of the Claimant, Ms Gurden challenged the Defendant's decisions to administer the caution, and to uphold it, as unlawful for the following reasons.
45. First, she said DC Eames did not properly apply the Caution Guidance because:
- a. DC Eames did not properly apply the Full Test Code: had she done so she would have concluded, taking into account all the circumstances of the investigation, that there was not sufficient evidence to give rise to a realistic prospect of conviction.
 - b. DC Eames did not take the allegation of the Claimant that she was the victim of domestic abuse seriously, she did not take a positive approach taking account all of the circumstance of the case nor did she consider the case in its entirety.
 - c. DC Eames did not consider whether the entirety of the circumstances of the case could give rise to a possible defence of self-defence.
 - d. The Claimant did not provide a clear and reliable admission to carrying out an assault occasioning actual bodily harm.
46. She said DC Eames had not provided evidence that she concluded that there was a realistic prospect of conviction. In particular, in her statement she had not mentioned the assault on ABC by XYZ with the shoes, or taken account of ABC's injuries. She also said that DC Eames had not carried out an effective interview of ABC, and had not resolved ambiguous answers given by ABC, which it was especially important to do because ABC was not legally represented. She said ABC was not told that she was being interviewed about an alleged offence of assault occasioning actual bodily harm and had not made a clear and reliable admission of having committed that offence. Ms Gurden also said there was a paucity suitably precise medical evidence about XYZ's injury.
47. She said at its highest, the justification given by the Chief Constable in the reply to the letter before action had been that ABC had 'probably' caused a cut to XYZ's head. This was not a clear and unambiguous admission. She also said the law on self-defence had not been applied properly.

The Defendant's submissions

48. In reply, Mr Cohen submitted as follows.
49. He said that ABC had accepted the caution having made several admissions of assaulting her husband and without making any claim she had acted in self-defence

either expressly or by necessary indication. He said the hurdle for successfully challenging a caution was high, but in any event, in this case the legal and evidential basis for the caution was unimpeachable.

50. Mr Cohen then referred to ABC's initial statement to the police that she did not want a solicitor at her interview, 'Cos I did it', and to the parts of the interview where he said she had clearly admitted the assault. He also referred to inconsistencies in ABC's account, eg, her first telling the police XYZ had pushed her down the stairs and then admitting she had fallen herself, and her first telling the police that the sex had been consensual, when her case now was that she had been raped.
51. He also said, relying on *R(Black) v Secretary of State for Justice* [2015] 1 WLR 3963, [94], and *R v Board of Visitors of Hull Prison, ex p St Germain (No 2)* [1979] 1 WLR 1401, 1410H, that to the extent there were disputes of fact between ABC and the officers, then I should accept the officers' accounts.
52. Mr Cohen said the central issue on which both challenged decisions turned was whether the caution was lawfully administered. He said the crux of that issue was whether ABC had clearly admitted the offence; whether she had raised a defence in her account to the police; and whether the requirements of the Caution Guidance had been complied with.
53. Mr Cohen submitted that there had been no breach of the Caution Guidance. ABC had made a number of admissions and had clearly admitted the offence of assault occasioning actual bodily harm by admitting to intentionally throwing a glass-enclosed candle at her husband as he went down the stairs. There was evidence of injury from the arresting officers amounting to actual bodily harm in the form of a cut to XYZ's head which was more than transient or trifling as it had required hospital treatment. ABC had intentionally used force on her husband or at least been reckless as to whether force might be used. He said that it could be inferred from ABC's statement that she had thrown the candle 'because he'd hurt us' that thus that she had acted out of revenge. At no time had she asserted that she had acted in self-defence or been in fear of attack at the point she threw the candle when her husband was going downstairs, nor could any defence of self-defence properly arise on her account.
54. As to arguments whether XYZ should have been investigated with more rigour, or prosecuted for assaulting ABC, Mr Cohen said these were not relevant to the lawfulness of ABC's caution, which was a separate matter.

Legal principles

55. The parties were agreed that a caution should only be quashed in exceptional circumstances when it has been administered in clear breach of the Caution Guidance: *Lee v Chief Constable of Essex Police* [2012] EWHC 283, [15]-[16].
56. The relevant paragraphs of the Caution Guidance are [9]-[11]:

“9. A simple caution must not be offered to a person who has not admitted to committing the offence, and must not be given to an offender who does not agree to accept the simple caution.

