Hilary Term
[2017] UKSC 25
On appeal from: [2016] HCJCA HCA/2015/3552/XC

JUDGMENT

AB (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

before

Lord Kerr
Lord Wilson
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

5 April 2017

Heard on 11 July 2016

Appellant
Aidan O'Neill QC
Janice Green
Edward Craven
(Instructed by John Pryde & Co)

Respondent
HM Advocate
Andrew Brown QC
Angela Gray
(Instructed by Appeals Unit, Crown Office and Procurator Fiscal Service)

Intervener (Community Law Advice Network)
Morag Ross
Daniel Byrne
(Instructed by Clan Childlaw)

LORD HODGE: (with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Hughes agree)

1. This appeal is concerned with a challenge to the legality of legislation of the Scottish Parliament which deprives a person, A, who is accused of sexual activity with an under-aged person, B, of the defence that he or she reasonably believed that B was over the age of 16, if the police had previously charged A with a "relevant sexual offence".

2. The appellant raises a compatibility issue, which is a question, arising in criminal proceedings, as to "whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is incompatible with any of the Convention rights": section 288ZA(2)(b) of the Criminal Procedure (Scotland) Act 1995 ("the CPSA 1995"). Convention rights are the rights set out in the articles of the European Convention on Human Rights ("ECHR") which are listed in section 1(1) of the Human Rights Act 1998, and include the rights in articles 6, 8 and 14 of the ECHR which are the subject of this appeal. The compatibility issue raises a question of legality because section 29 of the Scotland Act 1998 provides:

> "(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply -
>
> …
>
> (d) it is incompatible with any of the Convention rights …"

The legislative provisions

3. Sections 28 to 37 of the Sexual Offences (Scotland) Act 2009 ("the 2009 Act") create various sexual offences against older children, who are children who have attained the age of 13 years but who have not attained the age of 16 years.

Section 39 provides the qualified defence ("the reasonable belief defence"), as follows:

> "(1) It is a defence to a charge in proceedings -
>
> (a) against A under any of sections 28 to 37(1) that A reasonably believed that B had attained the age of 16 years, …"

The defence is qualified because subsection (2) provides:

> "(2) But -
>
> (a) the defence under subsection 1(a) is not available to A -
>
> (i) if A has previously been charged by the police with a relevant sexual offence,
>
> (ia) if A has a previous conviction for a relevant foreign offence committed against a person under the age of 16, or
>
> (ii) if there is in force in respect of A a risk of sexual harm order. …"

4. The relevant sexual offences to which section 39(2)(a) refers are set out in 34 paragraphs in Schedule 1 to the 2009 Act and cover a wide range of sexual offences against children under the age of 16 in Scotland, England and Wales or under the age of 17 in Northern Ireland. In relation to offences under the 2009 Act, paragraph 1 of Schedule 1 includes in the phrase "relevant sexual offences":

> "Any of the following offences under this Act -
>
> (a) an offence under Part 1 against a person under the age of 16,

(b) an offence under Part 4 (but not an offence of engaging while an older child in sexual conduct with or towards another older child (section 37(1)) or engaging while an older child in consensual sexual conduct with another older child (section 37(4)),

(c) sexual abuse of trust (section 42) of a person under the age of 16,

(d) sexual abuse of trust of a mentally disordered person (section 46) of a person under the age of 16."

Offences in Part 1 of the 2009 Act, to which paragraph 1 of Schedule 1 refers, cover both consensual and non-consensual sexual activity. They range from rape to indecent communications, exposure of one's genitals and voyeurism. Those offences can be committed against a person of any age but paragraph 1(a) of Schedule 1 makes them a relevant sexual offence only if the victim is under the age of 16. Paragraph 15 of Schedule 1 lists common law offences against a person under the age of 16, which have been replaced by offences under the 2009 Act, including lewd, indecent or libidinous practice or behaviour.

The history of the reasonable belief defence

5. Since 1885 our law has recognised the possibility of an honest mistake as to a young person's age and has allowed a reasonable belief defence in some form. Section 5 of the Criminal Law Amendment Act 1885 ("the 1885 Act") created the offence of unlawful carnal knowledge of a girl between the ages of 13 and 16 but that offence was subject to a defence that the accused had reasonable cause to believe that the girl was aged 16 or over. The defence was restricted by section 2 of the Criminal Law Amendment Act 1922 ("the 1922 Act") to a man aged 23 or under and was available only on the first occasion that he was charged with the offence under section 5 of the 1885 Act. The law was restated in Scotland in section 4 of the Sexual Offences (Scotland) Act 1976 so that the reasonable belief defence was available only when the accused man was under the age of 24 and had not previously been charged with a "like offence". The offences which were "like offences" were defined as (i) having or attempting to have unlawful sexual intercourse with a girl aged between 13 and 16, and (ii) permitting a girl under the age of 16 to use premises for sexual intercourse. The law was restated without any substantive change in section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act").

