APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 2
HCA/2024/553/XC and
HCA/2024/554/XC

Lord Justice General
Lord Armstrong
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the references by Her Majesty's Advocate to the High Court of Justiciary under section 288AB(4) of the Criminal Procedure (Scotland) Act 1995 in the summary prosecutions by

THE PROCURATOR FISCAL, DUNDEE

against

(First) JH; and (Second) LL

Minuters

and

THE COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE IN SCOTLAND

Interveners

HM Advocate: Gill KC AD, Stalker AD, Jadelski AD; the Crown Agent
Minuters: Mackintosh KC, Loosemore; PDSO Dundee
Interveners: Mure KC, Reid

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17 January 2025

Introduction

[1] This is a reference about whether the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 applies to the Lord Advocate when exercising her

prosecutorial functions. If it does, a question arises of whether there is a duty on the Lord Advocate to ensure that, when prosecuting those under the age of 18, the Convention is complied with by, for example, proceeding only in courts which exclude members of the public. If so, the next issue is whether the Convention has been breached and what the consequences of that might be for the two summary prosecutions in which the references have been made.

[2] In their submissions the minuters sought to widen the issues for consideration to include breaches of Articles 6 and 8 of the European Convention, which had been raised before the sheriff. They wished to examine the availability of legal aid for children and the manner in which children ought to be cautioned by the police. These were not the subject of the References and were therefore not considered by the court. It will remain for the sheriff to deal with them in due course.

The Convention

[3] The UN Convention provides a number of high level, general principles about the manner in which children ought to be treated in both the civil and the criminal justice systems. In all actions concerning children "the best interests of the child shall be a primary consideration" (Article 3.1). A child who is capable of forming his own views shall have the right to express those views freely and they are to be given "due weight" (Article 12.1) The child is to be given the opportunity to be heard in judicial proceedings affecting him either directly or through a representative in a manner consistent with procedural rules (Article 12.2).

[4] Every child who is accused of a crime is to be (Article 40.1):

> "… treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights … of others and

> which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

A number of more specific rules are set out including (Article 40.2(b)(ii)) to be informed promptly and directly of the charges against him and to have legal or other appropriate assistance in the preparation and presentation of his defence. There is a right to a fair hearing and one not to be compelled to testify or confess guilt (*ibid* (iv)). The child's privacy is to be fully respected at all stages of the proceedings.

[5] The UN Committee on the Rights of the Child have produced General Comments in relation to how the Convention ought to be applied. The Comments in relation to Article 12 (para 60) included a need for the proceedings to be conducted in an atmosphere which allowed the child to participate and express himself freely. This was reiterated in the Comment on Article 40 (para 67).

Legislation

1995 Act

[6] Section 142 of the Criminal Procedure (Scotland) Act 1995 provides that, in respect of summary proceedings against a child:

> "(1) … the sheriff shall sit either in a different building or room from that in which he usually sits or on different days from those on which other courts in the building are engaged in criminal proceedings".

The public are to be excluded from the courtroom unless they are members or officers of the court, the parties and their legal representatives, the press and "such other persons as the court may specially authorise to be present".

UNCRC Incorporation Act

[7] The UNCRC Incorporation Act came into force on 16 July 2024. It incorporates the

Convention into Scots law. Section 6 is headed *"Acts of public authorities to be compatible with the UNCRC requirements"*. It provides that it is unlawful for a "public authority to act, or fail to act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements". "Relevant function" means a function that -

> "(2) … (a) it is within the legislative competence of the Scottish Parliament to confer on the authority, and
>
> (b) is conferred by—
>
> (i) an Act of the Scottish Parliament,
>
> … or (iv) a rule of law not created by an enactment.
>
> …
>
> It is not unlawful to do or fail to do something "if the authority was required or entitled to act in that way by words that are not contained in an enactment of a kind mentioned in subsection (2)(b) (s 6(4))".