Offenders retain the right to decline the offer of a simple caution – even where guilt has been admitted and their refusal may result in prosecution.

10. In addition, a simple caution may only be given if the decision-maker is satisfied that there is sufficient evidence to provide a realistic prospect of conviction if the offender were to be prosecuted.

11. Furthermore, a simple caution must not be given if the decision-maker considers that it is in the public interest for the offender to be prosecuted. See paragraphs 27-29 for further guidance on applying the Code for Crown Prosecutors when deciding whether to offer a simple caution.”

57. The following paragraphs are also relevant (original emphasis)

“20. **A simple caution must not be offered to a person who has not made a clear and reliable admission to committing the offence.** This is particularly important where there is any doubt at all about the mental state or capacity of the person. In these circumstances a decision-maker should be particularly careful about accepting an admission of guilt. Decisionmakers should refer to the Police and Criminal Evidence Act 1984 (“PACE”) and the Codes issued under that Act for assistance in identifying and dealing with such persons.

...

22. If a person admits guilt but also raises a defence, a simple caution cannot be offered. This includes where the person denies an essential element of the offence or where they assert a substantive defence; examples include where the offender claims they acted in self defence, or where the offender claims they had a good reason or lawful authority for having a bladed article in a public place.

...

The Full Code Test

24. In deciding whether a simple caution is appropriate a decision-maker must apply the Full Code Test, as set out in the Code for Crown Prosecutors.

Evidential Stage

25. A decision-maker may only decide that a simple caution is appropriate if satisfied that there is sufficient evidence to provide a realistic prospect of conviction in respect of the offence if the

offender were to be prosecuted. In doing so, the decision-maker may take any clear and reliable verbal or written admission by the offender to committing the offence into account. **However, a simple caution must not be offered in order to secure an admission that could then provide sufficient evidence to meet the evidential limb of the Full Code test.**

Public Interest Stage

26. Before deciding that a simple caution is appropriate, a decision-maker must be satisfied that it is in the public interest to offer a simple caution in respect of the offence rather than to prosecute. Relevant factors are set out below.

The offence

27. Simple cautions are available for any offence, although decision-makers should bear in mind that they are primarily intended for low-level, mainly first-time, offending. There are also statutory restrictions on the use of simple cautions in relation to some offences ...

28. An assessment of the seriousness of the offence is the starting point for considering whether a simple caution may be appropriate. The more serious the offence, the less likely it is that a simple caution will be appropriate.

29. Any aggravating circumstances of the offence (for example, any breach of trust or advantage taken of the vulnerable or young) may increase its seriousness to the point where the case should proceed to court.

...

Specific offence types

Domestic violence and abuse

40. Positive action is recommended in cases of domestic violence and abuse to ensure the safety and protection of victims and children while allowing the criminal justice system to hold the offender to account. Domestic violence and abuse cases often involve a number of incidents prior to reporting to the police. A positive action approach considers the incident in its entirety and should focus investigative efforts on gathering sufficient evidence to be able to build a prosecution case that does not rely entirely on the complainant's statement. Police and prosecutors should refer to the ACPO/CPS Charging checklist⁸ to help secure evidence-based prosecutions which are not solely reliant on the complainant.

41. If the evidential stage of the Full Code test is satisfied, it will rarely be appropriate to deal with the case by way of a simple caution in cases of domestic violence and abuse. However, where a positive action policy has been adhered to but the victim does not support a prosecution, and the available evidence (including any additional evidence adduced) would only support charging a very minor offence, a simple caution may be preferable to a decision to take no further action.”

58. Paragraphs 86 and 87 make clear there is no formal right of appeal against a simple caution once it has been administered. However, this does not prevent a person (for example an offender or a victim) who claims that it was not administered in accordance with the Guidance from challenging the simple caution by way of a complaint against the police force (by letter to the Chief Constable) or in court by way of a claim for judicial review.
59. Ms Gurden also referred me to the Code for Crown Prosecutors and the Full Code Test:

“4.6 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction ... They must consider what the defence case may be, and how it is likely to affect the prospects of conviction ...

4.7. 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 on which they might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing the case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.’