6. Although there was no Scottish judicial authority on the point, it was widely understood that the prior charge in the relevant provisions of the legislation, including the 1995 Act, referred to a charge at a trial in Scottish proceedings. In English law there was judicial authority that it referred to a charge at committal proceedings: *R v Rider* [1954] 1 WLR 463. In the highly respected textbook, *Sir Gerald Gordon, "The Criminal Law of Scotland"*, 3rd ed (2000), para 36.06, it was stated:

> "These words [ie 'previously charged'] have not generally been judicially defined in Scotland. They could refer to a charge by the police, an appearance on petition or complaint at the instance of the procurator fiscal, or an appearance on indictment. In England it has been held that where a man appears before a magistrate in committal proceedings that is a previous charge, being an appearance before a competent court, except where he is committed for trial, in which case the trial itself is his first charge. [fn: *R v Rider* [1954] 1 WLR 463] The nearest Scots equivalent to committal proceedings is an appearance on petition, but it is unlikely that such an appearance would be regarded as a 'previous charge' for the purposes of the subsection, particularly as it does not nowadays involve any adjudication on the case by the court. In practice, therefore, a man may not be regarded as having been 'previously charged' with an offence unless he has previously stood trial for it. …"

7. In recent years Scots law and English law have diverged. In England and Wales section 6 of the Sexual Offences Act 1956 made the offence of unlawful sexual intercourse with a girl between the ages of 13 and 16 subject to exceptions which included the exception that the defendant was under the age of 24, had not previously been charged with a like offence, and believed on reasonable grounds that the girl was aged 16 or over. In this Act a "like offence" was the offence of unlawful sexual intercourse with a girl aged between 13 and 16 or an attempt to commit that offence. Under the Sexual Offences Act 2003 the absence of reasonable belief as to age is made part of the definition of many sexual offences by persons aged 18 or over against children aged between 13 and 16. Under that Act the prosecution must establish that absence of belief against all such defendants, regardless of their age. The existence of a previous charge is no longer relevant in English law.

8. In 2006 the Scottish Law Commission published a Discussion Paper on Rape and Other Sexual Offences (Scot Law Com DP No 131) in which it described the reasonable belief defence, which was confined to accused persons under the age of 24, as "unprincipled" and suggested that it was a political compromise which led to

the enactment of the 1922 Act. It proposed (a) that the age of the accused person should not be a formal restriction on the raising of the defence, and (b) that the fact that the accused may have raised the reasonable belief defence before should go to the accused person's credibility and not be a restriction on the raising of the defence (paras 5.63 - 5.67).

9. The Scottish Law Commission in its Report on Rape and Other Sexual Offences (2007) (Scot Law Com No 209) recommended that there should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed on reasonable grounds that the child was 16 or older (para 4.64). The Commission saw merit in the view that the Crown should in appropriate cases be allowed to lead evidence that the accused had previously been charged with a like offence whenever the accused raised the defence for a second time, in order to test the accused person's credibility rather than to disallow the defence (paras 4.61-4.62). It recommended that the accused should bear an evidential, but not a legal, burden of establishing that defence (para 4.74).

The rationale of the current legislation

10. The Scottish Parliament in enacting the 2009 Act took up the Scottish Law Commission's recommendation that the reasonable belief defence should be available regardless of the age of the accused person. But it chose to reformulate the previous charge proviso in two material respects. First, as section 39(2)(a)(i) expressly states, a prior police charge is sufficient to disentitle the accused to the reasonable belief defence; a charge at trial is not necessary. Secondly, the prior charge is not confined to the like offences to which I referred in para 5 above, but extends to all of the relevant sexual offences in Schedule 1 to the 2009 Act (para 4 above).

11. In the Policy Memorandum to the Bill the Scottish Government explained the policy and their rejection of the Scottish Law Commission's recommendation. They stated (a) that the proposed restriction on the reasonable belief defence reflected the then current law in preventing someone who had been charged with a like offence from using the defence (paras 131-132) and (b) that the restriction was being re-enacted because they were concerned that its removal could enable serial predators to evade conviction (para 135). Both statements are problematic. First, the assertion (in paras 131-132) that the Bill's restriction of the defence reflected the current law was incorrect because the range of "relevant sexual offences" extended far beyond the "like offences" of the prior law. Secondly, as I will show, the Lord Advocate has not attempted to defend the impugned provision on the basis that its purpose was to prevent serial sexual predators repeatedly exploiting the defence.

12. In evidence to the Scottish Parliament, the Scottish Government's Bill Team Leader adopted the line of the Policy Memorandum by asserting that the purpose of the restriction of the defence was "to prevent a serial sexual predator who relied on that defence on a previous occasion but was acquitted of all charges from using the same defence to evade conviction on a subsequent offence or offences" (Subordinate Legislation Committee, 28 October 2008, col 392). But, immediately afterwards, a representative from the Scottish Government Legal Directorate expressed a different view as to the purpose of the restriction. He described the prior charge as "a shot across the bows" and as "effectively [putting the accused person] on notice" to be careful not to engage in sexual activity with another person who was under the age of 16 and thereby discouraging them from engaging in such activity (Subordinate Legislation Committee, 28 October 2008, cols 392-393). The Lord Advocate in his written case in this appeal did not attempt to defend the reasoning in the Policy Memorandum and relied instead on the latter rationale which the Scottish Government had presented to the Parliament, stating (para 19):

> "The defence is excluded where the accused has been charged by the police with a relevant sexual offence - and has therefore received an official warning about sexual offences with children."

In his careful oral submissions, the Lord Advocate again founded on the rationale of an official warning that one must make sure that one's sexual partner was aged 16 or over.

