APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 70
HCA/2015/3552/XC

Lord Justice General
Lady Dorrian
Lord Bracadale

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

REFERENCE OF A COMPATIBILITY ISSUE

under section 288ZB(1) of the Criminal Procedure (Scotland) Act 1995

in causa

MARK O'ROURKE

Minuter:

against

HER MAJESTY'S ADVOCATE

Respondent;

Minuter: O'Neill QC, Macintosh; John Pryde & Co (for EF Kelly, Coatbridge)
Respondent: K Harper, Solicitor Advocate, AD; the Crown Agent

26 February 2016

Introduction

[1] This is a reference to the High Court of Justiciary to determine a compatibility issue in terms of section 288ZB of the Criminal Procedure (Scotland) Act 1995. The minuter has been indicted on two charges of having sexual intercourse and sexual activity with a child

aged 14, contrary to sections 28 and 30 of the Sexual Offences (Scotland) Act 2009. At the time of the alleged offences, he was 19. The minuter does not dispute that the conduct occurred as libelled.

[2] The minuter wishes to rely on the statutory defence that he reasonably believed that the complainer was 16 years of age at the time of the offences, in terms of section 39(1)(a) of the 2009 Act. However, section 39(2)(a)(i) precludes an accused from relying on that defence when he has previously been charged by the police with a relevant sexual offence. Relevant sexual offences are listed in Schedule 1. They all relate to sexual conduct with children under the age of 16.

[3] When he was aged 14, the minuter was charged by the police with two instances of lewd and libidinous practices towards younger children, as well as indecent behaviour towards a child under 16, contrary to section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. He was referred to the Children's Reporter. Although neither party was aware of what had happened thereafter, it was not disputed that he was not prosecuted in the criminal courts. The general issue raised by the reference is the compatibility of section 39(2)(a)(i) with Articles 6 (fair trial, including presumption of innocence) and 8 (respect for private life) of the European Convention on Human Rights and Fundamental Freedoms.

Legislation

[4] The Sexual Offences (Scotland) Act 2009 was enacted following a report by the Scottish Law Commission (*Report on Rape and other Sexual Offences* (SLC No 209, 2007)). The Commission considered the reasonable belief defence under the pre-existing law (Criminal Law (Consolidation) (Scotland) Act 1995, s 5(5)(b); see also the Criminal Law Amendment

Act 1922, s 2). Section 5(5)(b) of the 1995 Act provided an accused with a defence if he reasonably believed that the complainer was 16, provided that he was under the age of 24 at the time of the offence, and had not previously been "charged" with a "like" offence. The Commission took the view that the restrictions on the availability of the defence were "unprincipled". They recommended (para 4.62) that the defence be replaced with one of reasonable belief without qualification. The Commission were puzzled by how the Crown could lead evidence of a previous charge, but thought that this could be permitted, were the defence to be unqualified, to test the credibility of that defence (para 4.61) subject to the question of "prejudice".

[5] The Scottish Government did not accept the Commission's recommendation. The Bill as introduced contained the same restrictions as now appear in the 2009 Act. The Government's Policy Memorandum set out (p 135) the reason for retaining the restrictions as being that to remove them "could enable serious sexual predators to evade conviction". The rules on evidence meant that the court could not hear the evidence of a previous charge, and could not therefore take it into account in assessing credibility. The Parliament's Justice Committee considered the use of a previous charge by the police, as distinct from a conviction (Report of the Justice Committee: Stage 1; 28 October 2008 SPPB 124). Oral evidence from the Legal Directorate emphasised that the purpose of the defence was not to provide a "get out of jail card" (*sic*), but rather a "shot across the bows" (*sic*). An accused could make use of the defence once, but, after he had been charged with a relevant offence, he was on notice that he ought to regulate his conduct with those who may be children very carefully.

Terms of the Reference

[6] The sheriff refers four questions:

(i) Is the accused's Article 8 right engaged when he is prohibited from utilising the defence provided by section 39(1)(a) of the 2009 Act by virtue of section 39(2)(a)(i) where he was charged with a relevant sexual offence whilst a child and the Lord Advocate did not instruct prosecution in the matter?

(ii) *Esto* the accused's Article 8 right is engaged, is the interference with his right in this prosecution in accordance with the law, necessary and accordingly compatible with his Article 8 right?