[8] In terms of section 6(5) a "public authority":

> "(a) includes, in particular –
>
> (i) the Scottish Ministers
>
> (ii) a court or tribunal
>
> (iii) any person certain of whose functions are functions of a public nature…".

[9] Section 8 deals with judicial remedies. These include damages, but these can only be awarded by a court or tribunal which has power to do so in civil proceedings. Otherwise the court or tribunal can grant relief for a breach of the Convention as it considers effective, just and appropriate. Section 32 makes provision for UNCRC compatibility issues arising in criminal proceedings by introducing section 288AB into the 1995 Act. Where a compatibility issue arises in criminal proceedings, the Lord Advocate may require the court to refer the matter to the High Court.

The Children Act

[10] The Children (Care and Justice) (Scotland) Act 2024 came into force on the same day

as the UNCRC Act. Section 33 modifies the 1995 Act by introducing section 288BZA. The section is headed "restriction on judicial remedies" in relation to the compatibility of a decision to prosecute a child. It provides that where, in determining a UNCRC compatibility issue, the court finds that the prosecutor, by bringing criminal proceedings against a child, has acted in a way which is made unlawful by section 6(1) of the UNCRC Act, and is considering deserting the diet or dismissing the complaint, it must give the prosecutor an opportunity to reconsider bringing the proceedings and only thereafter can it make a finding of unlawfulness.

[11] For the purposes of the 1995 Act and the UNCRC Act, the age of a child is 18 years old. Prior to the UNCRC Act, the age of a child was 16 years (1995 Act, s 307).

Procedure

JH

[12] JH is 17 years old. He is a child for the purposes of the UNCRC Act. On 15 May 2024, when he was 16, he was arrested on a number of statutory offences and common law assault. He was released on an undertaking to attend Dundee Sheriff Court on 6 June 2024. The case was reported to the Crown on 22 May. No views of JH on the alleged offences or prosecution were recorded. The Crown were told that he was the subject of a Compulsory Supervision Order, which terminated on 30 May 2024 due to his non-compliance. According to the Reference (*infra*) the Crown considered the best interests of JH and those of the several child complainers when reaching the decision to prosecute in the public interest. On 5 June, the case was marked for summary prosecution.

[13] On 6 June, JH appeared at a custody hearing at Dundee Sheriff Court which was open to the public. The complaint libelled 5 charges. The first was a breach of section 1 of

the Domestic Abuse (Scotland) Act 2018 by engaging in a course of abusive behaviour towards his partner, then aged 16, between 6 and 15 May 2024 at a number of addresses in the city. This included assaults upon the complainer; one involving driving a car at her. It included robbing her of car keys and a phone. The second charge was an assault on another female, aged 15, by spitting at her on a bus on 11 May 2024. The third involved a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by using threatening behaviour towards a third female, including the use of a knife on 13 May. The remaining two charges were of possessing a knife contrary to section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995.

[14] JH's lack of legal representation at the first hearing appears to have been caused by some form of industrial action by solicitors. The case was continued without a plea being tendered to enable JH to consult the Public Defence Solicitors Office. He was released on bail. On 1 July 2024, he again appeared at a hearing which was open to the public. An *amicus curiae* is recorded as having represented JH, perhaps informally. The case was continued again to allow JH to consult the PDSO. At the next calling, on 15 July, again in open court, JH was represented by the PDSO. The case was continued without plea to a case management hearing and to permit further disclosure of evidence. There had been no request to call the case in private because of JH's age or to make any other special arrangements.

[15] On 9 August 2024, at the continued diet, JH failed to appear (cf the relative minute). He was represented by the PDSO. A warrant was sought for his arrest but this was refused by the sheriff because of JH's youth. The case was continued for his appearance, but this time it was to call at 9.30 am, in advance of other business. It did so on 16 August when JH was represented by both counsel and the PDSO. It was continued again to allow a

compatibility issue minute, based upon breaches of the UNCRC Act, to be prepared. It was recorded that the next diet would require to be at 9.30am in a closed court. By this time, the Crown had decided that they would require the court to refer the UNCRC compatibility issues to the High Court. The compatibility minute alleged that the Crown had acted in a manner which was inconsistent with the Convention in respect of the public hearings. It was said that re-raising the proceedings would circumvent the UNCRC protections. The Crown had not considered JH's best interests and had not ensured that his views were being heard.