The factual background to the appeal

13. In 2009, when the appellant was aged 14, the police charged him with two charges of lewd and libidinous practices at common law and one contravention of section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995, which concerned indecent behaviour towards a girl aged between 12 and 16. One of the common law charges involved the allegation of showing online pornographic images to a young boy. The other common law charge and the statutory charge involved the allegations of exposing his penis to, and chasing after, three other children, who were girls aged 4, 12 and 13. The police reported the case to the Procurator Fiscal and a decision was made not to prosecute the appellant. Instead, the case was referred to the Children's Reporter. The outcome of this referral is unknown as there are no extant records, but it is legitimate to infer that the case did not proceed to a Children's Hearing.

14. In July 2015, when the appellant was aged 19, he appeared on petition on charges of having shortly before engaged in sexual intercourse with a girl who was

then aged 14 years and 11 months, contrary to sections 28 and 30 of the 2009 Act. He does not deny that sexual intercourse took place. His only defence to the charges is that at the time he reasonably believed that the girl had attained the age of 16 years. In other words, he wishes to plead the reasonable belief defence in section 39(1)(a) of the 2009 Act. But section 39(2)(a)(i) of the 2009 Act, if lawful, has the effect that the reasonable belief defence is not available to him. He has therefore challenged the legality of that statutory provision by raising a compatibility issue.

The prior proceedings

15. Sheriff Joan Kerr, Sheriff of Glasgow and Strathkelvin at Glasgow, referred the compatibility issue to the High Court under section 288ZB of the CPSA 1995. In the reference Sheriff Kerr asked whether article 8 of the ECHR was engaged by the prohibition against utilising the reasonable belief defence and, if so, whether the interference was compatible with the appellant's article 8 right; whether the lack of a mechanism to challenge the validity of the police charge would result in his trial being unfair under article 6 of the ECHR; and whether the prohibition applied when the police charged a child and the Lord Advocate did not instruct a prosecution on the charge.

16. On 26 February 2016 the Appeal Court of the High Court of Justiciary (the Lord Justice General (Lord Carloway), Lady Dorrian and Lord Bracadale) issued their opinion on the reference. In that opinion the court rejected the appellant's submission that the prohibition on raising the reasonable belief defence created a presumption of guilt and held that, absent any relevant complaint of procedural unfairness, the appellant was not within the ambit of article 6 of the ECHR. The court held that the appellant's decision as an adult to engage in sexual activity with a child under the age of 16 did not engage the protection of article 8 of the ECHR. It held that, even if article 8 were engaged, the interference was both in accordance with the law and proportionate. The court stated (para 25):

> "The purpose of section 39(2)(a)(i) is to give legal significance to a charge by the police as a 'shot across the bow'. An individual is entitled to plead ignorance of a child's true age on one occasion only. If the provision were not framed to cover charges, as distinct from convictions, the aim of protecting children from adults who may prey on their vulnerability may not be realised. The defence could be utilised over and over again. This would undermine the purpose of the provision. There is nothing disproportionate about the measure. Had article 8 been engaged, the interference would have been justified under article 8(2)."

The court answered the questions accordingly.

17. The appellant applied for leave to appeal to this court. On 24 March 2016 the High Court of Justiciary issued a statement of reasons on the application to appeal to this court. It held that the ground of appeal concerning article 6 of the ECHR was not arguable but that the ground relating to article 8 was, and that the latter raised a matter of general public importance. The High Court therefore granted leave to appeal to this court.

The challenge and the response

18. Mr Aidan O'Neill QC for the appellant advances four arguments. First, he argues that section 39(2)(a)(i) of the 2009 Act ("the impugned provision") is incompatible with article 6(2) of the ECHR because it breaches the presumption of innocence. Secondly, he submits that the impugned provision is incompatible with article 8 of the ECHR because it is not rationally connected to a legitimate aim, because it is not in accordance with the law, because there were less intrusive means of achieving the desired result and because it is disproportionate in its effect on the protected right. Thirdly, he argues that it unjustifiably discriminated (a) between those persons who had been previously charged with a relevant sexual offence and those who had not and (b) between UK nationals and others: article 14 read with article 8 of the ECHR. His fourth submission is that the impugned provision failed to distinguish between accused persons who had previously been charged as children and those who had previously been charged as adults, contrary to article 14 read with article 8 of the ECHR.

19. The court also has the benefit of submissions by Ms Morag Ross, advocate (now QC), on behalf of the charity, Community Law Advice Network, which aims to improve life chances for children and young people in Scotland by obtaining for them access to legal advice and securing the recognition and enforcement of their rights. Her submissions focus on the challenge under article 8 of the ECHR, and describe how offending by a child is treated differently from adult offending under the children's hearing system, which has existed in Scotland for over 50 years and which treats the welfare of the child as a paramount consideration. She submits that the rationale of an official warning has no place in such a scheme. There are less intrusive means of achieving the legitimate aims of protecting older children from sexual activity and predation. The impugned provision does not strike a fair balance between the public interest and the accused person's article 8 rights. In essence, her submission is that the impugned provision's interference with a person's article 8 rights when he or she has committed the relevant sexual offence as a child is not justified.

20. The Lord Advocate, in response, argues that the appellant's circumstances do not come within the ambit of article 6. Contrary to the opinion of the High Court of Justiciary, he accepts that the appeal comes within the ambit of article 8 of the ECHR because the prosecutor relied on the earlier police charges in the course of the criminal proceedings against the appellant and disclosed the charges to the court. In essence, he submits that the impugned provision strikes a fair balance between the accused person's rights and the public interest in the prevention of crime, the protection of health and morals, and the protection of the rights and freedoms of others. He also submits that any difference in treatment or absence of difference, on which the appellant founds, is objectively justified and so meets the requirements of article 14. The appellant whilst a child has been afforded the special treatment which the criminal justice system gave to children. Reliance on the 2009 charges once he had become an adult does not upset the fair balance which the Parliament had struck.

