



Neutral Citation Number: [2024] EWHC 1963 (KB)

Case No.: KA-2023-BRS-000029

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

**As amended under the slip rule pursuant to CPR 40.12(1)
on 27th August 2024 by Mr Justice Ritchie**

**ON APPEAL FROM HHJ BROWNHILL
WINCHESTER COUNTY COURT
CASE NO: J08YJ076**

Date: 29th July 2024

Before:

MR JUSTICE RITCHIE

BETWEEN

XGY

Claimant/Appellant

-and-

THE CHIEF CONSTABLE OF SUSSEX POLICE

First Defendant/Respondent

-and -

THE CROWN PROSECUTION SERVICE

Second Defendant/Respondent

**Fiona Murphy KC and Frederick Powell (instructed by Irwin Mitchell LLP) for the
Appellant**

Robert Talalay (instructed by Weightmans) for the 1st Defendant/Respondent

**John Goss (instructed by the Government Legal Department) for the 2nd
Defendant/Respondent**

Hearing dates: 10th & 11th July 2024

APPROVED JUDGMENT

Mr Justice Ritchie:

The parties

1. There is an anonymity order in place to protect the Appellant. She is a member of the public who was the victim of various domestic violence crimes committed by her partner K whilst they were in a relationship.
2. The 1st Defendant/Respondent is the Chief Constable of the Police for Sussex (the Police) to whom the Appellant reported the violent crimes committed by K and who then investigated the allegations. The 2nd Defendant/Respondent is the prosecuting authority in England and Wales which prosecuted K for some of the crimes (the CPS).

Bundles

3. For the hearing I was provided with 5 lever arch bundles (and digital copies) and three skeleton arguments. Two other documents were handed up during the hearing. For brevity and ease of reading I shall refer to the cases by the shorthand names indicated in bold in the Appendix.

Summary

4. This is an appeal from an order striking out the claims and giving summary judgment to the Defendants. This is a rolled up hearing of the Appellant's application for permission to appeal with the full appeal. The main issue relates to Advocates Immunity from suit for words said at Court.

Facts

5. In providing this summary I make no findings of fact. As I shall set out below, on a strike out application the law requires that the facts are assumed in the Appellant's favour at the height of the Appellant's case. I take the facts from the judgment below, the pleadings and the documents.
6. The Appellant told the Police that during a relationship with K in 2019 he physically, sexually and mentally assaulted her, threatened to kill her and her family (elderly grandparents and younger sister) and threatened to throw acid on her face and her relatives' faces. The relationship ended on 5th November 2019. She had to move out of her home as a result, to gain safety. The Appellant went to *Epsom* to live with her aunt. On 6th November 2019 the Appellant reported K to the Police alleging he had committed crimes arising from the actions summarised above. The Appellant was categorised as a victim of domestic violence. The Appellant obviously wished her new address to remain confidential to the Police and secret from K. Then and thereafter she asserted K had previous convictions for armed robbery (7 years in prison), driving offences, was a drugs dealer and had a fierce, eruptive temper which was often aimed towards her. Police records apparently contained references to K's record of domestic violence, drug offending and connections with firearms. The Appellant was assessed as being at a high risk of violence from K.

7. In November 2019, the Police arrested K and released him on bail but made that subject to a condition not to go to *Epsom*. K knew the Appellant's aunt's address in Epsom so that bail condition gave him knowledge of where she had fled to. This caused the Appellant to suffer depression through fear of assault or worse (according to Doctor Waheed, a consultant psychiatrist). As a result of this disclosure, she fled *Epsom* and lived in terror in a woman's refuge.
8. It took the Appellant a long time, with assistance, to find new accommodation for herself, but she succeeded and she relocated in March 2020 to an address in *Liphook, Hampshire*. She told the Police of the new address and required them expressly to keep it confidential from K. The month before, the Appellant had revealed to the Police that K had raped her (during their relationship). On 15th April 2020 the Police arrested K for the rape allegation and breach of bail conditions relating to an offence not concerned with the Appellant, then released him on police bail (for the allegation of rape) without mentioning the *Liphook* address. They prepared the CPS file for the Magistrates Court hearing listed for the next day. It included her address. They failed to mark manually it as confidential. They marked it as confidential on a digital Domestic Abuse system to which the CPS had no access due to a known IT issue. At the hearing in the Magistrates Court on 16th April the CPS advocate asked for a bail condition that K be prevented from going to "*The Mead, Liphook, Hampshire*", thereby informing K of the Appellant's confidential new address. Later the same day DC Wells called and informed the Appellant of this describing it as a "muck up". So, terrified, the Appellant fled from her new home. Doctor Waheed opined that this exacerbated her depression and caused Post Traumatic Stress Disorder [PTSD].
9. The Appellant brought a civil action against the Police and the CPS. They defended on the grounds, inter alia, of immunity from suit. They applied to strike out the claims and for summary judgment. All of the claims against the CPS were struck out and the *Hampshire* disclosure claims against the Police were struck out by HHJ Brownhill (the Judge) on 21.9.2023. The *Human Rights Act 1998* [HRA] and (as far as I can tell) the Data Protection Act 2018 [DPA] claims were dismissed by way of summary judgment for the Defendants. The Appellant appeals those decisions. The claims relating to the November 2019 disclosure of the Appellant's address in *Epsom* were not in the Police strike out application and were permitted by the Judge to continue (summary judgment being refused) so this appeal will not cover those claims in detail.

Power and procedure on appeal

Review of the decision

10. Under CPR r. 52.21 every appeal is a review of the decision of the lower Court and will only be granted if the decision below was wrong or unjust due to a serious procedural or other irregularity.

Wrong

11. The standard reasons for a finding that the Court below made a decision in law which was wrong include: failing to give any adequate reasons; getting the relevant law wrong; failing to follow precedent; failing to apply the relevant law correctly; failing to take into account a material matter and taking into account an immaterial matter. There are of course others.

Findings of fact

12. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per Lord Reed at [67] and *Grizzly Business v Stena Drilling* [2017] EWCA Civ. 94, per Longmore LJ at [39-40] and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, by Lord Justice Males at [48] - [55], that any challenges to findings of fact in the Court below have to pass a high threshold test. This principle rests on the fact that the trial judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable judge could have reached that decision. The threshold was summarised by Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2-4 and 52. However, in strike out and summary judgment applications the judge below does not have the benefit of seeing or hearing the witnesses and is in no better position than the judge on appeal, so the threshold is not so high.

Appeals against case management decisions

13. When considering the permission decision in an appeal from a case management decision, the Court may take into account whether the issue is of sufficient significance to justify the costs of appeal; the procedural consequences of the appeal; and whether it would be more convenient to determine it after the trial (CPR r.52 PD 52A para 4.6).
14. Appeals from case management decisions have a high threshold test, see *Royal & Sun v T & N* [2002] EWCA Civ. 1964, in which Chadwick LJ ruled as follows:

“37. ... these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate Court should respect the judge's decisions. It should not yield to the temptation to “second guess” the judge in a matter peculiarly within his province.

38. I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”

15. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ. 1537, at [52] the Master of the Rolls said:

“We start by reiterating a point that has been made before, namely that this Court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ. 1667 at [18] Lewison LJ said: “it has been said more than once in this Court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges.”

16. In *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ. 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68:

" ... The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable."

17. However, in this appeal the decisions made on the strike out application were pure matters of law arising from undisputed facts in relation to immunity from suit, so I do not consider that the high threshold relating to case management decisions applies. Either the Judge was right about the law or she was wrong. In addition, either the strike out jurisdiction was the correct one to determine the issues or it was not. I do not consider that the high threshold really impinges on the matters to be determined on this appeal in relation to the strike out application. In relation to the summary judgment application, I do apply a higher threshold.

Striking out and summary judgment

18. The power to strike out is in CPR r.3.4. It rests in this case on the statement of case disclosing no reasonable grounds for bringing the claim or the claim being an abuse. The notes in the *Supreme Court Practice (White Book) 2024* refer to *Barrett v Enfield Borough Council* [2001] 2 AC 550, in which Lord Browne-Wilkinson ruled (P557) that:

“Striking out

In my speech in the *Bedfordshire case* [1995] 2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the

exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.”

Art.6 of the *European Convention on Human Rights* is relevant here. In addition, when considering an application to strike out the facts pleaded by the claimant must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible, see *Allsop v Banner Jones Limited* [2021] EWCA Civ. 7, in which Marcus Smith J at para. 7 cited and applied the judgment of Arnold LJ in *Libyan Investment Authority v King* [2020] EWCA Civ. 1690, at para. 96 in which he ruled:

“In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call “reasonable arguability”. Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case”

19. In relation to summary judgment, a useful summary of the approach in this jurisdiction was provided in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch), by Lewison J.:

- “i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
- ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- iii) In reaching its conclusion the court must not conduct a “mini trial”: *Swain v Hillman*;
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) ...if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

Definition of terms

20. I am going to define some terms which I shall use in this judgment. I do so for clarity of expression and understanding. I also do so because many of the authorities do not clearly define the terms used in the judgments and this has enfranchised counsel (quite properly) to make competing submissions on the scope of various immunities due to the generality of the words used. Likewise, the Judge used terms in general ways, so for instance she used “Witness Immunity” to cover claims against persons who are not witnesses.

- **Judge’s Immunity at Court [AC]:** immunity from civil suit arising from being the judge presiding over a trial or hearing.
- **Witness Immunity at Court [AC]:** immunity from civil suit arising from being a lay or expert witness who gives evidence at a trial or hearing.
- **Witness Immunity before Court [BC]:** immunity from civil suit arising from being a lay or expert witness who may give evidence at a trial or hearing but has not done so yet.
- **Advocates Immunity at Court [AC]:** immunity from civil suit arising from being an advocate who appears at a trial or hearing representing a party. This has also been called forensic immunity.

- **Advocates Immunity before Court [BC]:** immunity from civil suit arising from being an advocate who may appear at a trial or hearing to represent a party but has not done so yet.
- **Legal Proceedings Immunity before Court [BC]:** immunity from civil suit arising from being a lawyer, Police officer or administrative staff member working on a criminal or civil case, for the prosecution/claimant or for the defence, in preparation for a trial or hearing.

The issues in the appeal

21. The essence of the issues in this appeal can be framed in this way:

- 21.1 **What is the scope of Witness Immunity BC and Legal Proceedings Immunity BC?** Arguably, did the scope fall short of applying to the Police actions in passing the Appellant's confidential *Hampshire* address to the CPS without a direction not to disclose it to K? Arguably, did the scope fall short of covering the actions of the CPS in disclosing the address to K in Court? Arguably, if the scope did cover the actions should the immunity be granted absolutely or was an analysis of the justification for the immunity required before deciding whether to grant it?
- 21.2 **What is the scope of Advocates Immunity AC?** Did the scope arguably fall short of covering the actions of the CPS in disclosing the address to K in Court? Arguably if the scope did cover the actions should the immunity be granted absolutely or was an analysis of the justification for the immunity required before deciding whether to grant it?
- 21.3 **Strike out jurisdiction:** should this have been exercised on the facts of this case in the context of a dispute over the scope of the law on immunity, its justification and the paucity of evidence before the Court?
- 21.4 **Summary judgment jurisdiction:** was the Court below correct to embark on a determination of the prospects of success of the common law, HRA and DPA claims on the limited evidence available, before full disclosure had been provided by the Police or any disclosure by the CPS? If so, were the decisions made wrong: namely that the Appellant was not arguably a victim under the HRA of breaches of her Arts. 2/3/8 ECHR rights because there was no arguable immediate risk of death/harm or interference with her family life and no arguable common law or DPA claim?

The pleadings and chronology of the action

22. On 4.2.2022 the Appellant issued the civil claim against the Police and the CPS. The causes of action were breaches of statutory duties under the HRA and DPA and/or a misuse of private information. The Appellant claimed damages at around £168,000 for personal injuries (psychiatric) and consequential losses (earnings etc). In the Particulars of Claim the Appellant asserted that the Defendants breached her rights under Arts. 2

(the right to life), 3 (the right to not be treated inhumanly or tortured) and 8 (the right to family life) of the *European Convention on Human Rights* [ECHR] and Sections 34, 35, 37 and 40 of the DPA and at common law.

23. The Appellant pleaded as facts that in early November 2019 the Appellant's relationship with K followed an escalating pattern of domestic abuse. She had been subjected to rape, harassment, threats of violence, physical assaults, sexual abuse and controlling and coercive behaviour by K, who had threatened to harm her and her family with whom she lived including her grandmother, great uncle and younger sister. K made further threats of violence after the end of the relationship. Out of fear for her safety she moved from Chichester to *Epsom* and kept that move secret. She informed the Police on 6th November 2019 that she had moved to *Epsom* to avoid K. She informed the Police of repeated threats by K since the separation and her move and his demands that she return home and threats to throw acid at her mother and sister when she refused. The Police completed a DASH risk assessment considering the risk to be medium / high. The Police log entries noted K was already wanted for a number of offences and was actively evading the Police. He had breached bail conditions relating to a previous drugs offence. The risk was upgraded to "high" after a SCARF assessment and the Police noted the Appellant was very teary and clearly very frightened. She was obviously terrified of K so much so that she had gone to stay in *Epsom* and although K was aware of the existence of her aunt's address, he did not know she was there. Despite this on 7th November 2019 the Police bailed K subject to conditions not to contact the Appellant or to enter Chichester or *Epsom*. When informed of the bail conditions the Appellant immediately understood that K would be able to track her down because he knew where her aunt lived in *Epsom* and told the Police of this concern and through fear for her personal safety relocated to a woman's refuge in Kent within two days. She languished there for four months, isolated from family and friends, out of work and experienced a decline in her mental health. She provided a witness statement to the Police on 27th November 2019 detailing the domestic violence and specifically requested the Police not to disclose her address due to her concern that K would commit further offences on her. The Appellant's mother moved to a new address in *Hampshire* in mid-December 2019 and in February 2020 the Appellant temporarily moved to live with her mother. In March 2020 the Appellant informed the Police that she was shortly moving into a new address in *Liphook, Hampshire* and emphasised the information should be kept confidential from K. On 15th April 2020 K was arrested in relation to the rape assertion the Appellant had made two months before and breach of bail conditions for an offence unrelated to the Appellant. In a conversation with the Police the Appellant made clear K did not know of her *Liphook* address when discussing the bail conditions she might want. On the 16th of April, at the Magistrates Court, K was dealt with for breach of bail on different criminal charges. The Police provided the CPS with her *Liphook* address but did not inform the CPS of the Appellant's requests for confidentiality nor did the Police include a warning marker on that database about the confidentiality and the need to protect the Appellant. During the hearing the CPS advocate applied for bail including requesting a condition that K should not enter *the*

Mead, Liphook, Hampshire. Hours after the hearing DC Wells of the Police telephoned the Appellant informing her that K had been released subject to the bail condition not to attend the *Liphook Hampshire* address amongst others and when the Appellant informed the Police that she was terrified that K, armed with this information, would find her and harm her, was advised not to return to the address so she decided not to return to her *Liphook* address. She lived with her mother until August 2020, when she moved into new accommodation. K was convicted of six counts of assault on the Appellant in December 2020. The Appellant made a formal complaint to the CPS on the 17th of April 2020. In response, in May 2020, the CPS explained that when their advocate disclosed the *Liphook* address there had been no information “easily accessible” to the advocate in Court that her *Liphook* address should not be revealed to K. There was no warning marker in the papers provided to the CPS and the Police Domestic Abuse digital checklist could not be accessed by the CPS because of a known and ongoing technical IT issue. In a further letter, dated 19th January 2022, the CPS accepted the *Hampshire* address ought not to have been disclosed but relied on the principle of Advocates Immunity AC.

24. The Appellant’s pleaded case under Arts. 2 and 3 of the ECHR. It was asserted that the Police knew or ought to have known of the existence of the real and immediate risk to the Appellant’s life and or physical integrity from K. That risk continued from November 2019 to 16th April 2020 because of K’s significant criminal history; breaches of Court orders and bail conditions; substance abuse; reaction to their breaking up; escalating violence towards the end of their relationship; numerous extreme threats including threats to kill; previous physical assaults on the Appellant; threats to the Appellant’s family after the relationship ended; the Appellant’s credible concern as to her own risk and the Police assessment that she was at a “high risk”. The Appellant asserted that the Police owed her positive duties to take appropriate steps to safeguard her life and prevent her from suffering inhuman and degrading treatment by K. She asserted they failed to comply with those duties on the facts in relation to her *Epsom* address and the *Hampshire* address and that they failed to formulate or institute an effective safeguarding plan. The Appellant asserted K was a highly dangerous individual with a motive to harm her. They relied on the Police’s own log entry on 16th of April 2020 and the advice from DC Wells that she was no longer safe at her *Hampshire* address. She asserted the CPS failed to protect her and undermined the confidentiality of her *Hampshire* address by sharing the information with K at Court and that they should have known that K posed a significant risk to the Appellant. She asserted that the breaches caused her psychiatric injury. Further the Appellant asserted breaches of systematic duties under Arts. 2 and 3 of the ECHR. She pleaded that the Defendants were under an obligation to put in place an appropriate system for protecting sensitive information regarding victims of domestic violence. Their systems were inadequate inter alia because the Domestic Abuse checklist was not accessible by the CPS. The Police and the CPS failed to make alternative arrangements when the system did not work. In addition, in breach of Art. 8 of the ECHR, the Appellant asserted that the facts evidenced a violation of her right to respect for her family private

and home life because she was forced to relocate on multiple occasions due to the asserted breaches which abolished or interfered with her family, private and home life. The Appellant asserted that the Defendants failed to conduct a balancing exercise before making the disclosures and that they were inherently disproportionate. Further, that the first Defendant's framework did not afford protection to the Appellant. In breach of the DPA the Appellant asserted that the 1st and 2nd Defendants failed to ensure that her personal special category data was obtained or processed fairly, lawfully or for lawful purposes, adequately or relevantly or in a secure manner. She pleaded that the disclosure of the *Hampshire* address was not necessary in order to prosecute or to bail K. Therefore, there was no justification for the disclosure. The Appellant also asserted that the facts evidenced a misuse of private information.