60. She also referred to the Crown Prosecution Service’s Charging Standard on Assault Occasioning Actual Bodily Harm, which requires that it must be proved that the assault ‘occasioned’ or ‘caused’ bodily harm. ‘Actual’ means that the bodily harm should not be as trivial or trifling as to be effectively without significance.

Discussion

61. A simple caution is a non-statutory, non-conviction disposal. It was once known as a ‘police caution’. In essence, it is a formal warning that may be given by the police to persons aged 18 or over who admit to committing an offence. It is recorded on the Police National Computer (PNC), and so a person who has received a caution has thereby got a criminal record. Whilst it is an alternative to prosecution, a caution may nonetheless have serious consequences for the individual concerned, for example, it might have to be disclosed as part of a DBS check for certain types of employment.

62. A simple caution is to be distinguished from a conditional caution (a caution with conditions attached), which were introduced by the Criminal Justice Act 2003.
63. As the Caution Guidance makes clear, simple cautions are intended for low-level, first-time offending. Paragraphs 5-6 state:

“5. The aims of the simple caution scheme are:

- To offer a proportionate response to low-level offending where the offender has admitted the offence;
- To deliver swift, simple and effective justice that carries a deterrent effect;
- To record an individual’s criminal conduct for possible reference in future criminal proceedings or in criminal record or other similar checks;
- To reduce the likelihood of re-offending;
- To increase the amount of time police officers spend dealing with more serious crime and reduce the amount of time officers spend completing paperwork and attending court, whilst simultaneously reducing the burden on the courts.

6. ... The simple caution scheme is designed to provide a means of dealing with low-level, mainly first-time, offending without a prosecution. A simple caution may only be given where specified criteria are met.”

64. There are some statutory restrictions on the use of simple cautions. For example, s 17(2) of the Criminal Justice and Courts Act 2015 prohibits the police from giving a simple caution to an offender for an indictable-only offence unless the CPS agree that a caution should be given. The same section contains further restrictions on their use. I need not go into the detail, however, because in this case there is no dispute that a caution was, in principle, a disposal which was available to the police in relation to the offence of which ABC was suspected. The essence of the challenge mounted by the Claimant to her caution is, as I have said, that the criteria in the Caution Guidance for the administration of her caution were not met.
65. I turn to the principles I have to apply in relation to this challenge. In *Lee*, supra, Maddison J said, by reference to *R v Metropolitan Police Commissioner ex parte Thompson* [1997] 1 WLR 1519 and *R v Commissioner of the Police for the Metropolis ex parte P* (1999) 160 JP 367:

“15. The law in my view can be shortly stated. The court has jurisdiction to quash a caution but only in an exceptional case where a caution is administered in clear breach of the guidelines set out in the relevant Home Office circular. However police officers responsible for applying the circular must enjoy a wide

margin of appreciation of the nature of the case and whether the pre-conditions for a caution are satisfied. Even if there has been a clear breach of the guidelines, the court retains a discretion not to interfere. In each of these two cases the caution concerned was in fact quashed, in the former because the person concerned had been cautioned even though there was no evidence of his guilt and he had not made a clear and reliable confession of the offence concerned; and in the latter because the person concerned had been wrongly induced to accept a caution. Plainly each of these cases fell into the exceptional category to which I have referred.

16. In my judgment, in the light of those authorities, the present application is to be determined by considering to what extent the police officers concerned did and did not in fact comply with the 2008 Circular - of which they were ignorant - and then by considering whether the extent to which they did not do so can be described as significant and substantial and took the case into the limited category described by the authorities to which I have referred in which it is appropriate for the court to quash a caution.”