Discussion

(i) Article 6 of the ECHR

21. Like the High Court, I am satisfied that the impugned provision is not within the ambit of article 6, which guarantees that a trial will be procedurally fair. The impugned provision did not, as the appellant's counsel asserts, create an irrebuttable presumption that the appellant did not have a reasonable belief as to the age of the girl with whom he had sexual intercourse, thereby overriding the presumption of innocence in breach of article 6(2) of the ECHR which provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Instead, the impugned provision, when applicable, makes the offences under sections 28 and 30 strict liability offences by treating as irrelevant the accused person's state of knowledge of the victim's age. The creation of what amounts to a strict liability offence in relation to the victim's age in such circumstances does not violate article 6(2) of the ECHR, which is concerned with procedural guarantees and not with the substantive elements of a criminal offence: *R v G* [2009] AC 92, paras 27-31 per Lord Hope, para 46 per Lady Hale; *Salabiaku v France* (1988) 13 EHRR 379, para 27; and *G v United Kingdom* (2011) 53 EHRR SE 25, paras 26-27 (which was a case concerning the strict liability offence of sexual intercourse with a child under the age of 13). The European Court of Human Rights ("ECtHR") concluded in para 29 of *G v United Kingdom* that

> "the court does not consider that Parliament's decision not to make available a defence based on reasonable belief that the complainant was aged 13 or over can give rise to any issue under article 6(1) or (2) of the Convention."

In my view, that reasoning applies, mutatis mutandis, to the decision of the Scottish Parliament in its enactment of the impugned provision.

(ii) Article 8 of the ECHR

22. Article 8 of the ECHR provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

23. As I have said, the Lord Advocate concedes that in this case the impugned provision fell within the ambit of article 8 because the prosecutor relied on the earlier police charge in the course of the criminal proceedings and disclosed its existence to the court. In my view that concession is rightly made. I would go further: the recording for possible later use of the charges involved interference with the appellant's article 8 rights which may have to be justified. In *S v United Kingdom* (2008) 48 EHRR 1169 the Grand Chamber of the ECtHR held that, save in exceptional circumstances, the retention by the police of DNA samples and fingerprints taken from persons who were suspected but never convicted of a criminal offence represented an interference with their article 8 rights. In *Bouchacourt v France* (Application No 5335/06) [2009] ECHR 2276 (unreported), a case which concerned material on a sex offenders' register, the ECtHR in a judgment given on 17 December 2009 declared (para 57) that the retention by a public authority of data relating to a person's private life by itself represented interference with that person's article 8 rights. In *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49, Lord Wilson at para 21 referred to those cases but left open the question whether retention by a public authority of data relating to private life which were not sensitive amounted to an interference

with article 8 rights. It is not necessary to resolve that issue in this appeal as a criminal charge relating to a sexual offence is sensitive personal data under domestic law: Data Protection Act 1998, section 2. Further support for this view of the ambit of article 8 can be found in the judgments of the ECtHR in *Rotaru v Romania* (2000) 8 BHRC 449, para 46 and *MM v United Kingdom* [2012] ECHR 24029/07, para 159, which Lord Reed discussed in *R (T)* (above) between paras 95 and 112. See also *Leander v Sweden* (1987) 9 EHRR 433, para 48 and *Amann v Switzerland* (2000) 30 EHRR 843, para 69. In this case, however, it is sufficient to focus only on the disclosure of the charge in court.

24. It is necessary to consider, first, whether the impugned provision is in accordance with the law and, secondly, whether it was necessary in the interests of one or more of the desirable outcomes set out in article 8(2). The second issue involves a consideration (i) whether the objective of the impugned provision is sufficiently important to justify the limitation of the appellant's right under article 8(1), (ii) whether there is a rational connection between the impugned provision and that legitimate aim or objective, (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether the impact of the right's infringement is proportionate, having regard to the likely benefit of the impugned provision.

25. *"In accordance with the law"*: It is well established that in order to be in accordance with the law under article 8(2) of the ECHR the measure must not only have some basis in domestic law but also be accessible to the person concerned and foreseeable as to its effects. There is a clear basis in domestic law in the 2009 Act, which is an enactment of a democratic legislature. The additional qualitative requirements of accessibility and foreseeability have two elements: (i) a rule must be formulated with sufficient precision to enable any individual, with appropriate advice when needed, to regulate his or her conduct and (ii) the rule must be sufficiently precise to give legal protection against arbitrariness. In relation to the latter element, there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined: *R (T)* (above), para 114 per Lord Reed.

26. The impugned provision innovates on the prior law by making a criminal charge by a police officer the basis for excluding the reasonable belief defence. The Lord Advocate explains that police officers are trained to charge an individual with an offence if they are satisfied that there is sufficient evidence that a crime has been committed. There is no formal guidance on charging people with criminal offences and no distinction is made between adults and children. He informs the court that this appeal has alerted him to the lack of any guidelines on charging children and that he has instructed a review of whether such guidelines are required.