25. A report from Doctor Waheed, a consultant psychiatrist, dated September 2022, was served with the Particulars of Claim. The Appellant was born in 1999, was only 19 rising 20 when she endured the relationship with K. After leaving school she had worked in a bar for 2.5 years and then worked as an estate agent. From November 2019 to August 2020 she was unable to work due to the frequent changes of addresses caused by the disclosures and then re-started work as an estate agent in August 2020. She had a previous psychiatric history of intermittent depression. The diagnosis provided was that the Appellant suffered moderate depression in November 2019 and an aggravation thereof in April 2020, alongside PTSD.
26. The Police filed and served a Defence in December 2022. I do not need to deal with the denials in relation to facts or non admissions in relation to the strike out application because of the assumptions made in law on such applications but they are relevant to the summary judgement applications so I will summarise them briefly. The Police admitted that on the 6th of November 2019 they bailed K on a condition not to enter *Epsom* amongst other conditions. The Police asserted that they proactively took steps to safeguard the Appellant from K. The Appellant raised the allegation of rape on the 8th of February 2020 which she asserted occurred in November 2019. The Police pleaded that the only bail condition they sought in April 2020 was no contact. After his arrest on the 15th K was bailed by the Police with two conditions neither of which disclosed the Appellant's address in *Hampshire*. It was the next day, on the 16th, when the CPS made the disclosure. K had already broken a bail condition imposed by the Police not to enter Sussex, which related to a different set of charges. The Police admitted including the Appellant's confidential *Hampshire* address in the file handed to the CPS. The Police admitted they did not expressly state that the details were not to be disclosed. The Police asserted that they provided the CPS with a Domestic Abuse checklist which set out that K did not know the *Hampshire* address and that the only bail conditions sought should be no contact with the Appellant and her family. They did this deliberately. The Police made limited admissions about the conversation between DC Wells and the Appellant in the afternoon of the 16th of April. K was convicted on the 6th of July 2020 but that conviction was quashed. He was retried in December and convicted of multiple offences of assault on the Appellant.

27. In relation to the law, the Police pleaded immunity from suit for passing the *Hampshire* address to the CPS because it was part of their public function prosecuting crime. The Police denied that the Appellant was a victim within Section 7 of the HRA and denied that her Arts. 2 or 3 rights under the ECHR were engaged. The Police asserted the Appellant's life was not put at serious risk and that she was not treated inhumanely or degradingly. The Police denied there was a real and imminent risk to her life or of inhumane or degrading treatment. The Police denied that they knew or ought to have known that there was a real or imminent risk to the Appellant's life or that she would be subject to inhuman or degrading treatment. The Police also denied being in breach of any positive duty under Arts. 2 or 3 of the ECHR and asserted it was necessary to impose a Police bail condition on K not to enter *Epsom* and that was proportionate and appropriate. The Police asserted they took appropriate measures and put in place plans to keep the Appellant safe at all material times. The Police denied that the Appellant's rights under Art. 8 of the ECHR were interfered with by sharing information with the CPS about her *Hampshire* address or the disclosure in Court and asserted that sharing her *Hampshire* address with the CPS was a necessary and proportionate means of achieving a legitimate aim, namely the prevention of crime and the protection of the Appellant and her family. (They provided no explanation justifying that assertion). In relation to the DPA claim the Police denied that disclosing the *Liphook* address to the CPS was a breach and asserted it was necessary for the exercise of the function they carried out namely the administration of justice and the protection of the Appellant's vital interests. (They provided no explanation justifying that assertion). Finally, the Police denied owing the Appellant a duty of confidence or that the Appellant had a reasonable expectation of privacy in relation to the *Liphook* address and denied common law liability. (They provided no explanation justifying that assertion).
28. The CPS never entered any Defence. Instead, they applied on 16.11.2022 for the Court to strike out the claim against them and in the alternative for summary judgment. In support of the application the CPS set out their grounds. They asserted they benefited from a core immunity barring any cause of action based on things said and done in Court. They relied on four High Court cases, *A and B*; *CLG*; *King* and *Smart*. They asserted that oral disclosure in Court is not caught by the DPA relying on *Scott*. In support of the application the CPS relied on a witness statement from Meena Phull, of the Government Legal Department, sworn on 14.11.2022. The CPS provided no disclosure for the hearing other than the complaint made by the Appellant a few days after the 16th of April 2020.
29. By application notice dated 16th March 2023 the Police applied to strike out the Appellant's claim relating to the *Hampshire* disclosure, not the *Epsom* disclosure, and in the alternative sought summary Judgment. They asked for this application to be listed at the same time as an application by the CPS. In a witness statement from Daniel Rutherford, sworn in March 2023 (he is a partner of Weightmans), he asserted immunity from suit for the Police officers and staff who made the disclosure to the CPS.

He asserted those actions were part of the ongoing criminal proceedings and were part of the preparation of the case file for the purposes of the bail hearing. He based his assertions on the case law cited in his witness statement that these actions were firmly within the core immunity provided to the Police. He also asserted that the Appellant did not qualify under Section 7 of the HRA as a victim because she did not satisfy the test: “is or would be a victim of the unlawful act”. He purported to give evidence that there was no real and immediate risk to the Appellant’s physical integrity stating: “In this case, the pleaded case and supporting evidence are insufficient to suggest that the Appellant’s life was at real and immediate risk”. Stopping there, I do not consider that it was right for a lawyer to make such evidential “opinions” in a witness statement. He had no first hand evidence to give on the issue. He did not disclose whether he had read the police file in full. He pointed out that, at its highest, the Appellant’s case consisted of past assaults plus post breakup text threats to kill but stated that K never took any physical steps at anytime after the separation and after the threat, so the factual matrix did not satisfy the test set out in law. Mr Rutherford also asserted that Art. 8 added nothing which was not already provided by Arts. 2 and 3. He also provided what were in effect submissions in relation to the other heads of claim. He exhibited the Police incident logs; the Police SCARF assessment; the Appellant’s witness statement dated 27th November 2019; the Police occurrence inquiry log and a solicitor’s report relating to the allegation that K raped the Appellant in October 2019 in Lewes. He referred at para. 16 to the “Crime Report” as a source of his assertions. I am not sure what he meant by that. The “Solicitor Report” at exhibit DR5 has blanked out parts relating to K, his mental health, drug taking, alcohol dependencies (if any) and the the custody officer’s observations on him so the Judge had none of that information, nor did Mr Rutherford.

The judgment under appeal

The findings of fact

30. The Judge summarised the facts at paras. 4-25. I shall not repeat them here. I have summarised them above.

The rulings on law

31. The Judge summarised the submissions then the law and made her rulings which I set out below.
32. At paras. 39-44 the Judge summarised the law and procedure on applications to strike out and for summary judgment. The parties do not appeal or challenge her summary. She ruled as follows in relation to strike out applications:

“a. It is not appropriate to strike out a claim in a developing area of law, as such decisions should be based on actual findings of fact (Farah v British Airways, The Times, 26 January 2000, CA).

b. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine -Brown, 19 January 2000, unrep., CA).”

33. At paras. 66 and 67 the Judge made her first main ruling: that the CPS's disclosure of the Appellant's *Hampshire* address on 16.4.2020 in Court was covered by what she called "core immunity". Thus, the Appellant, as a victim of domestic abuse and the main witness in the criminal case, who claimed breaches of duties owed to her by the CPS at common law, under the HRA and the DPA, was barred from advancing her claims. The Judge's reasoning was provided in paras. 51-65 then 68-69. She analysed *Taylor; Darker; Hall; Jones; A&B; Singh* and *King*. The Judge concluded that what I call Advocates Immunity AC was a long established "core immunity", the only derogation from which had been made in *Hall*. That derogation related only to civil claims made by an advocate's client relating to breaches of the advocate's common law or contractual duty of care to the client.
34. The Judge noted in para. 70, in relation to the claim against the Police, that both parties accepted that Witness Immunity AC was long established in law. At 72-73 the Judge noted that both parties accepted that if the proposed CPS bail condition relating to the *Hampshire* address had been challenged by K and evidence had been led by the CPS, that would have been covered by Witness Immunity AC. However, in my judgment, this reasoning piles the unlikely onto the negligent and is of no persuasive value. The whole point was that the Appellant, as a vulnerable witness, was to be protected, not to have her life further endangered and her new home taken from her by disclosure of her address to her assailant. So, to premise anything on the CPS carelessly exposing her confidential address (when they accept they should not have) and then seeking to prove she lived there because the assailant would challenge her asserted confidential address, is beyond unrealistic.
35. The Judge then considered the "extension" to Witness Immunity to actions BC, actions before Court hearings. At para. 81 the Judge noted both parties agreed that this covered the preparation of evidence for hearings. At paras. 89-92 the Judge made her second main ruling, that there was an established extension to the core Witness Immunity AC which was the existence of Witness Immunity BC covering the Police actions in preparing the file for the CPS to attend the bail hearing. This included the disclosure of the Appellant's confidential *Hampshire* address, unflagged and unmarked as being confidential from K. The reasons for this were set out in paras. 82-88 and contained an analysis of: *Taylor; Darker; Smart; Singh; Daniels* and *CLG*. I should clarify the language used here. The Appellant is not suing a witness. She is suing the Police or an administrator who prepared the file. So, in my judgment, what the Judge was actually considering was Legal Proceedings Immunity BC for the actions of a non-witness and whether those related to evidence for the hearing.
36. At para. 97 the Judge made her third main ruling, that the immunities created a threshold bar not only to common law claims but also to breach of statutory duty claims under the HRA and DPA. The reasoning was set out in paras. 93-96 and 98-104 in which the

Judge analysed *A&B; Jones; Van Colle; Crawford; Pierson; Greene; CLG; Smart and Mazhar*.

37. At paras.119-122 the Judge made her fourth main decision, which was a finding of fact. This was that even if an HRA claim did escape immunity it was bound to fail because the Appellant did not face a “real and imminent danger” from K of Art. 2 or 3 death or injury in April 2020. The reasoning was set out in paras. 115-118 and included analysis of: *Re Officer L; Rabone; Osman; Van Colle* and *Kurt*.
38. In para. 123 the Judge made her fifth main ruling: that the Appellant’s Art. 8 claim could not continue when the Art. 2/3 claims had failed on the facts. She relied on *CLG* and *DSD*.
39. At para. 148 the Judge dismissed the 1st Defendant’s summary judgment application in relation to the Appellant’s HRA, DPA and common law claims against the Police for the November 2019 *Epsom* disclosure. Interestingly, there was no ruling that the Police had Advocates Immunity BC, Witness Immunity BC or Legal Proceedings Immunity BC for those actions. This was so despite the Defence which pleaded immunity for the *Epsom* actions. It is clear from para. 28 of the judgment that the Police did not apply to strike out the *Epsom* claims on the grounds of immunity from suit. I wonder how that decision can sit alongside the finding of an established immunity for the April actions of the Police in relation to the *Hampshire* disclosure. Certainly, the *Epsom* disclosure was made at the start of their investigation, but the Appellant had made her assertions of assault and threats before then, the investigation had started and K had been arrested, so evidence was being gathered. The April *Hampshire* disclosure was also made at the start of the rape investigation so there was no difference there.

The Grounds of Appeal and submissions

40. The Appellant raises 7 grounds of appeal. My understanding of them in summary follows.
41. **Grounds 1, 3 and 6: That there was an arguable case that the Defendant/s did not have immunity from suit so the claims should not have been struck out.** The Judge found at paras. 89-92, that the Police actions in disclosing the confidential *Hampshire* address to the CPS with no red flag, and at para. 67 that the CPS’s words at Court disclosing the *Hampshire* address to K, were covered by: (1) Witness Immunity BC for the Police and (2) Advocates’ Immunity AC for the CPS for all claims including the HRA, the DPA and confidential information misuse. As I have stated above, I categorise the Police immunity claim as Legal Proceedings Immunity BC, because no witness was involved or sued for being a witness.
42. The Appellant submits that there is no such thing as Advocates’ Immunity whether AC or BC. There is no such thing as a “blanket immunity” for anything said in Court (relying on *Hall*). The only core or long established immunity is Witness Immunity AC.

Witness Immunity BC and Legal Proceedings Immunity BC are extensions which have been permitted but the immunity needs to be justified to cover the acts complained of. To found any further or extended immunity or “threshold bar”, inside or outside of Court, which will eradicate a Appellant’s otherwise valid right to redress for a tort or breach of statutory duty, the Defendants carried the burden of proof to show: (1) the public interest justification necessitating the immunity; (2) that the justification outweighs the public interest in providing a right to redress for any tortious wrongs (and breaches of Statutory Duties) suffered on the facts of the case (relying on *Hall, Darker* and *Singh*).

43. The Appellant submits (relying on *Hall, Taylor* and *Darker*) that the Court should first consider the classic justification for the original Witness Immunity AC, which is for promoting freedom of speech for “witnesses” and enfranchising them to:
- (a) make complaints to the Police or presumably to make civil claims, and
 - (b) to give evidence honestly and fully in Court, and
 - (c) to prevent the discouragement caused to them as a result of giving evidence in Court by potentially having to face later satellite or collateral attacks alleging defamation or any other civil suit.

The Appellant submits that analysing these justifications provides no justification for immunity for the Police giving her confidential information to the CPS with no red flag marker that it must be kept confidential. Nor do they provide justification for the CPS advocate being granted immunity for failing to check for red flags or failing to apply common sense, like the Police did the day before and failing to keep her address confidential to protect her from her assailant.

44. The Appellant submits that the Court should secondly consider the classic justifications for Advocates’ Immunity AC, which the Appellant submits is a mere subset of Witness Immunity AC, namely:
- (a) to encourage full and unfettered communication at Court, and
 - (b) to encourage fearless advocacy, and
 - (c) to prevent the fear and discouragement caused to advocates as a result of appearing in Court by potentially having to face satellite or collateral attacks through litigation for defamation or any other civil suit.

45. The Appellant submits that there was no public interest in her *Hampshire* address being read out in Court by the CPS, quite the opposite, the public interest was in protecting her as the victim of domestic violence, the key prosecution witness for the upcoming criminal trial and being the person at risk of violence in future from K whilst he was on bail. Allowing redress for such “muck ups”, as DC Wells described them, will promote better advocacy and protection of vulnerable witnesses and hence promote the administration of Justice, not inhibit better advocacy or undermine the administration of justice.

46. The Appellant also seeks to distance her causes of action from what she accepts is the well-established threshold bar of Witness Immunity AC or BC extension (which in my terminology is Legal Proceedings Immunity BC). She submits that the complaints concerned administrative actions by the Police before Court, so were not within Witness Immunity BC and she asserts that the CPS's disclosure in Court was not "evidential" it was "procedural" and wholly unnecessary to the hearing and so was not covered by Witness Immunity AC (relying on *Taylor, Darker and Daniels*).
47. The Appellant submits that Advocates Immunity AC only exists as an extension of Witness Immunity AC. In support she submits that the Supreme Court swept away Advocates Immunity AC altogether in *Hall*. This was unanimous for civil liability to clients in civil actions, and by a majority for civil liability to clients in criminal cases. It was submitted the public policy previously underlying the Advocates Immunity was found no longer to justify it in any circumstances. The Appellant accepted that, like witnesses, advocates still had immunity from defamation claims "and the like" (relying on *Jones*), but submitted that was limited to claims in respect of the evidence and that no greater immunity existed or was justified, because if an advocate acts honestly and carefully a claim is very unlikely to succeed (relying on *Saif Ali*).
48. The Appellant submitted that for the CPS to succeed they had the burden and the task of justifying an extension of Witness Immunity AC to the action of disclosing the Appellant's address in Court, which they had wholly failed to do.
49. The Appellant distinguished *King* on the bases that: (1) the causes of action were flawed, an abuse and lacked pleadable substance; (2) the ruling of Cockerill J on immunity was obiter and academic; (3) the claim related to an alleged conspiracy about the evidence, so would be within the Witness Immunity AC. The Appellant distinguished *A&B* on the grounds that: (1) the advocate's statements in Court related to the evidence; (2) Spencer J's formulation of Advocates Immunity AC was too wide (relying on *Daniels*).
50. The Appellant submits that it is arguable that her DPA, HRA and confidential information misuse claims are not barred by the immunities even if they are applicable to the Defendants, asserting that the Judge misinterpreted *Jones* and *A&B*, so should not have been struck out.
51. **Ground 2: That there is an arguable case that the Police did not have Witness or Advocates or Legal Proceedings Immunity BC.** To a large extent, this ground overlapped with Ground 1 which was put generally in relation to both Defendants. The Appellant asserts that neither Witness Immunity BC (and on my terminology Legal Proceedings Immunity BC) or Advocates Immunity BC (if it exists) extends to everything the Police do before Court. The Police implicitly accepted it was arguable that the Appellant could sue the Police for the *Epsom* disclosure but not the *Hampshire* disclosure, yet the Police action in passing the *Hampshire* address to the CPS without

red flags caused or contributed to the CPS effecting the “muck up” disclosure in Court to K and was no different. The Appellant accepts that, since *Darker*, Witness Immunity BC (in my terminology: Legal Proceedings Immunity) covers a Police Officer taking and preparing witness statements for witnesses before Court hearings, but distinguishes the release of her confidential address as different from the preparation of witness evidence. The Appellant accepts that notes between investigators about the investigation would also potentially be covered (under Legal Proceedings Immunity BC). The Appellant submitted that her confidential address was wholly extraneous to the bail hearing in April 2020 and was not evidence for it. The Police did not ask for that as a bail condition. The CPS accept that they should not have disclosed it. It did nothing to “protect the Appellant”, it achieved the opposite. The Appellant distinguished *Taylor* on the basis that the document or note in that case related to evidence from a person assisting with the inquiry. The Appellant sought to distinguish *CLG* as well, on the basis that the relevant disclosed matter (an address) was in a witness statement to support a warrant for arrest at the very address which was disclosed. Thus, it was the key evidence for the arrest warrant hearing and came within the Witness Immunity AC. In contradistinction, for the Appellant, her address was neither key nor relevant in the bail hearing and should have been excluded entirely from the hearing, so was not evidence.