(iii) Will the unavailability of a mechanism by which the accused can challenge the validity of a charge made by police officers for a relevant sexual offence, without legal instruction from the Crown, result in the whole [trial] being unfair in terms of Article 6?

(iv) Is section 39(2)(a)(i) compatible with Article 8 insofar as it applies to charges made against children where the Lord Advocate subsequently does not prosecute on the matter? Should the terms of section 39(2)(a)(i) be read down, so as to exclude the situation where children are "charged by police" with a relevant sexual offence other than in circumstances where the Lord Advocate has instructed a prosecution of that child on that offence?

Submissions

Minuter

[7] The minuter submitted that section 39(2)(a)(i) of the 2009 Act was incompatible with the European Convention and therefore not law. The court should delete the words "if he has ever been charged by the police with a relevant offence". Section 39(2)(a)(i) was incompatible with Articles 6 and 8 separately, and when read together with Article 14.

[8] Section 39(2)(a)(i) was incompatible with the Article 6(2) right to be presumed innocent. It was open to a member state in principle to exclude all defences, and to create an offence of strict liability (*Salabiaku* v *France* (1991) 13 EHRR 379 at para 26). Where the state did provide a defence, that defence had to be Convention compliant. Article 6(2) had two dimensions. Not only were those accused of a crime entitled to be presumed innocent until

proven guilty, but also those who had been acquitted of a crime were not to be treated as though they were guilty (*Allen* v *United Kingdom* [2014] ECHR 25424/09 at paras 93-4). Article 6 was engaged because the minuter would not be able to utilise the defence even where he had been acquitted of the previous charge (*G* v *United Kingdom* (2011) 53 EHRR SE25 at para 29). The minuter would necessarily be found guilty, if the reasonable belief defence was not available to him, on the basis of the previous charge. This created a presumption of guilt. A previous conviction may be a basis for restricting the availability of a defence, but a previous charge could not be. It prevented the court from respecting the previous decision not to prosecute in favour of referring the matter for a non-criminal welfare-based disposal (*S* v *Miller* (No 1) 2001 SC 977 at para [23]). Not only was there no conviction, there had been no criminal proceedings (cf *Watson* v *King* 2009 SLT 228).

[9] Whilst member states could create offences of strict liability, where a defence was provided, it was not legitimate to discriminate between those who had previously been charged and those who had not. The prohibition against discrimination in Article 14 applied to additional rights falling within the ambit of any article (*EB* v *France* (2008) 47 EHRR 21 at 48-9; *McGeoch* v *Lord President of the Council* 2014 SC (UKSC) 25 at para 63). Article 14 was very broad. It prevented discrimination not only where the characteristic was intimate or inherent and thus "personal", but also where it related to a particular "status" of an individual (*Clift* v *United Kingdom* [2010] ECHR 7205/07 at para 58).

[10] The minuter's right to respect for his private life under Article 8 was engaged when he was criminalised for having sexual intercourse with an older child (*G* v *United Kingdom* (*supra*) at para 35, citing *SL* v *Austria* (2003) 37 EHRR 39). Sexual activity is an element of private life which falls within the ambit of Article 8 (*Dudgeon* v *United Kingdom* (1982) 4 EHRR 149). There was no subjective criminality when the minuter believed that the

complainer was over the age of 16. That conduct fell within the notional expectation of privacy.

[11] Article 8 was not an absolute right. Any interference with it required to satisfy the requirement of legality (*R (Purdy)* v *Director of Public Prosecutions* [2010] 1 AC 345 at para 40). The third limb of the legality test was substantive proportionality. There had to be sufficient safeguards to avoid the risk of power being arbitrarily exercised (*Gillan* v *United Kingdom* (2010) 50 EHRR 45 at para 76). Legality in this substantive sense may be breached where there was an over-rigid regime which did not contain sufficient flexibility to avoid an unjustified interference with a fundamental right (*MM* v *United Kingdom* [2012] ECHR 24029/07). The existence of safeguards could demonstrate that the state had properly addressed the proportionality of the interference with the right (*R (T)* v *Chief Constable of Greater Manchester Police* [2015] AC 49 at para 114). There were no safeguards in this case. Section 39(2)(a)(i) embodied an over-rigid regime without sufficient flexibility. The unavailability of a mechanism to challenge the validity of the previous charge by the police was contrary to the principle of legality.