27. If the only rationale of the impugned provision was to prevent a person asserting a reasonable belief defence more than once, the provision could have arbitrary results because it could deprive a person of that defence when he or she had never used it in the past. But the rationale, which the Lord Advocate advances and which is supported by what the representative of the Scottish Government's Legal Directorate told the Parliament, is that the charge by the police officer gives the person charged an official warning that consensual sexual activity with children between the ages of 13 and 16 is an offence. On the hypothesis that there was a warning or notice, the rule that a person once warned would not in future be able to advance the reasonable belief defence would in my view be sufficiently accessible to enable the person charged to regulate his or her conduct and thus be "in accordance with the law".

28. Finally on the topic of the requirement to be "in accordance with the law", I do not accept the submission of the appellant's counsel that the impugned provision gives rise to arbitrary results because a prior charge could relate to an alleged offence which occurred after the occurrence which is the subject of the criminal proceedings in which the accused person wishes to advance the reasonable belief defence. It is straightforward to interpret the impugned provision in a way which avoids that absurd result by reading "A has previously been charged … with a relevant sexual offence" to refer to an offence which is alleged to have occurred before the events which are the subject matter of the proceedings in which the accused person seeks to advance the defence.

29. Thus, as a prior charge can act as a relevant warning, I consider the provision to be "in accordance with the law". The problem in this case, which is relevant to the issue of proportionality, is that the prior charges, which were not charges of consensual sexual activity with a child aged between 13 and 16, did not by themselves provide such a warning.

30. *Necessary for the prevention of crime, the protection of health or morals, and the protection of the rights of others*: (i) The importance of the aims: Of the public purposes listed in article 8(2) as possible justifications for an interference with an article 8(1) right, the prevention of crime, the protection of health or morals, and the protection of the rights of others, in this case potential victims of sexual offending, appear the most relevant. The aims of the legislation, as the Lord Advocate submits, include the protection of children from premature sexual activity, young teenage pregnancy, sexually transmitted diseases, and also exploitation and abuse. It also seeks to deter adults from sexual activity with children under the age of 16. Those aims are undoubtedly legitimate and are consistent with the state's positive obligation to protect children from exploitation and abuse. The aims are, in my view, sufficiently important to justify some limitation of the appellant's right to privacy.

31. *(ii) Rational connection*: As a matter of policy both the United Kingdom Parliament and the Scottish Parliament have not sought to criminalise all sexual activity between an adult and children between the ages of 13 and 16, recognising the possibility of reasonable mistake as to age. In the 2003 Act in England and Wales and in the 2009 Act in Scotland the democratic legislatures have created strict liability offences where sexual activity is with children under the age of 13, but have allowed a role for honest belief as to age to exclude criminal liability where that activity is with older children. In English law the prosecution must exclude such honest belief (para 7 above); in Scots law a reasonable belief defence is available so long as the accused person has not been charged with an earlier relevant sexual offence (paras 10 and 11 above).

32. The rational connection between the restriction of the reasonable belief defence in the impugned provision and the legitimate aims of protecting children and deterring adults from sexual activity with older children principally, but not exclusively, depends on the extent to which the prior police charge can operate as a warning to the person so charged. There are no operating procedures which require police officers to give any particular warning. Instead, the official warning or notice on which the Lord Advocate relies is (if it exists at all) an implied notice as it is left to the charged person to infer from the particular charge that consensual sexual activity with older children is a criminal activity.

33. Until the 2009 Act was enacted, the prior charge which excluded the reasonable belief defence in a charge of sexual intercourse with an older child was a charge of a "like offence", ie principally, having or attempting to have (consensual) sexual intercourse with an older child (para 5 above). As I have said, it was generally accepted that the relevant charge had to proceed to trial before the reasonable belief defence was excluded. In the 2009 Act, by contrast, the charge can relate to a wide range of "relevant sexual offences" in Schedule 1, involving both consensual and non-consensual sexual activity and including offences, such as coercing a person into looking at a sexual image, sexual exposure or voyeurism (sections 6, 8 and 9), in which the age of the victim is not an essential component. The sexual offence in, for example, Part 1 of the Act becomes a relevant sexual offence under Schedule 1 if the victim is in fact under the age of 16. Thus, while the police officer in formulating the charge of a sexual offence may follow the practice in a formal charge in an indictment by narrating the date of birth of the victim, if a child, in cases where that person's age is not an essential component of the crime, the charge itself would contain no further warning about the criminality of consensual sexual activity with an older child.

34. In addition, it is striking that Schedule 1, Part 1, paragraph 1(b) excludes from the list of relevant sexual offences those which prima facie would have been most relevant as a warning to a person who, like the appellant, committed the prior

offence while still aged between 13 and 16, namely the offences of older children engaging in sexual conduct with each other: section 37(1) and (4).

35. In my view there will in many cases be no rational connection between the suggested "warning" and the deterrence of the person who is charged from consensual sexual activity with older children, because there will not be an adequate basis in the charge from which the charged person can infer the official warning about sexual behaviour with children under 16, for which the Lord Advocate contends. On the other hand, the limitation of the availability of the reasonable belief defence, which may often be difficult for the Crown to disprove, is rationally connected with the protection of children from sexual activity and predation, because it creates strict liability offences which are easier for the Crown to prove. It may therefore contribute towards the aim stated in the Policy Memorandum of preventing serial sexual predators evading conviction by repeated use of the reasonable belief defence. I conclude therefore that the impugned provision does not infringe the appellant's article 8 right because of an absence of rational connection.