52. **Ground 4: That the Art. 2/3 HRA claims were arguably unaffected by immunity.** The Appellant submits that the Judge failed to give proper consideration to the status and purpose of the ECHR and the new *Istanbul Convention 2014* on preventing and combatting Domestic Violence which was ratified by the UK on 1.11.2022 (so 2 years after the last event complained of). The Appellant asserted the Judge misunderstood the decision in *CLG*, in which the HRA claim failed on the facts, not due to the immunity bar and misread *Mazhar*, which concerned S.9 not S.7 of the HRA and not Arts. 2, 3, and 8. The Appellant asserted that the Judge also misunderstood *Smart* and misapplied *Crawford*. The Appellant asserted that blanket immunity infringed a class of Claimants’ rights without justification through a legitimate aim or proportionality (relying on *Z* and *Fayed*).
53. **Ground 5: That the S.7 HRA and Arts. 2 and 3 and Art. 8 claims against the Police and CPS, as a victim and for interference with private life, were arguable on the facts, so summary judgment should not have been granted to the Defendants.** The Appellant asserts that the Judge was wrong to give summary judgment on the “real and immediate” risk assertion, just because K had not assaulted or threatened the Appellant since early November 2019. This ignored the increased risk, due to the allegation of rape; the disclosure of her address in *Liphook* and the Police’s own assessment of the risk as “high” and the advice not to return home. In submissions this was expanded to assert that the evidence was inadequate to make any summary judgment determination due to lack of disclosure by the Police and the CPS for instance about K and the risk they knew or should have known that he actually presented (full details of his past

criminality, drug taking, current psychiatric state, past involvement with guns and more).

54. The Judge should have considered the positive and negative obligations on the Police in Arts. 2, 3 and 8. Under Art. 8, as a result of the April disclosure, the Appellant was rendered homeless, deprived of her work and her depression was aggravated by the alleged statutory breaches by both Defendants. Those matters were separate from the threats to her life and the threat of inhuman treatment.
55. **Ground 7: That strike out was the wrong jurisdiction to determine immunity.** The Appellant asserts that because there was no settled or established immunity the Judge was dealing with an unsettled and disputed immunity which was not properly amenable to determination at strike out. Only after full disclosure and pleading could such matters be determined by reference to the justifications for immunity. The Judge was wrong and unfair to criticise the Appellant for failing to apply for pre-action or specific disclosure when the CPS had not even pleaded a defence or provided any disclosure and the Police had provided minimal disclosure, in breach of the requirement in the pre-action protocol. The Judge ought to have decided in the Appellant's favour due to the lack of disclosure. There was no short point of law in the strike out application, instead there were many long and complicated points to be decided, including 2000 pages of case law.
56. In a supplementary skeleton the Appellant submitted, in response to the CPS skeleton, that the justification for the necessity for Advocates Immunity AC arose from the justification for Witness Immunity AC (relying on *Taylor* and *Darker*). The Appellant distinguished *SXH* on the basis that the decision related to a CPS decision to initiate a criminal prosecution, but relied on it to support an open door for HRA claims being engaged by other prosecution actions (disclosure of confidential information about a victim to a defendant). The Appellant relied upon: (1) *R(WV)* in which the High Court quashed a decision by the CPS to disclose the identity of an informer because that would breach the CPS' duty to take reasonable operational measures to minimise the risk to life; (2) *DSD*, in which the Supreme Court, at paras. 68-69, stated that the immunity from liability at common law should not be assumed to apply mutatis mutanda to HRA breaches under Arts. 2, 3 and 8. The Appellant relied on three other authorities setting out the duties on prosecutors towards witnesses to avoid risks to their lives and of injury arising from the trial process. Arising from these, the Appellant submitted that the CPS had a positive operational and investigatory duty to protect the Appellant and breached it. There was a significant public interest in the CPS protecting victims and witnesses and minimising the risks to them and that a blanket immunity would eradicate liability for breach of those duties without any reasonable justification.

The Respondent's submissions

The Police

57. The main submission of the first Defendant/Respondent was that the Judge was right, the CPS advocate was immune from suit for what was said in Court, the Police were immune from suit for their preparation of the file for the bail hearing and the Appellant was not a victim, within S.7 of the HRA, on the facts. The main submission was that the immunities were absolute, clearly established and covered all torts and breaches of statutory duty (HRA and DPA). There are two sub-species of immunity: Witness Immunity (AC and BC) and Advocates Immunity AC. The Police submitted that Witness Immunity BC applied to their preparation of the file for the CPS.
58. **Purpose of the immunities.** The Police submitted that the justification for the immunities was that it is in the public interest to protect the Court process and the persons taking part (relying on *R v Skinner; Jones; Hall and Taylor*). The purpose is to ensure that all persons can speak freely and fully without fear of civil action. Such persons are regulated only by the remedies within the court process such as: proceedings for perjury, contempt of Court or malicious institution of proceedings. The Appellant was wrong to attempt to carve up the immunities by reference to parts of the process. There are two separate immunities at play in the case: Witness Immunity BC and Advocates Immunity AC. These are separate and the latter is not the child of the former. The Police recognised and accepted that there are two competing principles at work: (1) no wrong should go without a remedy and (2) immunity should be extended only to that which is necessary in order to prevent the core immunity from being outflanked (relying on Lewison LJ in *Singh* at paras 20 and 66). The Police submitted that *Hall* did not affect Witness Immunity AC or BC. It only related to Advocates Immunity AC or BC and abolished that immunity only for claims made by clients against their lawyers (solicitor and advocates). It did not abolish Advocates Immunity AC or BC against claims made by non-clients. The Police relied on *Jones, El Haddad, King and A&B*.
59. In relation to Police liability, it was submitted that their actions before Court hearings, like preparing the file for the CPS for the bail hearing, were covered by immunity (relying on Lord Hope at 218D-G in *Taylor*; Lord Clyde at 460B-C in *Darker; A&B and CLG*). In written submissions they were coy about whether it was Witness Immunity BC or Advocate's Immunity BC initially but at para 26 nailed their colours to Advocates Immunity BC. (They did not disclose whether an advocate did the work). They submitted that allowing otherwise would be a collateral attack on the core immunities which they consider are Witness and Advocates Immunities AC. The Police relied on the Director of Public Prosecution's Guidance of 2013 and 2020 which required the Police to provide witness contact details to the CPS (see the National File Standard and MG 9). The Police asserted that no tort arose by their breaches of duty (if any) until the CPS disclosed the address in Court and the Judge accepted that submission at para. 76 and found that the claims against the Police were parasitic on the claims against the CPS. The Police submitted that the decision of Spencer J in *A&B* determined this case on similar facts. The Police then went on to submit (skeleton para. 29) that Witness Immunity BC covered their actions in passing the address to the

CPS because the address might have had to have been proven at the bail hearing by calling a witness to give evidence about it, if K had disputed it. The Judge accepted this submission at para. 90. The Police submitted that chaos would be caused if all of the preparation for Court hearings by the Police were not covered by immunity, but their actions in Court were covered by immunity.

60. The Police submitted that immunity covered all forms of action and the HRA and DPA were therefore caught (relying on Kennedy LJ at P194A-B in *Taylor; Crawford*). The Police also submitted that new statutes do not overturn longstanding immunities from suit unless they say so and that the principle in *Green*, at paras. 62-66, applied namely that clear language would be needed in the DPA and the HRA to abolish the longstanding common law immunity in relation to new causes of action under those Acts. Finally, the Police submitted that the Court of Appeal in *Mazhar*, at para. 109, supported this approach in relation to Judicial Immunity AC, so that was a powerful indicator.
61. The Police supported the Judge's finding that there was no real or imminent risk to life or of violence (relying on *Osman; Van Colle* and *Rabone*) and sought to argue that this decision was one of balancing factors which the Appeal Court should be reluctant to interfere with (relying on *Aldi*).
62. The 1st Defendant supported the 2nd Defendant's submission on their Advocate's Immunity AC (relying on *R v Blandford; Lynch* and *A&B*).

The CPS submissions

63. The CPS submitted on Ground 1 that the Judge rightly rejected the submission that all immunities had to be justified and asserted that only new extensions had to be justified. The Appellant's approach would undermine the purpose of the immunities (relying on *Taylor; Darker* and *SXH*) to avoid satellite litigation and provide certainty (relying on *El Haddad*). The decision should take place at the level of principle not on the facts of the case (relying on *Taylor*). The proper approach was to look at the facts and see whether they fit into an existing recognised immunity. If they do that's the end of the claim. The Supreme Court's approach in *Jones*, of keeping immunities under review, did not apply to lower Courts when considering "established immunities". On Ground 2, the CPS submitted that there was an "established extension" of Witness Immunity AC to Witness Immunity BC (relying on *Taylor; CLG, Darker* and *Daniels*). Furthermore, the CPS disclosure at Court was not merely administrative, albeit without evidence, it was a hearing (relying on *R (DPP) v Haverling*) and, had there been a challenge to the address, it would have had to have been proven by evidence. (I have already rejected that argument above as being without merit). The CPS submitted that to hold the CPS liable would "outflank" the immunity to which they were entitled in relation to evidence. On Ground 3 the CPS asserted that the Judge was right to find that Advocates Immunity AC (core immunity as they called it) applied (relying on

Taylor; Darker; Jones; A&B; Singh; Crawford; Daniels; King; El Haddad) and that had not been abolished by *Hall*.

64. The CPS submitted that the following propositions flow from the modern authorities as regards advocate immunity:
- a. The core immunity bars any cause of action based on things said or done by an advocate in the course of court proceedings: *Darker* at 445-6; *A & B* at §§27-34; *King* at §§319-335;
 - b. It extends so far as practically necessary to avoid it being outflanked: *Taylor; Singh; CLG* at §32;
 - c. As a corollary to that, it does not simply apply to defamation claims, but to all forms of cause of action, including claims arising under statute: *Marrinan v Vibert; Darker* at 445H; *Daniels* at §33; *Crawford* at §§69-70; *King v Stiefel* at §329;
 - d. The abolition of the immunity of advocates against claims by a client for negligent conduct in court did not affect the core immunity: *Jones v Kaney* at §65; *King v Stiefel* at §333; *El Haddad* at §90;
 - e. It in particular continues to render advocates immune from claims arising from information disclosed or things said in court: *Singh* at §42; *King v Stiefel* at §§319-335; *A & B* at §§27 and 34.
65. On Grounds 4 and 6 the CPS submitted that the Advocates Immunity covered all types of civil claim including HRA and DPA (relying on *Marrinan; Daniels; Thacker; Carter; Jones; Watson; Crawford* and *Pierson*). Orthodox statutory construction requires that common law immunities are not defeated by new breach of statutory duty claims unless express words are used (relying on *Green; Pierson; Smart; Mazhar; CLG*) and submitted it would be absurd if the immunity barred a common law claim but permitted an HRA Art. 8 or a DPA claim on the same facts. On Ground 5, the CPS submitted that the Judge's findings of fact were challenged. It was noted that the Appellant had filed no evidence in support. The Judge took the pleaded case at its highest. The Appellant did not criticise the Judge's approach to the summary judgment application and the Judge was entitled on the evidence to find that the Appellant did not face a "real and immediate risk of harm" (relying on *ASY*). In addition, the Art.8 claim failed because it was wholly parasitic on the Arts. 2/3 claims and added nothing more (relying on *CLG*). The CPS submitted that the Judge had a generous ambit for disagreement (relying on *Global Torch*) when deciding whether to allow the summary judgment to be argued on the facts and the law in this claim. The *Istanbul Convention* was ratified long after the events in issue.

The case law on immunities

66. I start 439 years ago. In *Cutler*, 1585, immunity from civil suit was expressed as follows:

"So no false or scandalous matter contained in answers to interrogatories, in affidavits duly made (*Astley v. Young*, 2 Burr. 807.), in a petition to

either House of Parliament (*Lake v. King*, 1 Saund. 131. 1 Lev. 240.), or in any other proceedings in a regular course of justice, will make it libellous, though the offensive matter may be ordered to be struck out, with costs, 2 Burr. 807. Hawk. b. 1. c. 73. s. 8. 1 Saund. 131. (1). 1 Barn. & A. 244, 5. 3 Chit. C. L. 870.; and the reason of this is obvious, because the Courts of Justice and the great council of the State, are the constitutional tribunals to which grievances should be preferred, and to bring alleged wrongs under their notice, is to support and not to break the peace; since their discussion puts an end to the dispute, *id. ibid.* **And this privilege extends to the parties, counsel, and witnesses in a cause, provided the allegations be pertinent to the matter in issue.**” (My emboldening).

67. These general words confirmed the existence of immunity AC and created what I call the core immunities: Witness Immunity AC and Advocates Immunity AC. They also provided the justification and the limitation that the immunities were limited to allegations made pertinent to the matters in issue. The Court proceedings put an end to the disputes and subsequent collateral litigation is barred.

68. In *Skinner* 1772, Lord Mansfield, in the High Court, ruled as follows at P530:

“What Mr. Lucas has said is very just; neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If any thing of mala mens is found on such enquiry, it will be punished suitably.”

69. Thus, the immunities for witnesses, advocates and judges were confirmed but with a caveat that the protection applied is subject to the contempt proceedings. In *Dawkins*, 1883, a ten Judge Court approved the judgment of Kelly CB (the Chief Baron) in which the following ruling was made about a civil claim arising from evidence at a military tribunal at Ps. 263 and 265:

“Mr. Justice Willes, that most learned and lamented judge, in alluding to the very evidence given by the defendant before the court of inquiry, which is the subject of this action, observed: "What he stated before the court he stated in the capacity of a witness; and assuming, apart from the reasons which I have already given, that **no action would lie against him for what he did, there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would speak in fear of litigation; and no man who's called on to give evidence would be safe from some troublesome action being brought against him.** Upon all these authorities it may now be taken to be **settled law, that no action**

lies against a witness upon evidence given before any court or tribunal constituted according to law."

...

“On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity or in county courts, or sessions of the peace, **by counsel at the bar in pleading causes, or by witnesses in giving evidence**, or by members of the legislature in either House of Parliament, or by ministers of the Crown in advising the sovereign, **is absolutely privileged, and cannot be inquired into in an action at law for defamation.** (My emboldening).

70. Thus, the Witness Immunity AC, Advocates Immunity AC and Judges Immunity AC were again confirmed, at least in relation to later claims for defamation and were phrased as “absolute”. This approach supports the Respondents in the appeal before me. In 1883, in *Munster*, a two judge Court of Appeal confirmed the very wide scope of Advocates Immunity AC. At first instance Mathew J. had limited the scope at P595 by ruling that:

“It may be inconvenient to individuals that advocates should be at liberty to abuse their privilege of free speech, subject only to animadversion or punishment from the presiding judge. **But it would be a far greater inconvenience to suitors if advocates were embarrassed or enfeebled in endeavouring to perform their duty by the fear of subsequent litigation. This consequence would follow, that no advocates could be as independent as those whose circumstances rendered it useless to bring actions against them.** The passage in *Seaman v. Netherclift* upon which Mr. Avaddy relied was not, as it seems to me, intended to qualify the statement of the law contained in the earlier judgments relied upon for the defendant. All that was intended to be laid down was this, that, for defamatory **statements made by an advocate outside his office of advocate and with no reference to the subject before the Court, and which therefore were necessarily made in bad faith and were irrelevant, a counsel might be proceeded against in an action.**” (My emboldening).

On appeal, Brett MR, the Master of the Rolls, made clear that the protection was absolute at P599:

“This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as the advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, **I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing**

something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been.”

...

P600, at the bottom “Certain persons can claim the benefit of the privilege which arises as to everything said or written in the course of an inquiry as to the administration of the law, and without making an exhaustive enumeration I may say that **those persons are judges, advocates, parties, and witnesses.**”

...

P601 at the bottom “It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained of was false to the knowledge of the witness, and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable”

...

P603 at the bottom “**Of the three classes—judge, witness, and counsel it seems to me that a counsel has a special need to have his mind clear from all anxiety.** A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. **If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform.** For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public”

...

P604 in the middle: “**If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall**

never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.”

...

P605 in the middle, **“That rule is founded upon public policy. With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law.** If that be so, the case against a counsel must be stopped at once. **No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry,** that is, an inquiry before any court of justice into any matter concerning the administration of the law.” (My emboldening).

These words expressed absolutism on Advocates Immunity AC save as to words not in the course of the administration of the law but Fry LJ, who generally agreed, added a qualification as follows at P695 at the bottom:

“The facts must be taken to be these: an advocate has made a defamatory statement of another person, which is false, and has been made by reason of malice in the advocate, but which has been made by him when speaking as an advocate **and with reference to the case which was being heard in the Court.** Is such a statement actionable? That I take to be the question for our decision in the present case. If we consider the number of statements made from time to time by advocates affecting the interests and characters of other persons, it is remarkable and, I may add, creditable to the profession, that hitherto no direct decision, either affirmative or negative, has been pronounced upon this point. But although there is no decision, there are dicta of the highest importance, directly bearing on the question.”