66. The Home Office Circular to which Maddison J referred has been replaced by the Caution Guidance.
67. In this case, for the substance of the reasons advanced by Mr Cohen, and the following reasons, I am satisfied that the caution administered to the Claimant was lawful and that the criteria in the Caution Guidelines were satisfied. Also, given the facts, it was well within the discretion of DI Richards to decide that it was appropriate to offer a caution to the Claimant and it was not irrational for him to do so.
68. I begin with one preliminary point. Although in her Skeleton Argument Ms Gurden attacked the decision and evidence of DC Eames – and the Judicial Review Claim Form asserts that the decision being challenged was that of DC Eames - as I explained earlier, the decision to administer the caution was strictly, in fact, that of DI Richards, DC Eames’ supervising officer although it is clear DC Eames was considerably involved in the process. It is therefore to his evidence that one has to look in order to see if the correct principles were applied.
69. I reject Ms Gurden’s first complaint that the Claimant was not told properly what she was being interviewed about. At no stage has she ever expressed any uncertainty or doubt about why she was being interviewed. Virtually the first thing DC Eames said in the interview after the formal parts had been concluded was that they needed to ‘ask you some questions about an allegation of assault that your husband [XYZ] alleged that happened on the 1st of January 2020.’ Prior to that ABC had already told the police that she did not want or need a solicitor, ‘Cos I done it.’ There can be no doubt that she knew exactly why the police wished to speak to her. She never asked what she was being questioned about. She made clear at the end of the interview she knew that she had injured her husband.

70. I turn to the question whether ABC made a clear and reliable admission of guilt to the offence of assault occasioning actual bodily harm, contrary to s 47 OAPA 1861. She plainly did, at several points during her interview, including directly at the end of the interview when she was asked in terms whether she admitted the offence, as well as in other statements. I set out the relevant extracts earlier and I do not need to repeat them. Ms Gurden took me in detail through the interview and whilst it is clear that the phrase ‘assault occasioning actual bodily harm’ was not used, ABC admitted throwing the candle at her husband that she had been told had injured him (as it had). The injury required hospital treatment. Although she said or indicated that she had not known at the time he had been injured, this is not an element of the offence (there is no requirement to intend to cause actual bodily harm, as Mr Cohen pointed out). By throwing the candle at her husband ABC must have been at least reckless that he would be subject to unlawful force and that, plus an injury caused by the force which is more than merely trifling or transient (which the injury in this case certainly was), is all that is required for this offence; *R v Savage*; *DPP v Parmenter* [1992] 1 AC 699; *Donovan* [1934] 2 KB 498. As to the nature of the injury, it is sufficient to quote the witness statement of PC Adey, who arrested XYZ:

“It was apparent to me that [XYZ] had a head injury as there was a mixture of wet and dried blood on the side of his neck and hands ... he provided me with an account of the earlier incident.

[XYZ] stated to me that he had been at home with his wife when an argument had occurred as she had accused him of having an affair. This had resulted in her throwing a glass candle holder which he stated had struck him on the back of the head and caused the injury. I observed that [XYZ] had a 1 inch linear cut to the back of his head which was bleeding heavily ...”

71. PC Adey went on to say that he took XYZ to a local community hospital for treatment but they were referred on to the A&E department at a larger hospital.
72. There is an entry on the detention log from 30 January 2020 at 13:37 after the interview that ABC had denied the offence, but I can only conclude that this was a clerical error. For the reasons I have given, she did clearly admit the offence. Ms Gurden did make reference to this point in her reply (and in her initial grounds of claim), but looking at the material overall including the detention log from 18 February 2020 (which refers to the admission having been made), it is plain the police correctly concluded that the offence had been admitted.
73. I also reject Ms Gurden’s submission that the Evidential Stage of the Full Code Test in the Code for Crown Prosecutors was not satisfied and that at the time the caution was administered there was not a realistic prospect of conviction (leaving aside the admission in the caution, as required by [25] of the Caution Guidelines). By the 18 February 2020 the police were in possession of evidence from XYZ that his wife had injured him; that that injury had been seen by police officers to be bleeding heavily and had required hospital treatment; and that she had admitted causing the injury by throwing the candle at him as he retreated downstairs in order to leave the house. On this basis, there was in my judgment ample evidence to satisfy the Evidential Stage. I reject Ms Gurden’s criticism that there was insufficient medical evidence about

XYZ's injury. PC Adey's description was more than sufficient to prove the necessary actual bodily harm, and a statement from the hospital could easily have been obtained had it been necessary.