[12] There were four elements to the assessment of proportionality: whether the objective was sufficiently important to justify the limitation; whether the measure was rationally connected to the objective; whether a less intrusive measure could have been used; and whether the effect of the measure on the individual's right was disproportionate to the likely benefit of the measure (*Bank Mellat* v *Her Majesty's Treasury* (*No 2*) [2014] 1 AC 700). The Government had made it clear that the objective of section 39(2)(a)(i) was to prevent serial sexual predators from evading conviction. This was a legitimate aim and disallowing the reasonable belief defence was rationally connected to it. However, the provision failed on the third and fourth limbs. The use of "charge" rather than conviction was over-inclusive. It

would catch more than those who were serial sexual predators. A fairer balance could have been struck; such as a measure to restrict the defence on the basis of a conviction, or to have accepted the Commission's recommendation that evidence of the previous charge could be led before the jury to determine credibility.

[13] The restriction of the defence ought to differentiate between offences committed by an adult and those committed by a child. The restriction was within the ambit of the minuter's Article 8(1) right, and, when read together with Article 14, there was a violation in failing to differentiate. Article 14 required states to treat differently persons whose cases were significantly different, unless there were an objective and reasonable justification for not doing so (*Thlimmenos* v *Greece* (2001) 31 EHRR 15). The Scottish system treated children accused or convicted of crimes differently from adults, in line with the practice of other jurisdictions (*R (Smith)* v *Secretary of State for the Home Department* [2006] 1 AC 159 at para 12; *D* v *B* [2008] SCC 25; *Centre for Child Law* v *Minister for Justice and Constitutional Development* [2009] ZACC 18). This requirement of Convention compatibility drew upon Article 40 of the UN Convention on the Rights of the Child (*S* v *United Kingdom* (2009) 48 EHRR 50 at para 124). The Scottish Government had not considered the aims of Article 40 in considering how section 39(2)(a)(i) would impact upon children.

Crown

[14] The Advocate Depute initially conceded that the minuter's Article 8 right was engaged on the basis that private life was a broad concept, not subject to exhaustive definition. It included the collection and retention of information about convictions and police cautions (*PG* v *UK* (2001) EHRR 1272 at para 56; *R (L)* v *Commissioner of Police of the Metropolis* [2010] 1 AC 410 at para 27; *R (T)* v *Chief Constable of Greater Manchester Police*

[2015] AC 49). That concession was withdrawn. The criminalisation of sexual conduct between an adult and a 14 year old child did not engage the minuter's right to respect for private life. The first question ought to be answered in the negative (*Logan* v *Thomson* 2011 SLT 345; *Watson* v *HM Advocate* 2009 SCCR 323).

[15] Even if Article 8(1) were engaged, the interference was in accordance with the law, necessary and proportionate. In order for the interference to be in accordance with the law there had to be safeguards to enable the proportionality of the measure to be examined (*R (T and another)* v *Chief Constable of Greater Manchester Police* (*supra*) at para 114). The interference was not arbitrary. It only affected those who had been charged with a relevant offence. This would be a very small category of individuals. The offence with which the minuter had been charged when he was 14 was highly relevant to the present prosecution (*cf R (T)* v *Chief Constable of Greater Manchester Police* (*supra*) at para 114). The aim of the legislation was to protect young and vulnerable children from premature sexual activity, exploitation and abuse. This was a legitimate aim (*G* v *United Kingdom* (*supra*) at para 36; *Logan* v *Thomson* (*supra*) at para [18]). The use of the previous charge was not a disproportionate interference. The reference to the Children's Reporter was not an indication that the offences were minor. There had been sufficient evidence to prosecute. They were not isolated incidents. The minuter's whole history of offending (which included offences of a sexual nature) should be taken into account in considering whether the interference was proportionate.