...

And at P608:

“A court of justice has control over all proceedings before it: it has very great powers, to which I need not particularly refer, with regard to witnesses, solicitors, and counsel; **the Court can always check improper conduct.** If such actions were allowed, persons performing their duty would be constantly in fear of actions. Every consideration of convenience is against the action being brought, and in my opinion that is the reason why the present point has not been determined, no action like this having ever been instituted.” (My emboldening).

71. In contradiction of the ruling by the MR, under the ruling by Fry LJ, the Advocates Immunity AC was therefore absolute if the words were said in Court with reference to the case and the control over misconduct was up to the Judge and criminal law. In 1905

the House of Lords considered immunities in *Watson*. The Earl of Halsbury gave judgment in relation to Witness Immunity AC and ruled as follows at P486:

“The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; **as to the immunity of a witness for evidence given in a Court of justice, it is too late to argue that as if it were doubtful.** By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable—**it is settled law and cannot be doubted.** The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument.” (My emboldening).

Furthermore, an extension was made in relation to Witness Immunity BC and Legal Proceedings Immunity BC for preparing witness statements involving lawyers taking the proofs of evidence. This ruling was made at P487:

“**It appears to me that the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them—that is, to the solicitor or writer to the Signet.** If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply—that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box." **If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties.** A witness would only have to say, "I shall not tell you anything; I may have an action brought against me to-morrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of

justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.” (My emboldening).

72. This case created what I have called Witness Immunity BC and Legal Proceedings Immunity BC, or at least clarified the existence of those categories as an extension of Witness Immunity AC, necessary to protect the latter. Coming forwards nearly 60 years, in *Marrinan* 1962, the Court of Appeal considered Legal Proceedings Immunity BC in a civil claim by a barrister, who was disbarred, against some police officers who had given evidence against him. Sellers LJ ruled thus at P583:

“This action is, in my view, misconceived. **Those who take part in the administration of justice (and it is one of the important functions of police officers to obtain and bring evidence before the court) must be free from the fear of civil proceedings.** I am inclined to think that the plaintiff (who is not unversed in the law) must know that the action does not lie and has issued the writ in order to annoy others and give vent to his feelings rather than genuinely to seek a redress to which he believes himself to be entitled. In these circumstances a preliminary issue was properly raised on the pleadings and the judge, at a timely stage in this action, has rightly ruled that no actionable wrong has been disclosed as averred by the plaintiff in his writ and in the statement of claim.”

...

“It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of **conspiracy**. I can see no difference in the principles of the matter at all. **Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given.**” (My emboldening).

73. This dicta suggests and fortifies the absolute bar relied upon by the Police and the CPS in submissions against civil suits which are not for defamation (for instance, by analogy, under the HRA and the DPA). I pass over *Rondel v Worsley* [1969] 1 AC 191, because part of it was overruled in 2000. The House of Lords returned to the subject of immunities in *Taylor* in 1999 and considered Witness Immunity BC and Legal Proceedings Immunity BC. The relevant facts were that the claimant (a solicitor) asserted that evidence, including files notes gathered for a criminal prosecution which was never proceeded with against him, were defamatory and sued the DPP. A

prosecution for fraud had been commenced against other defendants and the money they obtained had passed through the claimant's accounts. The case was struck out on the grounds of: (1) the implied undertaking not to use evidence obtained in a criminal case for other purposes, and (2) for what I call Legal Proceedings Immunity BC. It is necessary when reading the judgment of the Lords to fillet out those paragraphs relating to (1), which are not relevant to the case before me, from those relating to (2), which are. Not all of counsels' submissions before me achieved this filleting. The relevant rulings now follow. Lord Hoffman summarised the settled law on immunities at P207F:

“Likewise, the core of the principle of immunity from suit is not in doubt. **By the end of the 19th century it was settled that persons taking part in a trial—the judge, the advocates, the witnesses—could not be sued for anything written or spoken in the course of the proceedings. The immunity was absolute** and could not be defeated even by proof of malice. The reason for the immunity was explained by Fry L.J. in a well known passage in *Munster*...”

At P208E Lord Hoffman explained the justification thus:

“**The immunity from suit, on the other hand is designed to encourage freedom of speech and communication in judicial proceedings** by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. **In this respect, however, the immunity is absolute and cannot be removed by the court or affected by subsequent publication of the statement.**”

At P213E he considered before Court, pre-trial preparation of evidence activities:

“In later cases there has been some discussion of the general principle upon which this extension was based. Judges have rightly cautioned against further extension merely by analogy. In *Mann v. O'Neill* (1997) 71 A.L.J.R. 903, 912 McHugh J. identified two dangers in judicial reasoning—**a Scylla and Charybdis through which it was necessary to navigate**. The first was:

"the temptation to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of **the underlying rationale** for the defence."

On the other hand, there was an opposite peril in:

"the temptation too readily to dismiss the defence as applicable in novel circumstances because the case is not within or analogous to an existing

category but without determining the matter by reference to the defence's **underlying rationale.**"

There is no doubt that the claim for absolute immunity in respect of statements made by one investigator to another (as in the case of the letter from the S.F.O. to the Attorney-General of the Isle of Man) or by an investigator to a person helping with the inquiry (as in the statements of Ms McKenzie recorded in the file note) or to an investigator by a person helping the inquiry who is not intended to be called as a witness (as in the remarks of Mr. Rogerson included in the file note) is a **novel** one. So far as I know, it is not a category of absolute immunity which has been considered before. But it should not for that reason be rejected. Again, I would imagine that the reason why this question now arises for the first time is that before the broadening of the prosecution's disclosure obligation, such letters and memoranda, internal to the investigation, would never have seen the light of day. At any rate, the question is now whether they fall within the underlying rationale for the existence of immunity from suit. In *Mann v. O'Neill*, 71 A.L.J.R. 903, 907 the judgment of Brennan C.J., Dawson, Toohey and Gaudron JJ. describes the rationale as one of necessity:

"It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. **Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.'** Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged."

Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.

Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but none the less valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the

same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.

When one turns to the position of investigators, it seems to me that the same degree of necessity applies. It would be an incoherent rule which gave a potential witness immunity in respect of the statements which he made to an investigator but offered no similar immunity to the investigator if he passed that information to a colleague engaged in the investigation or put it to another potential witness. In my view it is necessary for the administration of justice that investigators should be able to exchange information, theories and hypotheses among themselves and to put them to other persons assisting in the inquiry without fear of being sued if such statements are disclosed in the course of the proceedings. I therefore agree with the test proposed by Drake J. in *Evans v. London Hospital Medical College (University of London)* [1981] 1 W.L.R. 184, 192:

"the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."

...

And at P215B:

"This formulation excludes statements which are wholly extraneous to the investigation—irrelevant and gratuitous libels—but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other. As the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action" (My emboldening throughout).

This case confirmed that extending immunity from Witness Immunity BC to Legal Proceedings Immunity BC covering not only witnesses, whether called or not, but also investigators, requires an analysis of necessity. The justifications were provided. The immunity was extended but was less absolute and more qualified than Witness Immunity AC. It needed to be grounded in justification by reference to the underlying rationale. Lord Hope agreed but gave no judgment on the immunity issue. Lord Hutton at P221D said that he favoured absolute Legal Proceedings Immunity BC, with a limit that it was tied to actions which were part of the process of the investigation, as follows:

"In my opinion the argument should not prevail that the defence of qualified privilege would give adequate protection to investigators and those who spoke to them because I consider that there would be a real risk that an unfounded allegation of malice made by a plaintiff bringing an action for defamation would subject an investigator or informant to harassment to which he should not be subjected. I am in agreement with the statement of

Drake J. in *Evans v. London Hospital Medical College* (University of London) [1981] 1 W.L.R. 184, 192c in respect of witnesses and possible witnesses that:

"the protection exists only where the statement or conduct is such that it can fairly be said to be part of the **process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated.**"

I would also apply this requirement to an investigator or a person who gives him information so that the protection will not apply to a gratuitous defamatory remark made by an investigator to a third party or by a third party to an investigator." (My emboldening).

And at P222:

"In this case, whilst the immunity may on occasions benefit a malicious investigator or informant, I consider that the balance of public advantage lies in allowing it to the defendants."

74. These judgments show that the Courts have considered the swings and roundabout arguments. All investigators were regarded as immune so long as they were dealing with the case, not extraneous matters, even if they acted maliciously and the immunity protected the majority, despite also protecting the malicious minority. But, would that immunity cover fabricated evidence or the police hiding probative evidence which favoured the defendants? In *Darker*, handed down in 2000, reported in 2001, following a police undercover operation the five claimants were indicted for conspiracy to import cannabis and to forge travellers' cheques. The criminal trial was permanently stayed on the ground of abuse of process by the police. The claimants sued the police for damages for conspiracy and misfeasance in public office, alleging, the police fabricated evidence. The police applied for the statement of claim to be struck out, claiming absolute immunity. The judge struck out the claim. The House of Lords allowed the appeal ruling that neither Witness Immunity AC or BC or Legal Proceedings Immunity BC covered fabricated evidence which was not properly to be considered part of the judicial process. Lord Hope at P445H summarised the law as follows:

"My Lords, when a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and

probable cause: Dawkins v Lord Rokeby (1873) LR 8 QB 2.55, 264, per Kelly CB. The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of **negligence**. No challenge is made in this case to what may conveniently be described as the **core immunity**. It is not suggested that police officers who participate in the proceedings as witnesses should no longer have the benefit of it in regard to things said or done by them while they are actually in the witness box. The question that has been raised relates to the further extent of the immunity. **Where are the boundaries to be drawn? It arises because there is another factor that must always be balanced against the public interest in matters relating to the administration of justice. It is the principle that a wrong ought not to be without a remedy. The immunity is a derogation from a person's right of access to the court which requires to be justified.**" (My emboldening).

Lord Hope then ruled that the police actions in that case did not attract immunity for the following reasons.

P446F: **"The first step that must be taken in order to identify the extent of the immunity is to examine the grounds of public policy which explain the basis for the immunity."**

P447H, having considered the extension of immunity to the collection of evidence BC he ruled:

"A similar extension of the immunity to statements given by police officers who later gave evidence or were potential witnesses at the trial can be justified on public policy grounds. Here again it is normal for police witnesses to undergo a preliminary examination during the preparatory stage in order to find out what they can prove. Prosecutors and defence solicitors require this information in order that they may take an informed decision as to which witnesses to call and whether they should be cross-examined and, if so, on what grounds. The trial process would be inhibited if police witnesses and potential police witnesses were to be exposed to action for things said or done by them during the preparatory stage when they are undergoing this preliminary examination. The same approach can properly be taken to the preparation of technical reports by police officers with expertise in such matters as ballistics, explosives or fingerprinting. As in the case of other expert witnesses, it would unduly inhibit the trial process if they did not have the protection of the immunity in regard to the content of the reports which they had prepared with a view to giving evidence should the matter come to trial."

He then drew a line between evidence gathering and law enforcement or investigation of crime thus:

at P448C: “But there is a crucial difference between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence, **and their conduct at earlier stages in the case when they are performing their functions as enforcers of the law or as investigators.** The actions which the police take as law enforcers or as investigators may, of course, become the subject of evidence. It may then be necessary for the police officers concerned to assume the functions of witnesses at the trial to describe what they did or what they heard or what they saw. **But there is no good reason on grounds of public policy to extend the immunity which attaches to things said or done by them when they are describing these matters to things done by them which cannot fairly be said to form part of their participation in the judicial process as witnesses. The purpose of the immunity is to protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence. It is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators. The rule of law requires that the police must act within the law when they are enforcing the law or are investigating allegations of criminal conduct. It also requires that those who complain that the police have acted outside the law in the performance of those functions, as in cases alleging unlawful arrest or trespass, should have access to a court for a remedy.**” (My emboldening).

75. Lord Hope went on to explain why he drew the line there, at P449B:

“This distinction rests upon the fact that acts which are calculated to create or procure false evidence or to destroy evidence have an independent existence from, and are extraneous to, the evidence that may be given as to the consequences of those acts. **It is unlikely that those who have fabricated or destroyed evidence would wish to enter the witness box for the purpose of admitting to their acts of fabrication or destruction.** Their acts were done with a view to the giving of evidence not about the acts themselves but about their consequences.” (My emboldening).

76. Lord Hope explained this further at P449G:

“It is important also not to confuse the immunity rule which extends to witnesses with the question whether or not in particular circumstances a duty of care is owed by the police or by prosecutors: see *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Elgouzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335. The purpose of the immunity rule is to protect the witness in respect of statements made or things done when giving or preparing to give evidence. **The acts of the witness in collecting material on which he may later be called to give evidence are not protected by the immunity. The immunity extends only to the content of the evidence which the witness gives or is preparing to give based on that material.**” (My emboldening).

At P450B he ruled as follows:

“In the present case the allegations that have been made against the police officers are not related only to the content of evidence that they might have given if they had been called upon to give evidence at the trial. They relate, at least in part, to things done by the police during the initial stage when they were acting as investigators. I do not think that it can be asserted without hearing the evidence that these allegations fall within the boundaries of the immunity. This is a matter which should be considered in the light of the facts as they emerge at the trial. I would allow the appeal...” (My emboldening).

77. This boundary between evidence and investigation, or method of production of evidence, is tighter than the dicta in *Taylor* and is defined by looking at the function being performed by the police at the time. If they were preparing evidence for a witness in the trial that would be covered by immunity. If they were investigating or enforcing the law, that would not be. It is on these principles, expounded by Lord Hope, that the Appellant in the case before me rests her claims that immunity does not cover disclosing her confidential address in a bail hearing concerning an unrelated criminal charge against K and K’s arrest the day before to start to investigate whether he raped her. So, the Appellant submits that the Police actions of passing on her confidential address with no red flag stating it was confidential, in the circumstances where the digital Domestic Abuse file was not accessible, and the CPS actions of reading it out in open Court, were extraneous to the evidence in the bail application or the main trial for assault. The only difference between the Police actions in the appeal before me and the facts in *Darker*, was that the acts were breaches of common law or statutory duties, not dishonest fabrication of evidence or hiding evidence by the Police.
78. At P451B Lord Mackay agreed and said this:

“In my view there are materials in these allegations which do not depend as a cause of action on alleged statements relating to the preparation of evidence for proceedings and go beyond matters of freedom of speech either at, or in the course of preparation for, a criminal trial. It follows that in my opinion the immunity claimed cannot apply to these allegations and consequently the action cannot be struck out.”

Lord Cooke ruled at P453D that:

“Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in Rees v Sinclair [1974] 1 NZLR 180, 187, "The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice . . ." Many other authorities contain language to similar effect.”

Then at P453H: “A police officer who gives evidence or a proof of proposed evidence is entitled to the same immunity as any other witness or potential witness. And to prevent the evasion of this immunity it is necessary to rule out also allegations of conspiracy to give false evidence, as was held in *Marrinan v Vibart* [1963] 1 QB 528. There may be some borderline cases where it is not easy to draw the line as to the precise extent of witness immunity. **The solution of these cases may be helped to some extent by bearing in mind that witness immunity is a general doctrine applying to all persons called upon to give evidence, whereas the function of official investigation is limited to the police and various other public officials. Conduct which is primarily and naturally to be seen as belonging to the investigatory function, even though it may have some ultimate link with the giving of evidence, should not be within the general protection.**” (My emboldening).

79. On this ruling, if the bail hearing was primarily belonging to the investigatory function, then Legal Proceedings Immunity BC would not assist the Police. Lord Clyde analysed the issue thus, at P459B:

“It is then not enough that there be an investigation; the investigation must also be with a view to an action or to a prosecution which is already under consideration. Before that stage is reached it would be very difficult to justify the grant of an immunity. Even after that stage, if proceedings are commenced, it does not necessarily follow that all that is said or done in connection with the proceedings will be immune.

A helpful distinction has been drawn in the American jurisprudence between matters of advocacy and matters of detection.”

And at P459E: “That the police may mount prosecutions or that prosecutors may engage in detective work should not obscure **the critical consideration of the function which is being performed. It is to the function that the immunity attaches rather than to the individual who performs it.**”

At P460E: “But that is not to say that everything said or done by anyone in the investigation or preparation for a judicial process is covered by the immunity. In drawing the line in any particular case it may be necessary to study precisely what was being done and how closely it was linked with the proceedings in court. **No immunity should attach to things said or done which would not form part of the evidence to be given in the judicial process. The reason for admitting to the benefit of the immunity things said or done without the walls of the court is to prevent any collateral attack on the witness and circumvention of the immunity he or she may enjoy within the court.** (My emboldening).

On the basis of this ruling, that no immunity attaches to actions which do not form part of the evidence to be given at trial, the bail hearing file prepared by the Police was arguably extraneous. Lord Hutton summarised the boundary as follows at P469E:

“The underlying rationale of the immunity given to a witness is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court. This immunity has been extended, as I have described, to proofs of evidence and to prevent witnesses being sued for conspiracy to give false evidence. **But the immunity in essence relates to the giving of evidence.** There is, in my opinion, a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence, such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say or a police officer planting a brick or drugs on a suspect. In practice the distinction may appear to be a fine one, as, for example, between the police officer who does not claim to have made a note, but falsely says in the witness box that the suspect made a verbal confession to him (for which statement the police officer has immunity), and a police officer who, to support the evidence he will give in court, fabricates a note containing an admission which the suspect never made. But I consider that the distinction is a real one and that the first example comes within the proper ambit of the immunity and the other does not.” (My emboldening).