36. *(iii) Less intrusive means*: Mr O'Neill submits that the Parliament could sufficiently have achieved the legitimate aims of protecting older children from sexual activity and deterring adults from such activity with them by other means which would not interfere with the appellant's article 8 right to the same extent. He puts forward four possibilities. He suggests that the reasonable belief defence could be disallowed either if the accused person has been convicted of a relevant sexual offence or if the accused has actually relied on the defence in court on a previous occasion. Alternatively, the Parliament could have adopted the recommendation of the Scottish Law Commission to allow the Crown to challenge the credibility of the accused if he or she has attempted to raise a reasonable belief defence in earlier criminal proceedings. Finally, he suggests that if the mere fact of a police charge were to be used as the basis for modifying the individual's defences, its effect could be confined, for example, to imposing a legal burden rather than merely an evidential burden on the accused to establish the existence of the reasonable belief.

37. I am not persuaded. It is important to recall that the question of whether the Parliament could have used a less intrusive measure does not involve the court in identifying the alternative measure which is least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the article 8 right is one which it was reasonable for the Parliament to propose: *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700, para 75 per Lord Reed; *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, para 110. Had the 2009 Act provided that the reasonable belief defence would not be available if on an earlier occasion the accused had been charged with an offence which itself objectively entailed a warning of the illegality of consensual sexual activity with older children, the fact that there were other options, which were less intrusive, to restrict the availability of that defence would not cause an infringement of the

individual's article 8 right. The problem for the Lord Advocate in this appeal is where to find such a warning.

38. *(iv) Proportionality*: The Scottish Parliament has sought to strike a balance between protecting young people under the age of 16 from both premature sexual activity and predation on the one hand and the recognition that it might be harsh to criminalise an honest mistake when an older child appears older than his or her true age. It has expanded the reasonable belief defence by making it available to accused persons regardless of their age. But it has set a limit on the defence by excluding it when the accused person has previously been charged with a relevant sexual offence. As I have said, the principal rationale now advanced for the use of the prior charge to limit the availability of the defence is that the charge amounts to "an official warning about sexual offences with children" as the Lord Advocate states in his written case.

39. The balance, which this court is enjoined to address, is different. It is the question of a fair balance between the public interest and the individual's right to respect for his or her private life under article 8. The question for the court is, in other words, whether the impact of the infringement of that right is proportionate, having regard to the likely benefit of the impugned provision.

40. In addressing this question, I acknowledge that the Scottish Parliament might have chosen to make sexual activity with older children a strict liability offence by excluding altogether the reasonable belief defence. But it did not. Instead, it chose to use as a limit on the defence the prior police charge of a relevant sexual offence, thereby bringing the limitation in the impugned provision within the ambit of article 8.

41. In addressing the limit which the Parliament has chosen to place on the defence and its effect on the appellant's article 8 right I bear in mind that

> "… it will almost always be possible for the courts to conclude that a more precisely tailored bright line rule might have been devised than the one selected by the body to which the choice has been democratically entrusted and which, unlike the courts, is politically accountable for that choice. … the courts are not called on to substitute judicial opinions for legislative or executive ones as to the place at which to draw a precise line."

(R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57, [2015] 1 WLR 3820, para 93 per Lord Sumption and Lord Reed (in a dissenting

judgment)). I also have regard to the fact that once a police officer has charged a person with a relevant sexual offence, the record of that charge will remain available to exclude the reasonable belief defence for the rest of that person's life.

42. I am satisfied that in principle a warning by a police officer that sexual activity with older children, including consensual activity, was a criminal offence, could form a basis for the exclusion of the reasonable belief defence without infringing an accused person's article 8 right. The problem in this case is that there does not appear to have been such a warning.

43. The relevant sexual offences with which the appellant was charged when he was aged 14 (para 13 above) were common law offences which could be committed only against children under the age of puberty and a statutory offence which could be committed only against girls aged 12 or over and under 16. To that extent, he, when a child, was given notice that certain sexual activity involving children was criminal. But the charges, which involved showing online pornographic images to a young boy and the exposure of his genitals to girls, did not involve consensual sexual activity with an older child and could not amount to an implicit warning that such activity was an offence. There is no suggestion that the police officer gave any explicit warning that such consensual activity amounted to an offence or that in future any such sexual activity with an older child would be a strict liability offence because the reasonable belief defence would not be available. No charge was laid against the appellant at a trial. Instead, the case was referred to the Children's Reporter, who appears to have decided to take no action.

44. In my view the use of the prior charges in this case to exclude the reasonable belief defence amounts to a disproportionate interference with the appellant's article 8 right because the prior charges did not give the official warning or official notice, which is the only rationale of the impugned provision which the Lord Advocate seeks to defend. If the appellant had in the past been charged with an offence of consensual sexual activity under section 37 of the 2009 Act and that offence had been listed as a relevant sexual offence, it would clearly be arguable that he had been given sufficient notice to meet the rationale of an official warning. Similarly, if an adult had been charged with the equivalent of a "like offence" under the prior law, there would clearly be scope for finding that there had been an implicit warning which would justify a restriction of the defence by the Parliament. But that is not what happened in this case.

45. When discussing whether there was a rational connection between the impugned provision and the legitimate aim, I have observed that the list of "relevant sexual offences" includes charges in which the age of the victim is not an essential component, extends far beyond consensual sexual activity with an older child and excludes charges relating to sexual conduct (including consensual conduct) under

section 37 of the 2009 Act, which might be most relevant to a person of the appellant's age when he was first charged. This suggests that the impugned provision is likely in many other cases to give rise to infringements of article 8 because of the absence of a warning.