[16] There was no contact between JH's representatives and the Crown which conveyed JH's views or any information as to what might be in his best interests. On 10 September 2024, the compatibility minute was lodged and the Crown moved to refer it to the High Court in terms of section 288AB(4) of the 1995 Act. By this time, similar issues had emerged in the prosecution of LL. On 10 September and 20 September when the Crown formally made the request for a reference, JH had been excused attendance. The issues raised in the Reference are:

> "(i) … whether the Crown, in raising these proceedings and continuing with a prosecution, is acting in a way that is unlawful by virtue of section 6(1) of the 2024 Act;
>
> (ii) … whether the Crown, in raising these proceedings and continuing with a prosecution in an adult forum and without regard to the special procedural and other guarantees afforded to children in the UNCRC, is acting in a way that is unlawful by virtue of section 6(1) of the 2024 Act".

LL

[17] LL is 17 years old and is also a child for the purposes of the UNCRC Act. On 16 July 2024, he was arrested and charged with assault. On 22 July the case was reported to the Crown. There was no information on LL's views on the offences or the prosecution.

According to the Reference, the Crown considered the best interests of LL and the complainer who was aged 16, as a primary consideration when reaching a decision to prosecute in the public interest. On 26 July 2024 the case first called at an open public hearing at Dundee Sheriff Court. In advance of the hearing, the Crown had advised the court of the LL's age.

[18] The charge was that LL had breached section 1 of the 2018 Act by engaging in a course of abusive behaviour towards his partner, aged 16, between 14 February and 16 July 2024. The allegations included locking her in certain rooms, repeatedly assaulting her by, amongst other things, punching her on the head, compressing her neck, biting her and trying to stab her. LL was represented by a solicitor. There was no request to have the case call in private or for any other special arrangements. The case was continued without plea and for the disclosure of evidence until 16 August. On that date, LL was represented by counsel and the PDSO, as was JH. At that diet LL's counsel intimated an intention to lodge a compatibility minute. The Crown intimated their intention to have the UNCRC matters referred to the High Court. It was recorded that the case would require to call again on 10 September at 9.30 in a closed court because of LL's age. The procedure broadly followed that in JH. The matters raised in the compatibility issue follow those lodged in JH's Minute. The Reference asks the same questions.

Submissions

Crown

[19] Section 6(1) of the UNCRC Act was of no application to the Lord Advocate's exercise of her functions as head of the prosecution system. The Lord Advocate's prosecution functions were not "relevant functions" within section 6(2) because they were not functions

within section 6(2)(a). They were not functions which it was within the legislative competence of the Scottish Parliament to confer upon the Lord Advocate. The Lord Advocate, in exercising her prosecution functions, was acting as she was required or entitled to do by the 1995 Act. That was not an enactment of a kind mentioned in section 6(2)(b).

[20] Even if her functions were "relevant functions", the Lord Advocate did not act, or fail to act, in a way which was incompatible with the UNCRC requirements. As a matter of policy and practice, the Lord Advocate was fully committed to acting compatibly with the UNCRC in all her functions. Prosecution policy had acknowledged and reflected the spirit of the requirements of the UNCRC for many years (*Dyer* v *Watson* 2002 SC (PC) 98 at para 180). The compatibility minutes of JH and LL were the first to be lodged in relation to the UNCRC requirements. It was of public importance to know whether section 6 applied. The Lord Advocate felt a constitutional duty to bring these cases to the court for determination as quickly as possible (*R (Jackson)* v *Attorney General* [2006] 1 AC 262 at para 27).