80. If, as set out in this ruling, the underlying rule is to protect witnesses who will give evidence at trial, then anything which undermines that rule is to be examined very carefully. These analyses of the boundary of Witness Immunity BC and Legal Proceedings Immunity BC are tighter than the earlier cases suggested. If the function being performed is the recording of evidence for the trial then immunity covers the work. Lord Cooke and Sir Thaddeus McCarthy P's guidance was that Courts should be "grudging" in granting immunity outside the core rationale relating to evidence. This approach has been adopted by the highest Courts in England and Wales. If the function carried out was mere investigation, then immunity does not cover the work. The Appellant relies on these rulings. They express that the boundary is drawn to exclude acts of investigation extraneous to the content of witness statements, in the initial stages of a criminal investigation, thus support the Appellant's submissions that the bail hearing was an administrative part of the investigation and an early part, requiring K to surrender when called back for the continuance of the investigation or the continuance of the court case. I trail here that I consider that it is arguable that the assumed breaches of common law and statutory duties by the Police in this appeal were not automatically covered by Witness or Legal Proceedings Immunity BC for these reasons. The Appellant asserts that the disclosure of the confidential address fettered and endangered her freedom of speech by endangering her personally as a witness to K's alleged crime of rape. I accept that it was arguable that her confidential address was not evidence in the rape case, proved nothing of the crime, was irrelevant to the bail hearing and it was extraneous.
81. In the same year, 2000, the House of Lords imposed a further boundary (or carve out) on immunity in *Hall*, in relation to Advocates Immunity AC and BC. The House ruled that, taking into account changes in the common law, the functioning of the legal profession, the administration of justice and society, Advocates Immunity would be abolished for claims by their clients. The justifications for Advocates Immunity, Witness Immunity AC and BC and Legal Proceedings Immunity BC which were based upon public policy against collateral attacks on the finality of litigation; collateral vexatious attacks on litigators and witnesses and the administration of justice; the cab-rank rule; freedom of speech and fearless advocacy; and all the public policy justifications for Witness Immunity AC, each and all had insufficient weight to justify Advocates being immune from suit by their clients for negligence or breach of retainer in civil actions (by unanimous decision) and in criminal proceedings (by a majority decision). Lord Bingham, giving the lead judgment of the majority summarised Advocates Immunity as follows at para. 2:

"Immunity

2. Our primary sources on lawyers' immunity are two relatively recent decisions of the House of Lords in *Rondel v Worsley* [1969] 1 AC 191 and *Saif Alt v Sydney Mitchell & Co* [1980] AC 198. These cases clearly establish four propositions.

(1) A lawyer acting as an advocate is immune from any claim for damages for negligence by a client **arising out of almost anything done or omitted in the course of conducting a case in court.** For convenience we refer to this as "forensic immunity".

(2) The rationale of forensic immunity is recognised to be public policy principally (a) to prevent the relitigation, otherwise than on appeal, of issues already concluded adversely to the plaintiff by court decision; (b) as part of the general immunity from civil liability which attaches to all persons who participate in proceedings before a court of justice; and (c) because an advocate owes a duty to the court as well as to his client and should not be inhibited, through apprehension of an action by his client, from performing his duty fearlessly and independently.

(3) **Since forensic immunity derogates from the fundamental principle that a professional person is answerable to a client for any loss caused to the client by any want of the skill and care ordinarily to be expected from such a professional person, the scope of the immunity should be restricted to cases in which public policy grounds call for its recognition.** (4) While forensic immunity extends beyond the limits expressed in (1) above, it applies only "where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice." (My emboldening).

82. The reasoning for the change in the Advocates Immunity was explained as follows:

"12. ... Thus, **when any advocate claims to be immune in respect of any specific thing which he has done or omitted to do, it is necessary to test that claim by reference to that specific act or omission and to examine the public policy grounds which may be relied on to support the recognition of immunity in that instance.**"

...

"41 **It is not open to us to question the existence of the core forensic immunity** upheld in *Rondel v Worsley* [1969] 1 AC 191, nor to doubt the limited extension recognised in the *Saif Ali* case [1980] AC 198. It is, however, plain from the tenor of the majority speeches in the *Saif Ali* case **that any extension beyond the core immunity must be rigorously scrutinised and clearly justified by considerations of public policy.** While their Lordships made it plain that forensic immunity was available to solicitors as well as barristers, they could scarcely have made it plainer that such immunity was available only to those acting, in respect of any relevant act or omission, as advocates." (My emboldening).

83. Lords Bingham, Steyn and Hoffman all analysed each justification for the Advocates Immunity and found them all wanting in modern society and litigation in relation to client claims. It is not necessary to recite the analyses here save to look at what the their Lordships called the “analogous” immunity for witnesses. This wording justifies my categorisation and terminology above. Lord Hoffman ruled thus:

“18. **The witness analogy** This argument starts from the well-established rule that a witness is absolutely immune from liability for anything which he says in court. **So is the judge, counsel and the parties.** They cannot be sued for libel, malicious falsehood or conspiring to give false evidence: *Marrinan v Vibart* [1963] 1 QB 528. The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say. And, as Fry LJ explained in the passage which I have already cited from *Munster v Lamb* 11 QBD 588, 607 this policy is regarded as so important that it requires not merely qualified privilege but absolute immunity. The application of the analogy to the negligence of lawyers involves generalising the policy of the witness immunity and expressing it, as Lord Diplock did in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222A, as a “general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice”. Stated at this level of generality, it includes immunity for advocates from liability for anything that they may do. The rationale is said to be to “ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them”. **My Lords, with all respect to Lord Diplock, it seems to me that to generalise the witness immunity in this way is illegitimate and dangerous.** In the High Court of Australia in *Mann v O'Neill* (1997) 191 CLR 204, 221, 912 McHugh J spoke of the perils of extending the witness immunity by analogy. There is, he said, a temptation: “to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence.” (My emboldening).

As for the stress of collateral attack from later civil litigation Lord Hoffman ruled at para. 18 that:

“It is not sufficient, therefore, to explain any immunity relating to court proceedings by saying that the people involved should be free from “avoidable stress and tensions”. That merely suggests that everyone would find litigation more agreeable if no awkward consequences could follow from anything which the participants did. It is another version of the vexation argument, which I have already rejected. **It is necessary to go further and explain why the public interest requires that a particular**

participant should be free from the stress created by the possibility that he might be sued. How would he otherwise behave differently in a way which was contrary to the public interest?"

...

“Nor is there in my opinion any analogy with the position of the judge. The judge owes no duty of care to either of the parties. He has only a public duty to administer justice in accordance with his oath. The fact that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.”

Lord Hope at P710D (dissenting on criminal cases Advocates Liability), ruled thus:

“The basic principle any immunity from suit is a derogation from a person's fundamental right of access to the court which has to be justified. This principle is found both in the common law and in the jurisprudence of the European Court of Human Rights.”

So, the House of Lords was taking into account the recently passed HRA. He continued at P711H:

“**Summary** I wish at the outset to summarise the main points with which I intend to deal in order to explain the position which I would adopt on the question of the immunity. I shall use the expression "the core immunity" to describe the immunity which attaches to the advocate, when engaged in conduct performed in court, from claims by his client for negligence. I am conscious of the fact that, **if the immunity is to continue, the scope of its application may need to be defined more carefully in due course**, (a) The sole basis for retaining the core immunity is the public interest in the administration of justice, (b) The public interest in the administration of justice is at its most compelling in the field of criminal justice, (c) The risks to the efficient administration of our system of criminal justice which would result from the removal of the core immunity greatly outweigh the benefits, (d) The principle in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 which treats collateral challenge as an abuse of process is not a satisfactory substitute in the field of criminal justice for the core immunity. (e) The risks to the efficient administration of justice are significantly less in the field of civil justice, so in that field the retention of the core immunity of the advocate from claims by his client for negligence is no longer justified.” (My emboldening).

At 714G:

“I think that there is a little more, but not much, to be said for the analogy with the immunity of others who participate in the proceedings which take

place in court. At best it is only an analogy. It is a make-weight argument. Its significance lies in the fact that the **other immunities exist because they also can be justified on grounds of public policy**. They are illustrations of the fundamental point that it is in the public interest that those who are called upon to give evidence in court or who have to perform duties there should be enabled to do so without the risk of being sued for defamation or for negligence. As Mason CJ said in *Giannarelli v Wraith* 165 CLR 543, 557 **the exception in favour of counsel is in conformity with the privilege which the law has always conferred on those engaged in the administration of justice, whether as judge, juror, witness, party, counsel or solicitor in respect of what they say in court. In an appropriate case the public interest will prevail over the private interest. But each of these immunities needs to be justified**, and this can be done only on grounds which are relevant to the public interest in the efficient and impartial administration of justice.” (My emboldening).

And at P724D:

“**Civil cases** ... It has not proved possible to devise a satisfactory alternative test for use in the field of civil justice, bearing in mind the overriding need to ensure that the protection given must not be any wider than is absolutely necessary. **I have come to the conclusion therefore that, while the core immunity may still be said to have a legitimate aim in civil cases, its application in this field is now vulnerable to attack on the ground that it is disproportionate. It is a derogation from the right of access to the court which is no longer clearly justifiable on the grounds of public interest.** But here again I would stress the point which I have already mentioned several times, that the immunity to which I refer is the advocate's immunity against claims by his client for negligence. I would retain the immunity of the advocate against claims for negligence by third parties. For example, it is desirable that it should be retained where the position of the advocate in a civil case is analogous to that of the prosecutor—as where he is representing a professional body in disciplinary proceedings which have been brought against one of its members. The tort of malicious prosecution is a sufficient protection for the individual if the proceedings have been brought against him without reasonable and probable cause: ...” (My emboldening).

Lord Hobhouse (dissenting on liability from criminal advocacy) at P736F added his ruling on the scope of the immunity thus:

“What is in issue is a true immunity. But in any event, the submitted exclusion of a duty of care was based upon the same criterion as the immunity. **Its relevance was to the human rights aspect of the debate.** If it were a question of a blanket public policy limitation on the scope of the

duty of care, *Osman v United Kingdom* [1999] 1 FLR 193 would be directly in point whereas if it is a question of an immunity the criteria laid down in *Ashingdane v United Kingdom* (1985) 7 EHRR 528 would govern. **These criteria are similar to and no more rigorous than those to be applied under English law to justify the immunity: the immunity must "pursue a legitimate aim" and there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved": pp 546-547, para 57.** (My emboldening).

84. These considerations of public policy, the HRA, the changes in society, the need for balancing the justifications for immunities with the right to redress for wrongs and the ultimate decision show a movement away from absolutism towards analysing the justification.
85. In the appeal before me the Judge rejected Ms Murphy's submission that after *Hall* there was no such thing as "Advocates Immunity", there was only "Witness Immunity" and I agree with her. *Hall*, when properly read and understood, clearly recognises the category Advocates Immunity AC as separate from Witness Immunity whether AC or BC and the previous cases do too. But, that does not mean Ms Murphy is wrong in her analysis of the boundaries of immunity and the move from absolutism to analysis of the justification before granting immunity.
86. In *Jones*, 2011, the Supreme Court were focussed on experts' Witness Immunity BC and continued the movement established in *Darker* and continued in *Hall* towards justification, away from absolutism and to tighten the boundaries of immunities from civil suit. The Supreme Court ruled (by a majority) that any exception to the general rule that every wrong should have a remedy had to be justified as being necessary in the public interest and should be kept under review. They found no justification for continuing to allow expert witnesses to be immune from suit for breach of duty AC or BC so the previously permitted immunity was abolished. Lord Phillips PSC ruled thus:

"The current state of the law

11. The immunity of expert witnesses, as propounded by the Court of Appeal in *Stanton v Callaghan* [1998] QB 75, has a long history. This dates back over 400 years: see *Cutler v Dixon* (1585) Co Rep 14b. Thus the immunity was established long before the development of the modern law of negligence and, in particular, the recognition of the possibility of liability for negligent misstatement. It also dates back to an era long before it became common for forensic experts to offer their services under contracts for reward. The immunity has its origin in a reaction to an actual or perceived tendency on the part of disgruntled litigants, or defendants in criminal proceedings, to bring proceedings for libel or slander against those who had given evidence against them. **Thus the immunity originally took the form**

of absolute privilege against a claim for defamation and it extended to all who took part in legal proceedings.”

... “13 The typical situation where the immunity was invoked was where a witness or party had given evidence hostile to the plaintiff. A similar protection was afforded to counsel in relation to defamatory allegations made against a party, or indeed anyone else, in the course of his conduct of legal proceedings. This immunity overlapped with a wider immunity enjoyed by a barrister from a claim by his own client for failure to exercise reasonable skill and care in the conduct of litigation on behalf of the client. That immunity was unsuccessfully challenged in *Rondel v Worsley* [1969] 1 AC 191. In *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 the House of Lords abolished it on the ground that it could no longer be justified. The barrister is, however, still protected by absolute privilege from a claim in defamation in relation to statements made in the course of the conduct of legal proceedings: see *Medcalf v Mardell* [2003] 1 AC 120, 142, per Lord Hobhouse of Woodborough.” (My emboldening).

Then having referred to the legal principle that every wrong deserves a remedy he said:

“51. ... With this principle in mind, I would adopt the approach advocated by Lord Reid in *Rondel v Worsley* [1969] AC 191, 228, when considering the **immunity from suit enjoyed by advocates**: “the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable.” **It would not be right to start with a presumption that because the immunity exists it should be maintained unless it is shown to be unjustified. The onus lies fairly and squarely on the defendant to justify the immunity behind which she seeks to shelter. I turn to consider whether she can do so. I shall consider the various justifications advanced for the immunity that I have identified earlier in this judgment.**” (My emboldening)

87. This ruling is relied upon by the Appellant against the CPS and I shall return to consider it below. It is an exposition of the move away from absolutism, towards justificationism. Lord Phillips then considered each alleged justification for keeping the asserted Witness Immunity AC and BC for experts and all were found wanting. He ruled thus:

“57 There is here, I believe, a lesson to be learnt from the position of barristers. It was always believed that it was necessary that barristers should be immune from suit in order to ensure that they were not inhibited from performing their duty to the court. Yet removal of their immunity has not in my experience resulted in any diminution of the advocate’s readiness to perform that duty. It would be quite wrong to perpetuate the immunity of

expert witnesses out of mere conjecture that they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty.”

88. Lord Dyson considered the suggestion that long standing immunities which are “established” should be overturned only with justification (para 109) and ruled thus:

“112. But secondly, **even if there is such a long established rule, it is based on policy grounds and cannot survive if the policy grounds on which it is based no longer justify the rule.** The mere fact that the immunity is long established is not a sufficient reason for blessing it with eternal life. Circumstances change as do attitudes to the policy reasons which underpin the immunity. The common law develops in response to these changes. The history of the rise and fall of the immunity of advocates provides a vivid illustration of the point. As Lord Reid observed in *Rondel v Worsley* [1969] 1 AC 191, 227C, **public policy is not immutable and any rule of immunity requires to be considered in the light of present day conditions.**

113 **The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional.**”

...

“114 Furthermore, the justification for any exception to this general rule should be kept under review.” (My emboldening).

89. There can perhaps be no clearer exposition of the move from absolutism towards justificationism. The minority rulings of Lord Hope and Baroness Hale were that the immunity was long established and should only be overturned by Parliament (the absolutism approach). The next year produced two relevant Court of Appeal decisions: *Smart* and *Singh*, both of which followed the movement restricting claimed immunity which had insufficient justification. In *Smart* the Court of Appeal continued the movement to restrict immunity for expert evidence. The witness was a forensic scientist who reported that a bullet found on C was “live” but he had reported upon the wrong one of two bullets provided by the CPS due to an exhibit number error/change/manipulation. C pleaded guilty as a result then later, when the error was disclosed, C sued the scientist and his employer in negligence and under the HRA. The judge struck out the claim finding Witness Immunity BC applied. The Appeal Court held that immunity did not necessarily cover the events. Moses LJ at par. 25 et seq. ruled thus:

“... Two features in *Darker* are of significance in this appeal. **First, absolute immunity is in principle inconsistent with the rule of law and the protection it affords must not be given any wider application than is absolutely necessary in the interests of the administration of justice**

(see Lord Cooke, page 435D-E). **Second, there is no immunity which covers the fabrication or creation of evidence in circumstances where that fabrication is never intended to appear in any statement,** (see, e.g., Lord Cooke at 454C and Lord Hutton at 466F).

26 The paradigm circumstance which falls within the protection of witness immunity is the giving of evidence by a witness in court. This has been extended to the preparation of evidence with a view to it being adduced, whether or not the witness is to give evidence (see Lord Hutton 463G-465E). The rationale for the immunity is: first, the need to protect witnesses from the fear that they will be harassed by subsequent actions against them. The immunity is designed to encourage freedom of speech and communication in judicial proceedings (see Lord Hoffman in *Taylor v Director of the Serious Fraud Office* [1999] 2 A.C. 177, 208). Second, the immunity is designed to prevent a collateral attack being made on the decision in which the allegedly false evidence was given (see, e.g., Lord Clyde, 461D-E).

27 Now that we have allowed the amendment, the rationale for conferring witness immunity has gone. First, witnesses, if called by the respondent, will have to explain and justify the handling of the exhibits in this case. They cannot be protected from being questioned or from accounting for their actions. Second, now that the allegations of deceit are to be fully aired, the immunity serves no purpose because it will not prevent a collateral attack.”

“31 It must be recognised that as a result of interference with the exhibit number the real bullet was falsely attributed to this appellant. The effect of interference with the exhibit numbers, whether it was designed originally to conceal confusion or “mix up” or not, was the same as planting the real bullet in the appellant's premises. **It is alarming that the course of justice appears to have been perverted by the alteration of exhibit numbers and the failure to disclose that that had occurred or any reason why it occurred. I suggest any court would be most reluctant to allow immunity to be deployed in a way which prevents these matters being litigated.**” (My emboldening).