Discrimination: article 8 and article 14

46. Having reached the conclusions which I have in relation to proportionality, it is not necessary to discuss this alternative challenge.

Conclusion and remedy

47. I am satisfied that section 39(2)(a)(i) of the 2009 Act is incompatible with Convention rights in its application to the appellant because it interferes disproportionately with his article 8 right (paras 43-44). It is likely to do so in all other cases where the prior charge does not objectively give the relevant warning.

48. I do not consider that it is possible to invoke section 101 of the Scotland Act 1998 to interpret the impugned provision narrowly so as to bring it within the competence of the Parliament.

49. The court's power under section 102 of the Scotland Act 1998 to suspend or vary the effect of its decision on a compatibility issue is to be exercised by the High Court of Justiciary: Scotland Act 1998, section 102(5A).

50. I would therefore allow the appeal and remit the proceedings to the High Court of Justiciary.

LORD REED: (with whom Lord Kerr, Lord Wilson and Lord Hughes agree)

51. When the provision which became section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 was introduced into the Scottish Parliament, as part of the Sexual Offences (Scotland) Bill, the Parliament was told, in the Scottish Government's policy memorandum which accompanied the Bill:

> "The Bill provides that it shall be a defence to a charge of sexual activity with an older child that the accused reasonably believed that the child was 16 years old or older. This is similar

> to what the SLC [Scottish Law Commission] proposed but differs by restricting the use of the defence to those not previously charged with a like offence.
>
> This reflects the current law, where the defence is allowed in respect of a charge of intercourse with a girl under 16, but it is a requirement that the accused had not previously been charged with a like offence." (paras 131-132)

52. As Lord Hodge has explained, however, the new provision departed from the then current law in two important respects. First, it restricted the defence to those not previously charged by the police, whereas the then current law (contained in section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995), as generally understood, restricted the defence to those who had not previously stood trial. That was a significant change, since people who are charged by the police are not necessarily brought to trial. The present case provides an example: the appellant was charged by the police when he was 14, but was not prosecuted. Instead, like most children in such circumstances, he was referred to the Children's Reporter, who seemingly decided to take no action.

53. Secondly, the defence was previously restricted to those not previously charged with "a like offence", defined as meaning (i) having or attempting to have unlawful sexual intercourse with a girl aged between 13 and 16, and (ii) permitting a girl under the age of 16 to use premises for sexual intercourse. The new provision, on the other hand, restricted the defence to those not previously charged with "a relevant sexual offence", defined in Schedule 1 to the 2009 Act so as to include a far wider range of offences. That was another important change.

54. As to the policy justifying the provision, the policy memorandum explained that the Scottish Government disagreed with the Scottish Law Commission's recommendation that there should be no restriction on the availability of the defence, and stated:

> "We were concerned that removing this restriction could enable serial sexual predators to evade conviction and have therefore re-instated it." (para 135)

In evidence to the Scottish Parliament, the Scottish Government's Bill Team Leader explained the thinking more fully:

> "Now, as regards the relevant offence and its restriction, the defence … is restricted to those not 'previously ... charged by the police with a relevant offence' to prevent a serial sexual predator who relied on that defence on a previous occasion but was acquitted of all charges from using the same defence to evade conviction on a subsequent offence or offences. … In each individual instance, the accused's claim of mistaken belief as to the child's age may appear to be reasonable. However, when considered together, the accused's behaviour would indicate that he or she was deliberately preying on children." (Subordinate Legislation Committee, 28 October 2008, col 392)

So the policy justification was to prevent the defence from being exploited by serial sexual predators.

55. No one could quarrel with that objective. The problem is that it cannot provide a legally tenable justification for the measure which was introduced and enacted. Indeed, the Lord Advocate has not attempted to defend the rationale put forward in the policy memorandum and in the Bill Team Leader's evidence. The difficulty with that rationale is that the restriction on the availability of the defence is not confined to persons who relied on the defence on a previous occasion, or even to persons who could conceivably have relied on the defence on a previous occasion. For example, a person who, like the appellant, was previously charged with offences against children under the age of puberty could not possibly have relied on a defence that he reasonably believed that the victims were 16 or older, since that would not be a defence to the charge.

The justification for the interference with article 8 rights

56. The need for a legally defensible justification for the provision arises from the fact, conceded on behalf of the Crown, that the application of section 39(2)(a)(i) involves an interference with rights guaranteed by article 8 of the European Convention on Human Rights, since it involves the disclosure of information about an earlier police charge. That concession departs from the Crown's position before the courts below.

57. Given that concession, it is legally necessary for the interference to be justified under article 8(2). The justification which is now put forward was first advanced in evidence given to the Scottish Parliament by a representative of the Scottish Government Legal Directorate. It was not, however, the policy which underlay the drafting of the provision and was set out in the policy memorandum,

namely to prevent the defence from being exploited by serial sexual predators. Unsurprisingly, the justification now put forward does not fit particularly well with a provision which was drafted with a different rationale in mind.

58. The justification now put forward is that "where the accused has been charged by the police with a relevant sexual offence [he] has therefore received an official warning about sexual offences with children". It is argued that such a warning alerts the person charged to the importance of a young person's age in relation to sexual behaviour, and therefore justifies depriving that person, if he is later charged with one of the sexual offences against older children set out in sections 28 to 37 of the 2009 Act, of the defence that he reasonably believed that the complainer was 16 or older. On that basis, it is argued that the disclosure of the previous charge is justified in the interests of protecting older children from sexual exploitation.