[16] Children were in a special position in the criminal justice system. They required special protection in certain situations (*S* v *United Kingdom* (2009) 48 EHRR 50; *Re JR38's application for Judicial Review* (*Northern Ireland*) [2015] 3 WLR 155 at para 53; UN Convention on the Rights of the Child, Art 40). In this case, the reliance on offences with which the minuter had been charged as a child was justified. Now that the minuter was an adult with a

relevant history of sexual offending, it was proportionate to restrict the defences available to him. The state had a positive duty to protect the rights of other citizens, in particular the right of children not to be subjected to unlawful sexual activity (*E* v *United Kingdom* [2003] 36 EHRR 31). A balance required to be struck between the rights of the minuter and the interests of the community. A fair balance had been struck by section 39(2)(a)(i) of the 2009 Act. In any event, a member state had a margin of appreciation in assessing the necessity and proportionality of an interference with a Convention right (*S* v *United Kingdom* (*supra*)). That margin of appreciation was wide where the aim of the measure was to protect vulnerable children from serious sexual harm (*G* v *United Kingdom* (*supra*)).

[17] Whilst the unavailability of the statutory defence by virtue of section 39(2)(a)(i) rendered the offence one of strict liability, the prosecution of strict liability offences was not incompatible with Article 6 (*Salabiaku* v *France* (*supra*) at para 33; *R* v *G* [2009] 1 AC 92 at paras 30 and 31; *G* v *United Kingdom* (*supra*) at para 27). Parliament was entitled to choose to limit the availability of a defence to anyone that had not previously been charged with a relevant sexual offence (*Watson* v *HM Advocate* (*supra*) at para [16]). It was open to Parliament to restrict the availability of the defence by virtue of a previous "charge", "prosecution", "conviction", or even "accusation". Parliament specifically considered and chose the verb "charged" advisedly.

Decision

[18] The purpose of Article 6 is to ensure that the trial process is fair. The focus is on procedural fairness. The presumption of innocence, enshrined in Article 6(2), is a procedural right, and is one element of a fair trial. Article 6 does not influence the substantive criminal law, in so far as national measures determine the limits of offences and

defences (*G* v *United Kingdom* (2011) 53 EHRR SE25 at para 26; *Salabiaku* v *France* (1991) 13 EHRR 379 at para 26). It would have been open to the Scottish Parliament to create an offence of strict liability for the conduct in which the minuter is alleged to have been engaged. The considered choice to create, but then limit, the defence provided in section 39(2)(a)(i) was one related to the substantive criminal law. It was one legitimately open to the Parliament to make.

[19] It is not correct to describe the effect of the provision as creating a presumption of guilt. The minuter is presumed to be innocent of the conduct. The burden of proof remains on the Crown to establish, beyond reasonable doubt by corroborated evidence, that the conduct as libelled in the indictment took place. The effect of section 39(2)(a)(i) is that the Crown will not have to prove that the minuter knew that the complainer was under the age of 16. That is entirely different to presuming him to be guilty. The minuter has not identified any procedural complaint. For that reason, Article 6 is simply not engaged.

[20] As it cannot be said that the minuter has brought himself within the ambit of Article 6, there is no requirement to consider Article 6 combined with Article 14 (*Clift* v *United Kingdom* [2010] ECHR 7205/07). In any event, the decision to limit the defence to those who have not previously been charged is not one which would fall foul of Article 6 and 14 taken together. Whilst being charged by the police may result in the minuter having a status relevant to Article 14 (*Clift* v *United Kingdom* (*supra*) at 59), the restriction of the defence to those not previously charged is not discriminatory. Individuals who have been charged previously with a relevant sexual offence towards children are in a different position to those who have never been charged. They have previously been warned about sexual offending against children. The purpose of the restriction in section 39(2)(a)(i) is to

prevent sexual predators from avoiding conviction by the repeated use of the defence of reasonable belief.

[21] Two separate aspects of the minuter's private life, which may engage the protection of Article 8, have been identified in the reference. The first, raised by the Crown, is that the previous charge constituted an element of his private life. If a charge is an element of private life, it may be an element of private life to which an individual is entitled to respect (*R (T)* v *Chief Constable of Greater Manchester Police* [2015] AC 49). What distinguishes *R (T)* from the present one is the element of publication or dissemination of the information. The state does not interfere with the minuter's right to respect for his private life by retaining and storing information relating to a previous charge. The interference with the right is in the release of that information (*R (T)* v *Chief Constable of Greater Manchester Police* (*supra*), Lord Wilson at para 16 citing *R (L)* v *Commissioner of Police for the Metropolis* [2010] 1 AC 410, Lord Hope at para 27). There is no interference with that aspect of the minuter's private life requiring justification.