Aikens LJ added:

“38 As for the Human Rights Act claim, the key issue (assuming that there is no immunity) is whether the FSSL is a public body or not. It is not clear to me, on the facts we have, which side of the line it falls on. That also needs investigation.” (FSSL was D’s employer).

90. This reasoning is relied upon by the Appellant in support of the submission that her confidential address was never going to form part of the evidence against the Defendant in the criminal trial and should never have been put in evidence or before the Court in

the bail hearing. It is therefore arguable that the justification for the immunity (to protect her and hence the administration of justice) does not exist in this appeal because immunity for the “muck up” would undermine the administration of justice in facilitating acts which themselves undermined the administration of justice.

91. In *Singh* the Court of Appeal considered whether what they described as “Judicial Process Immunity” (Legal Proceedings Immunity BC and Witness Immunity BC) covered the facts and was justified in doing so. C asserted that a witness statement had been procured by the local authority by undue pressure. The claim had been struck out by a tribunal who found that immunity applied. The Court of Appeal ruled that, on the facts, the improper pressure imposed on the witness to provide the witness statement was not within either Witness Immunity BC or Legal Proceedings Immunity BC. Lewison LJ ruled thus:

“Introduction

1. This appeal involves the clash of two principles: the principle that a wrong should not be without a remedy and the principle that those involved in the judicial process should be immune from civil suit for what they do or say in the course of the litigation. The latter principle is known as “judicial proceedings immunity”.

“The policy behind the rule

23. Before coming to the limits of the rule, it is important to understand its rationale. There are two strands of policy underlying the rule. The first is that those engaged in litigation should be able to speak freely without fear of civil liability. The second is a wish to avoid a multiplicity of actions where one court would have to examine whether evidence given before another court was true or not.”

Having considered the movement against absolute immunity started in *Darker*, continued in *Hall* and then in *Smart* he went on to rule that:

“27. ... As all the cases recognise, a rule designed to protect the innocent will, on occasion, protect the guilty. A witness does not lose his immunity simply because he has been dishonest or malicious in giving his evidence.

28 There have been two principal ways in which litigants have tried to outflank the rule: (i) by bringing an action based on a cause of action other than defamation; or (ii) by bringing an action based, not on what happened in court, but on what happened out of court.”

Having considered the case law he ruled as follows:

“46 ... it can no longer, in my judgment, be said that immunity from civil suit “attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in

respect of such behaviour or statement:” Heath’s case [2005] ICR 329, para 17.” (My emboldening).

Having considered *Taylor, Darker, Hall* and *Heath*, he commented thus:

“59 In fact it had already been decided that the mere fact that evidence is involved somewhere along the line is not determinative.” (My emboldening).

He then summarised the law on Witness Immunity BC and Legal Proceedings Immunity BC in this way:

“66. Summarising this part of the case: (i) **the core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;** (ii) the core immunity also comprises statements of case and other documents placed before the court; (iii) that immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked; (iv) whether something is necessary is to be decided by reference to what is practically necessary; (v) **where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial inquiry, there is no necessity to extend the immunity;** (vi) **in such cases the principle that a wrong should not be without a remedy prevails.”** (My emboldening).

“71 The means by which the council procured the witness statement is a free-standing act. While alleged untruths in Mrs Heath’s witness statement (and discrepancies between that statement and what Mrs Heath had previously said in interview) may help the claimant to prove the allegation that undue pressure was applied, the complaint is not about the content of the statement, but the means by which it was procured.” (My emboldening).

92. The boundaries of Legal Proceedings Immunity BC and Witness Immunity BC were therefore being set more clearly. In *Singh* the manipulation of the witness was the complaint and that was not within the immunities because it was extraneous to the actual evidence, although it manipulated the evidence which the witness gave. The rationale was that the function being performed by the local authority was not taking witness evidence, it was manipulating evidence. These are narrow margins on which to determine the extent of immunity but, in my judgment, are all part of the move away from absolutism and towards upholding the principle of redress for wrongs and against immunity from suit where the latter has no or no sufficient justification.
93. In *Daniels*, in 2015, C claimed misfeasance in public office against the police by concealing or destroying evidence helpful to the defence and other wrongs. The judge

determined immunity applied to some of the claims but not all. On appeal Lloyd Jones LJ decided that immunity did not apply and ruled as follows:

“33. It is well established that the immunity or privilege, where it applies, bars a claim whatever the cause of action, with the exception of suits for malicious prosecution (and analogous claims involving malicious initiation of criminal proceedings) and prosecution for perjury and proceedings for contempt of court. It is to be contrasted with the qualified privilege which protects all those who participate in a criminal investigation in good faith. However, as Lord Hope pointed out in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (at p219E) this is an imperfect protection because qualified privilege has to be pleaded and established as a defence and no action can be struck out on grounds of qualified privilege. Accordingly, unlike the absolute immunity, it does not prevent a collateral investigation in subsequent proceedings.”

“34. ... However, it must be emphasised that the effect of a successful plea of immunity is to deny access to the courts and, in many cases, to leave a wrong without a remedy. As Lord Cooke observed in *Darker* (at p. 453 D-E) **absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. Accordingly, the immunity must be limited to cases where it is necessary to achieve the objectives identified above.**” (My emboldening). (My emboldening).

Having considered *Taylor* he ruled:

“38. **I do not understand Lord Cooke or Lord Clyde to have been suggesting that the absolute immunity should apply to the prosecutorial function generally, even where the conduct challenged is unconnected with the giving of evidence or the making of statements.**” (My emboldening).

Having considered *Heath*, and *Darker* he ruled thus:

“40. In *Heath v Commissioner of Police of the Metropolis* [2004] EWCA Civ 943; [2005] ICR 329 Auld LJ rejected the submission that the absolute immunity attaches only to defamatory statements. In doing so he said:

“... it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement, except pursuits for malicious prosecution and prosecution for perjury and proceedings for contempt of court.”

This passage is relied upon by the Chief Constable. However, to my mind the description is too broad. As Lewison LJ pointed out in *Singh v Reading Borough Council* [2013] EWCA Civ 909; [2013] ICR 1158, the

statement cannot be taken literally. For example the immunity from liability and negligence given to advocates was abolished by *Arthur J. S. Hall & Co v Simons* [2002] 1 AC 615 and in *Jones v Kaney* the Supreme Court decided that an expert witness should no longer enjoy immunity from being sued for negligence in relation to an expert report prepared for the purpose of litigation or in relation to evidence that he gave litigation. In this regard Lewison LJ also drew attention to *Smart v Forensic Science Service Limited* [2013] EWCA Civ 783, which is considered below. I would add that this description in *Heath* also fails to recognise that the immunity is essentially a witness immunity concerned with the giving of evidence and the making of statements in judicial proceedings, which has necessarily been extended in the various ways indicated above. **Moreover, the inclusion of the words “or done” in the references to “anything said or done” which frequently appear in judgments describing the absolute immunity** (see e.g. *Dawkins v Lord Rokeby* LR 8 QB 255 per Kelly CB at p264; *Darker* per Lord Hope at p.446 A, D-E, H) **is not, to my mind, intended to extend the immunity to conduct unconnected with the giving of evidence or the making of statements.** As Lord Hutton observed in *Darker* (at p. 464) the reference in *Dawkins* to “anything done” was probably intended to cover the submission of a written statement to a court.” (My emboldening).

And at para. 42:

“... I consider that the immunity applies essentially to statements made by witnesses in the course of giving evidence and to certain limited but necessary extensions of that principle. **The fact that an activity may be intimately associated with the judicial phase of the criminal process, as distinct from the administrative or investigatory function, does not, in itself, necessarily give rise to immunity.**”

“45. I consider, therefore, that Lewison LJ was correct in his conclusion in *Singh* (at [66]) that **where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity.**

46. To my mind the proposed claim for misfeasance in public office in the present case is not founded on the content of any express or implied statement associated with service of the schedule of unused material. On the contrary, the substance of the complaint relates to the way in which the disclosure exercise was performed.” (My emboldening).

94. The rulings (1) that the immunity must be limited to cases where it is necessary to achieve the objectives and (2) that the whole of the prosecuting authority’s functions are not covered by Legal Proceedings Immunity BC are relevant in the appeal before me. More generally, para. 46 provided an important clarification of the generality of

words used in older judgments. It would not make sense for barristers or witnesses who assault each other in court to be immune from civil suit for their actions. So, immunity from suit for “words or actions” needs to be interpreted restrictively towards those related to and focussed on the litigation and thus away from those focussed on or related to extraneous matters.

95. Further, in *CLG* in 2015 the Court of Appeal considered an inappropriate disclosure by the prosecution of the address of two victims in a criminal prosecution. The victims had suffered gun shots at their house and some defendants were prosecuted and convicted, but the press released their new address and they then received threats at that address. They moved again. More defendants were prosecuted for the original shooting and the victims were again to be called as witnesses. They were summonsed but failed to appear at trial so the prosecution sought arrest warrants at their new confidential address. A witness statement was provided by a police officer containing the new address. It should have been redacted (by the police and the CPS) but was not. It was then served on the defendants. It was used in Court for the arrest warrants (in the absence of the defendants) and they were arrested and later discovered that their address had earlier been given to the defendants. Whereupon they sued the police for breaches of their common law rights and under the HRA and the DPA. The case was not decided at strike out but instead at trial. This point has not escaped me. The judge found both the police and CPS could be in breach of duties of care owed to the claimants but then found no duties of care were owed at common law relying on *Hill v CC South Wales* [1989] AC 53, and there were no breaches of Arts. 2 or 8 of the HRA or the DPA. on the facts. Finally, he found that there was no immunity. On appeal, Moore-Bick LJ considered firstly the law in relation to police immunity from suit for their operational duties when seeking to arrest criminals and protect the public (by analysing *Swinney v Chief Constable of Northumbria* [1997] Q.B. 464; *Hill*; *Robinson*; *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] Q.B. 335; *Brooks c Chief Constable of the Metropolis* [2005] UKHL 24; and *Van Colle*) and ruled that:

“22. In my view the actions of the police in serving a witness summons, making a statement with a view to giving evidence of that fact and producing that statement to the prosecuting authority for the purposes of making an application for a warrant of arrest **all form part of their core function of obtaining and preserving evidence, in the discharge of which they do not owe a duty of care to the public at large**. Nor in my view do the police owe a duty of care to potential witnesses in general, although they may incur a duty of care towards a particular individual if they have had dealings with him of a kind that involve an acceptance of responsibility for his safety.” (My emboldening).

96. This application of police immunity from suit for their operational duties extending into their actions during the legal proceedings emerges from the other end to the application of Legal Proceedings Immunity BC to protect the police relating to evidence for the

trial. This immunity was not pleaded by the Police and so is not before me and not relevant to the appeal. I wonder where the two meet?

97. Moore-Bick LJ then considered Witness Immunity AC and BC and intermingled that with Legal Proceedings Immunity BC. He summarised *Darker, Taylor; Smart; Singh and Daniels* thus:

“32. One of the features of the present case, which it shares with *Swinney v Chief Constable of Northumbria*, is that the claim is based not on anything that D.C. Gaffney said in his statement, but on what the police and CPS subsequently did with it. It is accepted that the CPS should have been alerted to the fact that the statement contained sensitive information and that on this occasion the system for ensuring that it was examined by the Disclosure Officer broke down. **The question for decision, however, is whether the transmission of the statement by the police to the CPS was part and parcel of preparing for D.C. Gaffney to give evidence in support of the application by the prosecution for a warrant of arrest. In my view it was**, because it falls squarely within Lord Hoffmann’s statement in *Taylor v Director of the Serious Fraud Office*, to which I referred earlier. It is true that the action in the present case is not based on the nature of the statement itself, as it would be if the claim were for defamation, **but it is based on the transmission by the police to the CPS of a statement required for the purposes of enabling D.C. Gaffney to give evidence in court, as he subsequently did**. In substance, the position is essentially the same as if D.C. Gaffney had made his statement orally to a representative of the CPS. **To hold the police liable for communicating its contents to the CPS would outflank the immunity to which they were entitled in relation to the evidence once given in court. In my view, therefore, the police are immune from action in respect of the transmission of his statement to the CPS, despite the fact that it was carried out negligently.**” (My emboldening).

Further, in relation to the HRA claim he ruled thus:

“35. Mr. Johnson submitted that the case advanced before the judge had been one of a breach of the state’s positive obligation and that the claim could not succeed on any other basis. The judge found that the disclosure resulted from an isolated incident and not from the absence of an adequate system for ensuring that sensitive personal information was not released without good reason. As to the negative obligation, the claimants’ address was identified in D.C. Gaffney’s statement in order to support an application for a witness summons. It therefore fell within the scope of article 8.2 and if there was an interference with their rights it was justified.”

98. The Police, in the appeal before me, relied on this case as direct authority that their errors were covered by immunity. The Appellant distinguished the case on two bases: (1) that Witness Immunity BC and AC applied to the witness statement of DC Gaffney, thus it was evidence and fell soundly within the immunity, and (2) it was central to obtaining the arrest warrant to be executed at the address. The Appellant submitted that in the appeal before me the confidential address was not in any witness statement and was specifically not relevant to the bail application or the trial to be held later. I consider that the Appellant's submissions on this are correct. In my judgment the central point is that the address *was* crucial evidence for the arrest warrant in *CLG*, whereas in the Appellant's case her *Hampshire* address was confidential and was *not* to be used as evidence either at the bail hearing or a later criminal trial.
99. In *Crawford*, 2016, the Court of Appeal upheld the judge's ruling that D was immune from suit for maliciously procuring an arrest and under the *Protection from Harassment Act 1997* under Witness Immunity BC when she complained to the police that he was breaching non molestation orders (see para. 57). This was so despite that fact that after his arrest and detention he was not charged. This case goes to the extent of the civil actions for breach of statutory duty which are caught by immunities.
100. The next case on which the Respondents relied in the appeal before me was *Mazhar* 2019. I do not find it of any assistance on the scope of immunity. It concerned Judge's Immunity AC from collateral civil suit (under the HRA) for decisions taken in the case before them. The judge struck out the claim and the Court of Appeal upheld the decision. The Respondents in the appeal before me relied on para. 109, but that takes this appeal in relation to the scope of immunity no further in my judgment for the reason explained in para. 108 of *Mazhar*. The case has relevance to the issue of whether immunity bars HRA claims.
101. The Respondents also relied on *A&B*, 2012. Mr Justice Spencer was considering an appeal from a claim struck out by the Master. C was a police informer who sued the police because they disclosed his address to dangerous criminals and did not protect him thereafter. The disclosure occurred by the combination of the Police disclosure of documents and what their counsel said in Court in the PII proceedings. Spencer J dismissed the appeal thus:

“27. It follows that, in relation to the first disclosure by the barrister at court, there is no possible doubt that the core immunity applies. Any breach of duty based upon that disclosure was bound to fail, and the Master was correct to strike out the relevant pleading.” ...

“33. In his skeleton argument, and in his oral submissions, **Mr Egleton still sought to draw a distinction between things said in the course of giving evidence, on the one hand, and disclosure by prosecuting counsel at court in a preliminary hearing, on the other. This is to misunderstand the rationale of the core immunity rule. It is not the giving of the**

evidence or otherwise that attracts immunity. It is the circumstance surrounding court proceedings and the leeway which must be given to parties, advocates, witnesses, judges and jury to speak freely, as the authorities make clear.

34. I therefore reject grounds 1, 2 and 3. The Master was quite right to conclude that there was immunity in respect of the disclosures allegedly made by or through prosecuting counsel at court and in the context of the PII hearing. The claim that those disclosures amounted to breaches of the “primary” duty disclosed no reasonable cause of action.” (My emboldening).

102. The CPS rely on this decision as analogous and the Judge relied upon it. The Appellant seeks to distinguish it on the basis that the disclosure occurred in Court in relation to evidence before the Court. In so far as it is relevant I find very little assistance arises from this case. Firstly, the proceedings were in camera and the report was anonymised. Secondly, the facts are murky and unclear. Thirdly, the disclosure was in evidence disclosed before the hearing and evidence summarised by counsel at the hearing. Neither of those could be described as “extraneous” to the evidence because they were in evidence. So, this case seems to me to be within the Advocates Immunity AC and the Legal Proceedings Immunity BC because the disclosures related to evidence used at the hearing. Further, there is an absolutism about the approach which does not appear to have considered the movement towards justification.
103. The final case relied on by the Respondents and cited by the Judge was *King*. In this case the Kings sued various persons [X] for misrepresentation. Half-way through the 20 day trial, after being cross examined effectively by X’s QC, they were advised to discontinue the claims and pay the costs. They did so and the costs were £1.7 million. Then they sued X again and this time also X’s solicitors and X’s counsel for a conspiracy (including fraudulently inflating costs figures) causing them to lose the misrepresentation claim and pay the costs. The defendants applied to strike out the claims. The QC relied on Advocates Immunity AC. Having decided the case on other grounds Cockerill J. then stated her judgment on the immunity issue was academic but provided it. She rejected the Kings’ submission that *Hall* swept away all of Advocates Immunity AC (at para. 329) and I agree. The allegations sprang to a large extent out of the QC’s 5-day cross examination of the Kings which was clearly successful. This fell foursquare within Advocate’s Immunity AC. There is nothing else in this judgment which assists me in this appeal.
104. Since the Judge’s decision, Fancourt J has handed down judgment in *El Haddad*. Most of the facts are irrelevant. C had lost various hearings and sued the other party again and their lawyers. The lawyers claimed Legal Proceedings Immunity AC and BC. Fancourt J ruled as follows:

“105. While accepting that the immunity rule is a rule of public policy that is based to some extent on an advocate’s duty to their client and to the court, there is no support for the proposition that immunity is conditional on compliance with those duties. If the focus were solely on whether a particular advocate should be entitled to rely on the rule, one can see a certain attraction to the proposition that someone who has flouted their duties by knowingly misleading the court ought not to have the benefit of immunity. However, the many passages in the authorities that explain the foundation of the rule are focused instead on the interests of justice as a whole. **The rule is calculated to encourage well meaning and honest persons to give truthful evidence and advocate fearlessly, in both these cases without fear of the possible consequences.** As Auld LJ explained, the price of such a rule is the possibility that it may benefit dishonest and malicious persons”

...