74. Ms Gurden made reference to the CPS's Charging Standards for the s 47 offence as compared with common assault. It is clear there can be an overlap between the two offences. The Charging Standards indicate that a charge of assault occasioning actual bodily harm may be justified where there has been a laceration which requires suturing and a weapon has been used. Based on those factors I can readily understand why the police opted for the s 47 offence. Whether or not it could have been charged as common assault, there is no doubt what ABC admitted was, in law, the s 47 offence.
75. Nor did she in her answers raise any defence of self-defence, or indeed any defence. Whilst I accept that she did not need to say in terms 'I acted in self-defence' (where there is evidence which if accepted could raise a *prima facie* case of self-defence, this should be left to the jury even if the accused has not formally relied upon self-defence: *DPP (Jamaica) v Bailey* [1995] 1 Cr App R 257), there was nothing in her account which could possibly have given rise to that defence. She never at any stage said that she had acted as she did because she needed to defend herself from an attack or imminent attack (cf *R v Beckford* [1988] AC 130, 141), nor did she give an account of events which even remotely, or *prima facie*, raised this as a possibility.
76. It is sufficient to quote from her police statement given to DC Eames on 2 January 2021. After attacking XYZ with a razor, because 'I felt so angry', she narrated what happened next:

"He ran downstairs. I ran straight down after him. As he got to the bottom step I grabbed a jar of Yankee candle off the window sill on the landing and threw it at him. It hit the back of his head. I realised what I had done and even shocked myself, as I have never done anything like that before. I asked him if he was alright and he left by the front door still laughing."
77. On this account, which was consistent with what she said four weeks later in her interview, there is no basis on which it could properly be concluded that she acted as she did in order to defend herself. I accept Mr Cohen's point that her interview made clear that she did what she did in revenge because of XYZ's treatment of her and because she was angry.
78. In her November 2020 statement for these proceedings ABC suggested she thought XYZ might obtain a weapon from the kitchen. I note nothing like this was ever said in her contemporaneous accounts and it seems to me to reflect an *ex post facto* rationale that developed during 2020.
79. For the reasons DI Richards gave (which I set out earlier), he was entitled to conclude this was a proper case for a caution and he clearly set out his reasons. Ms Gurden made reference to [40] and [41] of the Caution Guidance in relation to domestic violence, but those paragraphs do not seem to me to be relevant. They are concerned with ensuring that allegations of domestic violence are dealt with properly, with

prosecutions as opposed to cautions, taking place where appropriate, as Mr Cohen submitted.

80. Ms Gurden made a number of criticisms of how the allegations made by ABC had been investigated. She also criticised DC Eames' interview of ABC. Whether the allegations about what XYZ had done to ABC should have been better investigated is not a matter before me. Whether XYZ should have been prosecuted for injuring ABC, about which I say nothing, was an entirely separate question requiring separate consideration according to different principles. Ms Gurden said the matter should have gone to the CPS for a charging decision so that ABC could have had the possibility of the CPS deciding not to charge her in the public interest if they had concluded that she had been assaulted by XYZ immediately before she threw the candle. That submission, it seems to me, is wholly speculative.
81. Finally, as for the interview, ABC chose not to be legally represented and was given a full opportunity to give her account, which she did in terms which were consistent with the account she had given on 1, 2 and 4 January 2020 in her statements to the police. She was thus spoken to by the police a total of four times in January 2020 (in addition to her initial 999 call and her interactions with the officers who attended in the immediate aftermath of that call). Even though she was plainly very distressed on 1 January 2020, and had had some sort of black out and was initially very dazed, she had recovered sufficiently to give an account that evening and a statement the following day. She was then seen again on 4 January 2020, and was then interviewed on 30 January 2020. Overall, I am satisfied that ABC had every opportunity during the month of January 2020 to give her account of what had happened, and that if she had acted in self-defence when she threw the candle she would clearly and unambiguously said so. She did not.

Conclusion

82. In my judgment the caution in this case complied with the Caution Guidelines and was lawful. Ms Gurden also attacked the decision to caution as irrational, namely, as one which no reasonable police officer could have reached. For the same reasons as those already given, I reject that broad based challenge. The case law I cited earlier makes clear that officers enjoy a wide margin of judgment in the administration of cautions. Having concluded that the conditions in the Caution Guidance were satisfied, and it having been decided that a diversionary Checkpoint referral was not possible, it was rationally open to DI Richards, working with DC Eames, and well within the bounds of his discretion, to conclude that it was appropriate to offer ABC an out-of-court disposal by way of a caution as a low-level first-time offender.
83. This claim for judicial review is therefore dismissed.