[22] The second aspect is the minuter's right to privacy in his sexual life, or more specifically, respect for his choice to engage in sexual activity with a child, who was in fact aged 14, as an adult aged 19. The reference asks whether the restriction of the defence engages his Article 8 right. The real focus of the challenge is the criminalisation of an adult who engages in sexual activity with a child, whom he believes to be over the age of 16, and whether that could constitute an interference with his right to respect for his sexual life requiring justification. The minuter relied heavily upon the European Court in *G* v *United Kingdom* (*supra*) and the House of Lords in *R* v *G* [2009] 1 AC 92.

[23] In general, an individual's sexual life may be considered to be an aspect of his private life. The term "private life" is a broad concept (*Dudgeon* v *United Kingdom* (1982) 4 EHRR

149). That does not mean that an individual is entitled to respect for any act which he may commit because he considers it to be part of his sexual life in terms of Article 8 (*Laskey* v *United Kingdom* (1997) 24 EHRR 39; *R* v *G (supra*), Baroness Hale at para 54). The state is under a positive obligation to ensure that the physical and moral integrity of children is respected (*X and Y* v *The Netherlands* (1985) 8 EHRR 235). The minuter relied on *G* v *United Kingdom* (*supra*) in asserting that Article 8(1) "is undoubtedly engaged". *G* can be distinguished in a number of respects. First, it involved sexual activity between two children, as opposed to an adult and a child. Secondly, the circumstances of the complaint were quite different. The complaint in *G* was the prosecution of the appellant for the "rape of a child under 13" as opposed to the alternative offence of sexual activity with a child. The issue was not whether the prosecution of *G* for his choice to have sexual intercourse with a child aged 12 was in itself sufficient to engage Article 8. The plurality of offences, only one of which was labelled as "rape", in circumstances where the activity was between two children and the appellant believed that the complainer was the same age, were all important contextual factors (*G* v *United Kingdom* (*supra*) at para 35). They are all factors which are not present in this case. The stigmatisation of a 15 year old as a "rapist" in circumstances where the activity was *prima facie* consensual, with the consequences that that would inevitably have for the rest of his life, and in the face of an alternative offence under section 13, was a key element in the argument (*R* v *G* (*supra*), Lord Hope at 35; *G* v *United Kingdom* (*supra*) at 32). It is worthy of note that *SL* v *Austria* (2003) 37 EHRR 39, which was cited in *G*, was a decision on Article 14 read together with Article 8. The court held that the circumstances fell within the ambit of Article 8, and did not go on to consider whether Article 8 was engaged in itself (*SL* v *Austria* (*supra*) at para 29).

[24] The minuter is not entitled to respect for his decision, as an adult, to engage in sexual activity with a child under the age of 16. That act does not engage the protection of Article 8 (*R* v *G* (*supra*), Lord Hoffman at para 97-98; *Logan* v *Thomson* 2011 SLT 345, LJC (Gill) at para 15).

[25] Even if Article 8(1) were engaged, the interference is both in accordance with the law and proportionate. 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).

[26] It may be worth adding that, in practical terms, evidence of a previous charge would not be led before a jury. If agreement were not reached on whether a charge had been made, the issue would require to be resolved outwith the jury's presence (at a Preliminary Hearing or a First Diet). Contrary to the thinking of the Commission, the admission of evidence of a previous charge, or indeed conviction, before a jury (or a sheriff), to undermine an accused's credibility in relation to his belief, would not fit well with Scots criminal procedure's approach to fairness.

[27] If the provision does fall within the ambit of Article 8, it is necessary to consider whether Article 14, read together with Article 8, is engaged by the failure of the statute to distinguish between a previous charge against a child as distinct from an adult. Article 14 requires different cases to be treated differently (*Thlimmenos* v *Greece* (2001) 21 EHRR 15).

Whilst the procedure for the trial and sentencing of children and adults may differ, in recognition of the welfare of the child offender, the substantive criminal law generally applies equally to adults and children. In the present case, there is no principled basis upon which to suggest that a previous sexual offence against a child committed by a child is any more or less likely to be repeated than if it were committed by an adult. There is no basis to treat the two differently for the purposes of the substantive criminal law. In these circumstances, there is no ground for a complaint under Article 14, when read together with Article 8.

[28] Questions (i), (iii) and the second part of (iv) in the reference are answered in the negative. Questions (ii) and the first part of (iv) are answered in the affirmative. The case is remitted to the sheriff to proceed as accords.