“109. Accordingly, I find myself in respectful agreement with Cockerill J that there is no exception to the immunity rule, even in a case where what is alleged is that a witness or advocate was party to a dishonest conspiracy to mislead, and did mislead, the court.” (My emboldening).

I have not found this authority helps much in the determination of the issues in this appeal. If the immunity applies, then it is absolute. But that begs the question in this appeal.

Analysis of the appeal on the Law

105. In relation to the strike out application the issue is whether the Appellant had a reasonable argument that immunity did not apply to the Respondents’ actions. When considering the immunities (which I have labelled and listed above) the appellate Courts have arguably stated that the correct approach to claimed immunities beyond the core ones (Witness Immunity AC, Judges Immunity AC and parts of Advocates Immunity AC relating to the evidence in the case), is to grant or permit them “grudgingly”, because they undermine the key principle that every wrong should have an appropriate redress in law. It is clear to me from the case law that, when considering, on a strike out application, whether a defendant is entitled to a claimed immunity, which will operate as an absolute threshold bar to a class of claimants (in this case victims of domestic abuse) and is unqualified by the need for a pleaded defence, if there are relevant issues in relation to the facts of the case which may make the claimed immunity “unsettled” concerning the scope of or the justification for the claimed immunity, the justification should be analysed on the necessary evidence to see if it makes immunity necessary in the public interest.
106. I reach this view because of the movement in the last 25 years in the appellate case law has been away from absolutism, towards careful consideration of whether the facts of each case actually do fit with the claimed “immunity” by reference to whether the long-

established justifications for the immunity apply. This appears partly to be due to implementation of Art. 6 of the ECHR but also modernity in society. The absolutism approach requires that where there is a core and settled immunity covering functions carried out at Court by an advocate, in reference to the evidence in the case, then no inquiry may be needed and the claim will be struck out for falling foul of the absolute immunity. However, the justification approach which was applied in *Taylor; Darker; Hall; Singh* and *Daniels* shows that the old absolutism approach is not required in law by the appellate Courts in all cases, particularly in non-core cases. It is clear to me that in cases where the Appellant properly raises lack of any proper justification for the claimed immunity, particularly in BC cases, but also in non-core AC cases, the Court is required to look at the function performed not just the category of person who has performed it. The Court must also look at the way that function was performed and the effects, in particular on witnesses and justice. The Courts will analyse whether the actions undermined the justifications for the claimed immunity.

107. To effect this process, the correct questions need to be asked. Too often these were in the past limited to:

- “is there a settled immunity?”, the answer to which may be “yes, there are 3 categories of settled immunities: for Judges, witnesses and advocates and these may be sub categorised as AC (at Court) and BC (before Court)”. If so then:
- “is the person sued within a settled immunity?”, the answer to which may be: “yes if they are a judge, witness or advocate and may also be if they are a lawyer or police officer gathering evidence BC”. If so then:
- “are the facts of the case within a settled immunity?” the answer to which may be: “yes if they arose at Court or before Court but concern the production of evidence”. If so then:
- “is the immunity absolute?”, the answer to which may be: “yes if the case comes within it, but not if the case lies outside it”.

It seems to me that, based on the more recent justification approach of the appellate Courts, the better questions, where the Appellant asserts that the immunity is unjustified or the facts are outside its scope, appear to me to be:

- (1) “does the behaviour of the Defendant and the function being performed by the Defendant put the behaviour: (a) prima facie inside or outside the scope of the immunity? If inside, does it (b) support or undermine the justifications for the claimed immunity?”

To address those questions the Court will look at the facts and determine:

- (2) what the function being performed was; and
- (3) whether the function performed may come within the claimed immunity, and then
- (4) whether way in which the function was performed fulfilled the justifications for the claimed immunity or undermined them.

Then, if the Defendant has passed through these gateways there is a balancing exercise to be carried out to determine whether the way the function was performed so undermined the justifications for the claimed immunity that the swings and

roundabouts argument should be rejected and the immunity should not be granted. Overall, in such cases the Courts will look at the justifications behind the “unsettled” immunity to see whether, on the facts, it is appropriate “grudgingly” to grant immunity, all of the time keeping in mind the principle that the Courts require that wrongs are to be redressed. Turning then to the issues in the appeal.

108. **Did the scope of Witness Immunity BC or Legal Proceeding Immunity BC cover the actions of the Police and should immunity be granted?**

The Judge was not told who carried out the Police actions of preparing the CPS file. Was that person a police officer, administration assistant, secretary, clerk, trainee? Looking first at the function which the Police were fulfilling in preparing the CPS file, the hearing related to granting K bail, he having breached bail on an unrelated charge. It also related to the new rape charge/investigation. Police bail had already been granted (with no *Hampshire* address error) to ensure he returned when the Police needed him for their evidence gathering for the rape allegation. The work done by the Police employee was found by the Judge to be in accordance with their duties to provide the witness’ contact address to the CPS, but in my judgment that had nothing to do with the provision of evidence by the Appellant for the criminal cases being investigated. The Police were the investigating authority who would gather and had gathered some of her evidence for the trial. They had the Appellant’s address for gathering any further evidence from her. The CPS were involved in the Magistrates’ bail hearing to ensure that K returned to Court later, when required. The Police function when preparing the CPS file was arguably administrative or procedural not evidential. The Appellant was not a witness for the bail hearing. The address was not part of her evidence for any hearing (bail or trial). Looking at the rationale for the claimed Witness Immunity BC, and for Legal Proceedings Immunity BC, in my judgment it was more than arguable that Witness Immunity BC had nothing to do with the Police actions before the bail hearing. The Appellant (the witness) is not being sued. The Police are being sued. They are not being sued as witnesses. They are being sued as errant administrators. The only relevant immunity was Legal Proceedings Immunity BC. I have already ruled that the submission to the Judge below (and to me) that the *Hampshire* address was “evidence” because it could have become evidence if K had challenged it during the bail hearing was irrelevant and fanciful. I consider this so because firstly, the address should never, if properly handled by the CPS, have been disclosed at the hearing, so a dispute about it should never have arisen. It only arose due to carelessness. Secondly, because it was not in a witness statement and was not evidence. Thirdly, because there was no realistic prospect that K was going to dispute the address in *Liphook*. So, in my judgment, the Judge fell into error on this issue.

109. Having concluded that the only relevant immunity for the Police on the *Hampshire* disclosure in this case was Legal Proceedings Immunity BC, which is not a core immunity AC, the Court should have considered the justifications for granting immunity. It is an extension immunity and the Appellant reasonably challenged the scope and justification for it. The case law shows that Legal Proceedings Immunity BC

springs from the need to protect witnesses and the evidence they will give at trial. The whole rationale for the immunity in this case was to protect the Appellant from being in danger from K, so that she could give evidence at trial as a witness against him and thereby further the aims of the administration of justice. The public policy in the proper administration of justice entailed protecting the Appellant, not endangering her. The actions of the Police in failing to red flag her address undermined the very rationale for the Legal Proceedings Immunity BC which they sought to rely upon. It is arguably a nonsense to assert that the Police can rely on the public policy justification for immunity, which seeks to protect witnesses, in defence of an action in which they are presumed (at strike out) to have facilitated putting the witness in greater danger. This is a matter which the Judge never engaged with or determined in her judgment. The Judge took an absolutist approach and ignored the justification requirement. In my judgment, on this she fell into error.

110. The appellate Courts have arguably made it plain that the burden rests on the Police to justify relying on any extension of core AC immunity or any “unsettled” immunity, by reference to the facts. Mr Talalay was challenged by Ms Murphy to do so and the only justification he could put before the Court was the general provision requiring the Police to prepare the CPS file for the hearing which included the guidance to include witnesses’ contact details. That is a procedure not a public policy justification. The Police admitted that their red flag system to protect vulnerable witnesses did not work for the CPS due to an IT defect which they knew about. No evidence was provided as to how long that IT defect had continued for. If it had been defective for months the systemic risks would have been serious for many victims unless the Police had put in place a manual system. They admitted that, despite knowing of this defect, they did not red flag the address manually on the file. Thus, the Police left the CPS advocate “exposed” to error and arguably caused the advocate’s error. The way in which it was performed arguably undermined the very justifications underlying the immunity claimed. Thus, arguably a balancing exercise needed to be carried out to determine whether “grudgingly” the Courts should grant immunity for the actions. This was never done and the claims were struck out. Further, in my judgment the function performed by the Police was arguably administrative or procedural not evidential so outside the scope of Legal Proceedings Immunity BC. As Lewison LJ said: “(v) where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial inquiry, there is no necessity to extend the immunity; (vi) in such cases the principle that a wrong should not be without a remedy prevails.”
111. The striking out of the *Hampshire* claims due to immunity lies oddly with the choice by the Police not to apply to strike out the *Epsom* claims (which were on a similar disclosure), which implies an acceptance that their breaches in November 2019 did not attract Legal Proceedings Immunity BC. For all of these reasons, I consider that the Judge was wrong to rule at paras. 89-92 that there was no arguable case against the

Police and that Legal Proceedings Immunity BC (the Judge used different descriptors for the immunity) unquestionably arose on the facts to protect the Police.

112. I have also considered the Judge’s ruling that the claim against the Police could not succeed because it was parasitic on the claim against the CPS which was barred by Advocates Immunity AC. This rests on the conclusion that the damage was only caused when the address was disclosed and that only occurred in Court. Factually that appears to me to be correct in relation to the causation of injury and loss and damage. I note that no declaration was claimed.

113. **Did the scope of Advocate’s Immunity AC cover the CPS and should it have been granted?** I have no doubt that the Judge was right to determine that Advocates Immunity AC is long established and that the core part of it is settled law. The rationale and the justifications for this immunity are set out in the case law. They are:

- the public policy in supporting promoting freedom of speech for all witnesses and hence the parties who rely upon those witnesses;
- the public policy in enfranchising freedom of speech in Court for the advocate and fearless representation for parties;
- the public policy in the promotion of the administration of justice by preventing the inhibition of free and fearless advocacy in Court due to the fear of later civil suit;
- the public policy in the prevention of satellite or parasitic litigation based on previously decided cases and finality in litigation and criminal cases.

In my judgment, at least arguably, the core part of Advocates Immunity AC relates to the witness evidence in the case, not to extraneous or peripheral or administrative matters. There is no previous decision on the same facts. There are decisions on what has been asserted by the Respondents are analogous facts and I have dealt with those above. I do not consider that any of the High Court cases relied upon by the Judge were determinative of this case.

114. I do not glean from the case law at the highest level, set out above, that Advocates Immunity AC is absolute in relation to the boundaries or scope thereof covering all words or actions AC. Even in 1585 it was limited thus in *Cutler*: “... this privilege extends to the parties, counsel, and witnesses in a cause, provided the allegations be pertinent to the matter in issue.” In *Skinner* Lord Mansfield ruled that: “If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such enquiry, it will be punished suitably”. Another factor this Court must consider is whether the way the CPS performed its function in Court would have been adequately controlled by the Court’s contempt or perjury jurisdictions. The CPS advocates’ “muck up”, as DC Wells described it, would never have attracted the Court’s control functions through contempt or perjury. Therefore, such errors would always remain uncontrolled

if immunity is granted to cover them. In *Hall* it was shown to be limited in scope where the justifications no longer supported granting immunity.

115. **Justification.** When considering whether the the CPS should have been granted immunity from civil liability at common law or under their statutory duties under the HRA and the DPA, the Judge was required to assume the facts as pleaded: the disclosure of her address was wholly unnecessary and wrongful, it endangered the Appellant and it was a “muck up”. It occurred in Court and was part of a function performed by the CPS advocate. That function was imposing bail conditions to protect the witness (the Appellant). The way it was performed was that the advocate failed to keep the address confidential but instead disclosed it and so disclosed the confidential address of a vulnerable witness, who was the (alleged) victim of serious domestic violence, threats to kill and potentially rape, and was required to be a witness in the future criminal trial of her (alleged) attacker. This undoubtedly put her at greater risk because K was to be released on bail. The function performed undermined the main justification for Advocates Immunity AC for this function. In my judgment the Court had then to ask: “did the way the function was performed fulfil the policy justifications for the claimed immunity?” The answer to this question was clearly: “no”. Disclosing the address did not protect the witness, it endangered her.
116. Turning to the immunity itself, the Judge should have asked: “would permitting liability undermine the advocate’s freedom of speech in Court or freedom to represent their instructing party?” I do not see how it would have. Instead, it would make CPS advocates think more carefully before disclosing any vulnerable witnesses’ addresses in Court. It would encourage the CPS to impose a safer system. Would it undermine freedom of speech by giving rise to a fear of subsequent civil suit? I consider that it would raise such a fear, but the result of the fear would be beneficial to the administration of justice by protecting vulnerable witnesses and making advocates at bail hearings very careful about disclosing vulnerable witnesses’ addresses. Would allowing immunity for the way this function was performed support the rationale for the core immunity for witnesses? It would certainly not do that. It would wholly undermine the rationale, because immunity would facilitate and protect wrongful muck ups through disclosure of vulnerable witnesses’ addresses and put at risk the very witnesses whom the policy rationale seeks to protect. Would it prevent satellite litigation? Certainly, it would, but arguably that is not enough in itself to outweigh the principle of redress for wrongs, as the House of Lords and Supreme Court so found in *Hall* and *Jones*.
117. So, allowing an advocate to avail himself of the Advocates Immunity AC for disclosing a vulnerable witnesses’ confidential address at a bail hearing to a violent ex-partner who had threatened to kill and throw acid in her face, does arguably undermine the rationale justifying the immunity claimed by the advocate. Thus, in my judgment the scope of the claimed immunity was and is “unsettled” by the facts and the balancing

exercise I have attempted above needed to be carried out by the Judge. No such exercise was carried out.

118. For these reasons, in my judgment, the Judge was wrong to rule at paras. 66-67 that the Advocates Immunity AC was so well established *in relation to the facts of this case* that there was no arguable claim.
119. **Strike out jurisdiction:** I am reluctant to overturn a case management decision. The threshold is high. However, in my judgment strike out was not the appropriate forum for consideration of the scope or grant of the immunities claimed by the Defendants in this claim. Firstly, because the two applications were listed for a full day hearing. Judgment would need to be reserved for consideration (as it was). This amount of Court time used was no less than a preliminary issue after pleadings and disclosure would have taken. Secondly, because the determination required a huge number of authorities to be considered (most of which were relevant) and this is a developing area of law. Thirdly, because the movement of travel by the appellate Courts in the last 25 years has been away from absolutism and towards a more careful examination of the justifications for each immunity claimed where such can arguably be described as “unsettled” or potentially unsettled, in scope or justification against the facts of the case. Attempting to determine the issues on the pleadings before relevant disclosure and necessary evidence is provided hampers the pleaded factual background. The Appellant’s pleading may have needed to be amended after disclosure. No one in Court knew who had committed the Police or the CPS errors. There were no documents provided by the CPS. Strike out is decided on the pleadings. Such a decision is hampered by consideration too early before the claim is finally pleaded or amended after proper disclosure of the key evidence (held by the Police). Fourthly, because the assumed breaches by the Defendants put the crucial witness/victim in a criminal case at risk of violence and/or mental psychiatric injury and undermined the administration of justice by doing so. Fifthly, because no Defence was entered by the CPS. The claimed justifications for the claimed immunity were arguably needed and should have been pleaded. For all of these reasons combined I consider that this issue was not safely to be considered on a strike out application on the facts of this case. It would be different if the case concerned a core immunity which was unarguably settled.
120. **Summary judgment jurisdiction:** The Judge dismissed the summary judgment application in relation to the *Epsom* disclosures. So, it is inherent in that decision that there was sufficient risk to the Appellant’s life, bodily integrity or family life in November 2019 to justify the HRA claims being arguable. The only difference between those claims and the April 2020 claims related to the passage of time. The Judge held that the Appellant was not at “real and immediate risk” of death or harm. What the Judge did not have available to her was:
- sufficient or full evidence to know whether K had the ability to find or communicate with the Appellant in that 5 month period; and

- sufficient or full evidence about K’s emotional and psychiatric state gained from his Police files; his interview in April 2020; his previous convictions, his behaviour at arrest in April 2020 and his then current other offences being investigated;
- the documents listed by the Appellant in her demands for disclosure.

Without knowing how dangerous K had been and was, how could the judge assess how dangerous K was going to be?