59. In considering this justification, it is important to understand that sections 28 to 37 are concerned primarily with consensual sexual behaviour involving older children. Non-consensual offences, such as rape or sexual assault, are dealt with elsewhere in the 2009 Act. For example, a boy and girl of 15 who willingly have sexual intercourse together are both guilty of an offence under section 37. Section 39(1), which provides the defence taken away by section 39(2)(a)(i), provides the boy and the girl with a defence if they reasonably believed that their partner was 16 or older. If, on the other hand, the girl did not consent to sexual intercourse, the offence would be rape, which is dealt with in section 1 of the 2009 Act. No question of a defence under section 39(1) would arise: it is, of course, no defence to a charge of rape that the rapist was mistaken as to his victim's age.

60. Similarly, a boy of 16 who touches sexually a girl of 15, with her consent, commits an offence under section 30 of the 2009 Act. If he reasonably believed that she was 16 or older, he has a defence under section 39(1), unless he is deprived of it under section 39(2)(a)(i). If, on the other hand, the girl did not consent to being touched, the offence would be sexual assault, which is dealt with in section 3 of the 2009 Act. No question of a defence under section 39(1) could arise: a mistake as to the age of the victim is irrelevant to the question whether she was assaulted or not.

61. There are also some offences in sections 28 to 37 which can be committed either consensually or not (such as causing a child aged over 13 but under 16 to look at a sexual image), but in practice the offences charged under those sections are primarily concerned with sexual activities involving two or more willing parties. It is because even willing children need to be protected from premature sexual activities that these offences have been created; and it is because of the possibility that a person can make a reasonable mistake as to the age of an older child that the defence in section 39(1) has been provided.

62. Considered against that background, the fundamental problem with the justification now put forward for depriving a person of the defence - namely, that by being previously charged with a "relevant sexual offence", he has been alerted to the importance of making sure that his partner in sexual activities is over the age of consent - is readily apparent. The problem is that "relevant sexual offences" are defined in Schedule 1 to the 2009 Act as including almost all sexual offences, provided they were committed against a person under the age of 16. That made sense when the policy was to prevent the defence from being exploited by serial sexual predators. But it does not make sense if the justification is that the person charged has been warned about the importance of the age of consent. That is because the age of the victim is irrelevant to many sexual offences. As I have explained, rape and sexual assault, for example, are offences whatever the age of the victim; and the same is true of many other offences concerned with non-consensual sexual activities. A person who is charged with an offence of that nature, even if the complainer is aged under 16, is not in consequence put on notice that consensual sexual activity with a person of that age is equally unlawful.

63. An analogous problem arises also where the "relevant sexual offence" is one which can be committed only against younger children. For example, a person who is accused of having sexual intercourse with a girl under 13 will be charged with the rape of a young child, under section 18 of the 2009 Act. No question arises of a defence under section 39(1): sexual intercourse with a child under 13 is an offence of strict liability. It is difficult to regard such a charge as constituting a warning of the need to make sure that an older girl who is sexually mature and willing to engage in sexual intercourse is 16 or older. This point also arises in relation to the common law offences with which the appellant was charged when he was 14, since they could be committed only against children under the age of puberty. Even the statutory offence with which he was then charged, although one which could only be committed against someone aged between 12 and 16, was concerned with non-consensual conduct. On what basis could it be said that his being charged with offences of those kinds alerted him to the importance of ensuring that an older person who was willing to engage in consensual sexual behaviour with him was over the age of consent?

64. In short, the difficulty arises from the width of the definition of "relevant sexual offences" in Schedule 1 to the 2009 Act. Since such offences are not confined to sexual conduct which is illegal *because* it is with children in the relevant age group, prior charges of such offences cannot be taken to have alerted the accused to the importance of making sure that a person is over 16 before engaging in the sexual activities which are criminalised by sections 28 to 37. In addition, since the offences listed in Schedule 1 include non-consensual offences, prior charges cannot be taken to have alerted the accused to the importance of age in the context of consensual sexual conduct.

65. The difficulty is underlined by the fact that relevant sexual offences are defined in paragraph 1(b) of Schedule 1 so as to exclude consensual sexual activities between older children. For example, a 15 year old who has previously been charged with having sexual intercourse with another 15 year old is not deprived of the defence. Yet that is the clearest example of a situation where the charge alerts the person charged to the importance of the age of consent when engaging in consensual sexual behaviour. The explanation, presumably, is that it was considered inappropriate to apply the "serial sexual predator" policy to offenders who were themselves children at the time of a previous charge involving consensual behaviour with another child.

66. It follows that the interference with the right guaranteed by article 8 which is implicitly authorised by section 39(2)(a)(i) cannot be regarded as proportionate in cases (such as the present case) where the necessary link between the prior charge and the supposed warning does not exist. This problem cannot be resolved by interpreting the legislation narrowly: it can only be resolved by further legislation. It follows that section 39(2)(a)(i) must be held to be incompatible with article 8 and therefore not law.

67. Given that conclusion, and bearing in mind also that the Lord Advocate has instructed a review in relation to the charging of children, it is unnecessary to reach a concluded view on the challenge under article 14.

Conclusion

68. For these reasons, and those given by Lord Hodge, I agree that the appeal against the decision of the High Court of Justiciary should be allowed, and that the proceedings should be remitted to that court.