121. K had threatened to kill her and to disfigure the Appellant and her relatives by throwing acid on them as a result of her just splitting up with him. There was no evidence about how he felt after he discovered, on 15th April 2020, that she now alleged rape against him. This charge would have carried a far higher prison sentence if proven. The Judge found that this *“undoubtedly would have brought the claimant to the fore of DYP’s mind again in April 2020”*. It could not have been put at a lower alarm level than that. But on summary judgment the Appellant’s case is taken at its highest. I consider that arguably the effect of the rape allegation could have been far more dangerous, real and immediate, depending on the evidence about K’s state of mind, personality, and reaction to the second arrest, none of which was in the Appellant’s possession or before the Court. Only the Police knew how he reacted to being re-arrested and accused of rape. No police witness statement was provided. Instead, the Police relied on Mr Rutherford’s witness statement, which was not evidence but only contained legal argument and assertions of opinion on the evidence. Mr Rutherford asserted, at para. 15 of his witness statement that: *“In this case, the pleaded case and supporting evidence are insufficient to suggest that the Claimant’s life was at real and immediate risk”*, and at para. 16: *“Further, or in the alternative, if there was a real and immediate risk as of 6 November 2019, that was no longer present and continuing by 19 November 2019, when the Appellant reported having had no contact from Mr ‘K’ or, at the latest 27 November 2019, when the claimant provided a statement that (a) did not disclose any threats to kill made by Mr ‘K’ at any point and (b) did not disclose any direct or indirect contact from him since his arrest on 7 November 2019. Further, the crime report shows no contact with the claimant from Mr ‘K’, let alone any direct or indirect threats made by him, subsequent to early November 2019.”* Further at paras. 18-19 he asserted: *“(ii) Second, absent a person being tortured by the third party (as is the case here in respect of the potential consequences of the disclosures) the Claimant will again need to show there was a “real and immediate risk” of such an event occurring (X v Bulgaria (22457/16); DSD at [111]). 19. Accordingly, and for the same reasons as set out above in respect of art.2 ECHR, the is not a victim by reference to art.3 so as to have standing to bring a claim.”*
122. Whilst the decision focussed on the Appellant’s real or imminent risk of death or assault, nothing was said in the Judgment on the assertion about the mental suffering claimed by the Appellant as a result of the breaches. Yet mental suffering was the root of the claim for damages.

123. In *Osman* the European Court of Human Rights ruled that:

“115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention. **In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.** The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. 109 Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article ...”

“121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis.” (My emboldening).

124. The Judge relied on *Re Officer L* and *Rabone* to rule that “real” meant objectively well founded and that “immediate” meant “present and continuing” and those interpretations of the law were not challenged. The Judge then applied what she described as a “very high threshold” relying on *Osman* and *Van Colle*. However, I note from *Van Colle* the following ruling from Lord Bingham:

“30 The appellant chief constable, and the Secretary of State, relied on the ruling of my noble and learned friend, Lord Carswell, in *In re Officer L* [2007] 1 WLR 2135, para 20, that the test of real and immediate risk is one not easily satisfied, the threshold being high, **and I would for my part accept that a court should not lightly find that a public authority has violated one of an individual’s fundamental rights or freedoms, thereby ruling, as such a finding necessarily does, that the United Kingdom has violated an important international convention. But I see force in the submission of Mr Owen for the Equality and Human Rights Commission, that the test formulated by the Strasbourg court in Osman and cited on many occasions since is clear and calls for no judicial exegesis.** It is moreover clear that the Strasbourg court in *Osman*, para 116, roundly rejected the submission of Her Majesty’s Government that the failure to perceive the risk to life in the circumstances known at the time or to take preventative measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life.” ...

“32 In its formulation of the “real and immediate risk” test the Strasbourg court, in para 116 of its *Osman* judgment, **laid emphasis on what the authorities knew or ought to have known “at the time”.**” (My emboldening).

125. In my judgment it was not right, at the summary judgment stage, without the full evidence about what the Police knew about K, his reaction to the rape assertion, his mental state, his actions over those 5 months and his full police records, for the Judge to find that the Appellant was unarguably going to fail in proving a real or immediate risk of Arts. 2/3 violence by K towards her and/or of her suffering mental health problems as a result of her fear of that and from having to move house once again in April 2020 and so of proving Art. 8 interference with her family life. The only primary evidence the Court had was that DC Wells told the Appellant it was not safe to return to her *Liphook* address as a result of the disclosure. That sort of advice from a police officer cannot have been given lightly, or because she thought K was going to drop in for a cup of tea. That evidence was overlooked in the reasoning for this decision. The

Appellant's life was clearly interfered with from 16th April to August 2020. The facts of having to move out of her home are quite different from those in *Osman*. I also take into account that in this case the cost to the Police and CPS of protecting the Appellant would have been minimal (making a clear red flag file note) and that is a factor taken into account in the *Osman* test.

126. In my judgment the Judge was wrong to approach the applications for summary judgment in the way that she did, on the limited evidence available to her. I consider that the Judge was wrong to hold that there was no arguable prospect of the Appellant proving that the disclosures presented a real and immediate risk: (1) to her mental health from fear of K and from having to move house again and/or (2) to her life and physical health, from the new rape charge and the effect it would have had on K's behaviour towards her. The sole stated reason for deciding that the real and immediate risk, which the Judge accepted was arguable in November 2019 from the *Epsom* disclosure, had ceased to be arguable in April 2020, was the passage of time and the lack of threats and violence in the 5 months in between. But during those 5 months the Appellant had moved to a women's refuge, so K did not know how to reach her. In that time, he had breached his bail conditions and been accused of rape by the Appellant and been re-arrested. The witness statement from Mr Rutherford, put before the Judge by the Police on this issue, did not contain any evidence. The CPS failed to provide any disclosure and the Police failed to provide the relevant disclosure. In my judgment, the Judge did not have an adequate picture of K and his mental state on 16th April 2020.

Analysis of each ground of appeal

127. **Grounds 1, 2, 3 and 6:** These grounds are more conveniently considered together.

Claims against the Police

128. I refer back to paras. 105-112 above. In my judgment the Judge fell into error in concluding (at paras. 89-92) that there were no arguable claims against the Police because the Police's actions in disclosing the confidential *Hampshire* address to the CPS with no red flag were subject to Legal Proceedings Immunity BC (or any immunity).
129. It is clear that the Police implicitly accepted it was arguable that the Appellant could sue the Police for the *Epsom* disclosure. I consider, in the light of the facts of this case and the assertion that the Police actions undermined the justification for the claimed immunity, that arguably the claimed immunity needed to be analysed to determine whether the acts complained of justified or undermined the rationale for the immunity. I consider that it is arguable that to grant immunity in this case, which will eradicate the Appellant's otherwise valid right to redress for a tort or breach of statutory duty, entailed the Defendants carrying the burden of proof to show: (1) the public interest justification necessitating the immunity; (2) that the acts of the Defendants did not wholly undermine that very justification and (3) that the justification for the immunity outweighs the public interest in providing a right to redress for any tortious wrongs (and

breaches of Statutory Duties) suffered (see *Taylor, Hall, Darker, Singh and Daniels*). This stage was never reached.

130. I consider it is arguable that the Court in this case should have considered the justifications for the historic Witness Immunity AC, which involved promoting freedom of speech for “witnesses” enfranchising them to:
- (a) make complaints to the Police or presumably to make civil claims, and
 - (b) to give evidence honestly and fully in Court, and
 - (c) to prevent the discouragement caused to them as a result of giving evidence in Court by potentially having to face later satellite or collateral attacks alleging defamation or any other civil suit.

I consider that it is arguable that these justifications for granting immunity were undermined by the actions of the Police (in disclosing her confidential information to the CPS with no red flag marker that it must be kept confidential) which put her in danger and undermined her freedom of speech.

131. I consider that it is arguable that the Police were carrying out an administrative or procedural function before Court, not an evidential one and so those actions were not within the scope of Witness Immunity BC or Legal Proceedings Immunity BC.

The CPS

132. At para. 67 the Judge ruled that the CPS’s words at Court disclosing the address to K, were covered by Advocates’ Immunity AC. I refer to my reasoning set out in paras. 113-118 above. I consider that it was arguable that, for the CPS to succeed in being granted immunity, they had the burden of justifying an extension of Advocates Immunity AC, the core of which related to protecting witness evidence, not to their action of disclosing an at risk witness’ address in Court to a dangerous accused criminal. I consider it is arguable that the Court should have analysed the CPS’ actions in relation to the classic justifications for Witness Immunity set out above and for Advocates’ Immunity AC, namely:
- (a) to enable witness freedom of speech and to encourage full and unfettered communication at Court; and
 - (b) to encourage fearless advocacy; and
 - (c) to prevent the fear and discouragement caused to advocates as a result of appearing in Court by potentially having to face satellite or collateral attacks through litigation for defamation or any other civil suit; and
 - (d) to encourage finality in litigation.

I consider that it is more than arguable that there was no public interest in granting immunity on the facts. There was no public interest in her *Hampshire* address being read out in Court by the CPS, quite the opposite, the public interest was in protecting her as the victim of domestic violence, the key prosecution witness for the upcoming criminal trial and the person at risk of violence in future from K whilst he was on bail. Allowing redress for such “muck ups” will arguably promote better advocacy and better

protection of vulnerable witnesses and hence promote the administration of Justice not inhibit better advocacy or undermine the administration of justice.

133. I also consider that it is arguable that the CPS's disclosure in Court was not "evidential" but was "administrative or procedural" and was extraneous to and unnecessary for the bail hearing or any future trial and so was not covered by Advocates Immunity AC. I reject the Appellant's submission that Advocates Immunity AC only exists as an extension of Witness Immunity AC. In my judgment the Supreme Court in *Hall* swept away Advocates Immunity AC only in relation to civil claims by clients. I consider that it was arguable that *King, A&B, CLG* did not determine the issues in the case and were distinguishable on their facts. I consider that it is arguable that the release of her confidential address was different from the preparation of witness evidence and that her confidential address was wholly extraneous to the bail hearing in April 2020 and was not evidence for it. I consider that it was arguable that *CLG* was distinguishable on the basis that the relevant disclosed matter (an address) was in a witness statement to support a warrant for arrest at the very address which was disclosed. Thus, it was the key evidence for the arrest warrant and came with the Witness Immunity AC. In contradistinction, for the Appellant, her address was neither key nor relevant in the bail hearing and should have been excluded entirely from the hearing, so was not evidence.
134. **Ground 4: the Art. 2/3 HRA claims were arguably unaffected by immunity.** I consider that no decision needs to be made on this ground in the light of the rulings above but that all of the issues should be heard at a trial or preliminary hearing relating to immunity. The HRA claims are wholly fact sensitive and only after proper evidence is served can they properly be determined.
135. **Ground 5: Summary judgment and the S.7 HRA and Art. 8 claims against the Police and CPS as a victim and for interference with private life were arguable on the facts.** I refer back to paras. 119-124 above. I consider that the Judge's decision to give summary judgment to the Defendants by finding that there was no arguable case on the "real and immediate risk" assertion was wrong and inappropriate on the limited evidence before her. The justification provided by the Judge was just that K had not assaulted or threatened the Appellant since early November 2019. That decision effectively overlooked: (1) material obtainable evidence in the possession of the Police about K which would arguably have been directly relevant to the increased risk and to the effects on him emotionally and mentally of the new allegation of rape; (2) the effects on her of the disclosure of her address in *Liphook*; (3) the Police's own assessment of the risk as "high" and (4) the advice from DC Wells to the Appellant to leave her new home immediately to avoid the risk. I consider that the volume and depth of the actual evidence in relation to K was inadequate to make any safe determination, due to lack of adequate disclosure by the Police and the CPS about K and the risk he actually presented, at that time. In my judgment the witness statement of Mr Rutherford provided no actual evidence, save in the exhibits, it was mere submissions. I consider that the Judge was wrong and disproportionately strict when criticising the Appellant

for failing to apply for pre-action or specific disclosure when the CPS had not even pleaded a defence or provide any disclosure and the Police had provided minimal disclosure, in arguable breach of the requirements in the pre-action protocol.

136. I consider it was arguable that the Judge should have considered the positive and negative obligations on the Police in Arts. 2, 3 and CPS and the systemic failings. Under Art. 8, as a result of the April disclosure, the Appellant was rendered homeless, deprived of her work and her depression was aggravated by the alleged statutory breaches by both Defendants. I consider that arguably those matters were well evidenced breaches of her Art. 8 rights and quite separate from the threats to her life and/or of inhuman treatment.
137. **Ground 7: Strike out.** For the reasons set out above at para. 119 I uphold this ground of appeal. Strike out was not the appropriate forum for this complicated set of issues.

Conclusions

138. I grant permission to appeal on all 7 grounds and I grant the appeal on grounds 1 to 7.
139. The judgment below will be quashed when the order is drawn up and the claims will be listed for directions.

The Appendix attached below is part of the judgment.

APPENDIX
LIST OF AUTHORITIES CITED IN THE APPEAL
WITH SHORTHAND NAMES IN BOLD:

House of Lords/Supreme Court

Watson v McEwan [1905] AC 480
R v Secretary of State for the Home Department ex. p. Pierson [1998] AC 539
Taylor v Director of the Serious Fraud Office [1999] 2 AC 177
Barrett v Enfield BC [2001] 2 AC 550
Darker v Chief Constable of West Midlands Police [2001] 1 AC 435
Arthur JS Hall & Co v Simons [2002] 1 AC 615
Re Officer L [2007] UKHL 36; [2007] 1 WLR 2135
Van Colle v Chief Constable of the Hertfordshire Police [2008] UKHL 50; [2009] 1 AC 225
Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74; [2009] 1 AC 681
Jones v Kaney [2011] UKSC 13; [2011] 2 AC 398
Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72
Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 38; [2014] AC 700
Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64; [2014] 1 WLR 4495
Michael v Chief Constable of South Wales Police [2015] UKSC 2; [2015] AC 1732
R (SG) v Secretary of State for Work and Pensions [2015] UKSC; [2015] 1 WLR
In re JR38 [2015] UKSC 42; [2016] AC 1131
SXH v Crown Prosecution Service [2017] UKSC 30; [2017] 1 WLR 1401
Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] AC 736.
DSD v Commissioner of Police of the Metropolis [2018] UKSC 11; [2019] AC 196
James-Bowen & others v Commissioner of Police of the Metropolis [2018] UKSC 40; [2018] 1 WLR 4021
Poole BC v GN [2019] UKSC 25; [2020] AC 780.
R (Elgizouli) v Secretary State of the Home Department (Information Commissioner and others intervening) [2020] UKSC 10; [2021] AC 937
ZXC v Bloomberg LP [2022] UKSC 5; [2022] AC 1158

Court of Appeal

Dawkins v Lord Rokeby (1872-73) LR 8 QB 255
Munster v Lamb (1884) 11 QBD 588
Marrinan v Vibart [1963] 1 QB 528
R v Blandford Justices ex. p. Pamment [1990] 1 WLR 1490
Thacker v Crown Prosecution Service (CA, 16 Dec 1997, unrep)
Durant v Financial Services Authority [2003] EWCA Civ 1746; [2004] FSR 28
Greene v Associated Newspapers Ltd [2004] EWCA Civ 1462; [2005] QB 972
Heath v Comm. Of Police for the Metropolis [2005] ICR 329
Standard Bank Plc v Via Mat International Ltd [2013] EWCA Civ 490; [2013] C.P. Rep.

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Reading Borough Council v Singh [2013] EWCA Civ 909; [2013] 1 WLR 3052
Smart v Forensic Science Service Ltd [2013] EWCA Civ 783; [2013] PNLR 32
Crawford v Jenkins [2014] EWCA Civ 1035; [2016] QB 231
Daniels v Chief Constable of South Wales Police [2015] EWCA Civ 680
CLG & others v Chief Constable of Merseyside Police [2015] EWCA Civ 836
Mazhar v Lord Chancellor [2019] EWCA Civ 1558; [2021] Fam. 103
Jalla v Shell International Trading and Shipping Co Ltd [2021] EWCA Civ 1559
YZ v Chief Constable of South Wales Police [2022] EWCA Civ 683
ASY v Home Office [2024] EWCA Civ 373

High Court

R v Skinner (1772) 98 ER 529
Cutler v Dixon 76 ER 886; (1585) 4 Co Rep 14
Goodridge v Chief Constable of Hampshire [1999] 1 WLR 1558
R (DPP) v Havering Magistrates Court [2001] 1 WLR 805
R (D) v Central Criminal Court [2003] EWHC 1212; [2004] 1 Cr App R 41
Carter v Chief Constable of Cumbria [2008] EWHC 1072 (QB)
R (B) v Director of Public Prosecutions [2009] EWHC 106 (Admin); [2009] 1 WLR 2072
Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)
R (WV) v Crown Prosecution Service [2011] EWHC 2480 (Admin)
A & B v Chief Constable of Hampshire Constabulary [2012] EWHC 1517 (QB)
R (Kent County Council) v HM Coroner for Kent (North West District) [2012] EWHC (Admin); 177 JP 82
Daniels v Chief Constable of South Wales [2015] EWHC 228 (QB)
Re Lynch's Application [2016] NIQB 4; [2017] NI 281
Guriev v Community Safety Development (UK) Ltd [2016] EWHC 643 (QB)
R (XY) v Crown Court sitting at Newcastle [2016] EWHC 1872 (Admin)
TKC London Ltd v Allianz Insurance Plc [2020] EWHC 2710 (Comm)
King v Stiefel [2021] EWHC 1045 (QB)
Jinxin Inc v Aser Media PTE Limited and others [2022] EWHC 2988 (Comm)
60 BES Commercial Electricity Ltd v Cheshire West & Cheshire Council [2022] EWHC 2162 (QB)
El Haddad v Al Rostamani [2024] EWHC 448 (Ch)
SZR v Blackburn with Darwen Borough Council [2024] EWHC 598 (KB)

European Court of Human Rights Authorities

Fayed v UK (1994) EHRR 393
Ashingdane v UK (1985) 7 EHRR 528
Osman v UK (2000) 29 EHRR 245
Z v United Kingdom (2002) 34 EHRR 3
Mastromatteo v Italy [2002] ECHR 37703/97
Roche v UK (2006) 42 EHRR 40
Renolde v France (2009) 48 EHRR 42

X v Bulgaria (2021) 50 BHRC 344

Tershana v Albania (2021) 72 E.H.R.R. 13

Kurt v Austria (2022) 74 EHRR 6

Tunikova v Russia (2022) 75 EHRR 1

END