[21] The Lord Advocate was in a unique position; her universal title to prosecute arising at common law. The Lord Advocate's prosecution functions fell within section 6(2)(b)(iv); being functions "conferred by ... a rule of law not created by an enactment," as opposed to section 6(2)(a).

[22] The Scotland Act 1998 was structured to preserve the office of Lord Advocate as the public prosecutor in respect of offences within both reserved and devolved areas. The Lord Advocate's straddling of the two areas was an obvious explanation for the importance of maintaining her autonomy and independence. The Lord Advocate had an obligation to act independently (1998 Act s 48(5); *Al-Megrahi* v *HM Advocate* 2008 SCCR 358 at para [11]).

The independence of the Lord Advocate was essential to the impartial administration of justice and the maintenance of public confidence (*Stewart* v *Payne* 2017 JC 155 at para [97]). The functions of the Lord Advocate were protected in the 1998 Act to the effect that the Scottish Parliament may not confer the prosecution functions on any person other than the Lord Advocate. The Scottish Parliament had no power to alter such protections. On this understanding, section 6(2)(b) of the UNCRC 2024 Act applied.

[23] Alternatively, the term "function" in section 6 did relate to the functions exercised by the Lord Advocate. Those functions encompassed "the entire system" (*R* v *Manchester Stipendiary Magistrates, ex p Granada Television* [2001] 1 AC 300 at 305). "Function" required to be understood in a systematic sense. The Lord Advocate's prosecution functions should not be understood as a collection of statutory or common law powers or duties, each of which falls to be analysed separately, but as an overall function that she has as head of the prosecution system. "Confer" as used in section 6 referred to the genuine conferring of functions. The person conferred cannot already hold the power that is being conferred.

[24] Section 288BZA of the 1995 Act applied where a court found that the prosecutor, by bringing criminal proceedings against a person, had acted in a way which is made unlawful by section 6(1) of the 2024 Act. Section 288BZA could only apply if the prosecution functions were relevant functions. It did not itself provide that they were. No inference that might be drawn from section 288BZA should be capable of displacing the fundamental position in relation to the Lord Advocate's prosecution functions. The provision was added at Stage 3 of the Children (Care and Justice) (Scotland) Act 2024. There was a concern that had been identified by the Lord Advocate that it was not clear whether section 6(1) of the UNCRC Act applied to her or not. If it did, section 288BZA would be necessary to avoid serious offences being lost.

[25] The Lord Advocate did not do, or fail to do, anything in respect of the alleged breaches. The circumstances in which the minuters appeared at the hearings on 26 July 2024 and 16 August 2024 were the result of arrangements made by the sheriff court. No act or failure to act by the Lord Advocate caused those circumstances. The minuters' legal representatives made no attempt to have the circumstances altered. They raised no issue about section 142(1) of the 1995 Act. Because no act or failure to act by the Crown caused those circumstances, they were not capable of amounting to a breach of any duty by the Lord Advocate under the UNCRC Act.

[26] It was not unlawful, under section 6(1) of the UNCRC Act, for the Lord Advocate to initiate the prosecution of a child. It was only unlawful if that was done in a way which was incompatible with the UNCRC requirements. It was implicit in Articles 37 and 40 of the UNCRC that a child could be accused of a crime and may be prosecuted, detained, tried, and punished for a crime. While the best interests of the child is a primary consideration in terms of Article 3.1, it is not the only primary consideration. The best interests of the child accused may be outweighed by other considerations, such as the public interest. It remained for the prosecutor to decide whether a prosecution should take place. Article 12.2 stated that a child should be afforded the right to be heard, either directly or through a representative, in any judicial proceedings affecting the child. General Comment No 12 recognised that an accused person, of any age, had the right to remain silent. In recognition of this principle, it would be inappropriate for the Crown actively to seek views from a child accused.

[27] Section 6(4)(a) of the UNCRC Act applied to prevent the Lord Advocate's act or failure to act from being incompatible with the UNCRC requirements, because they were fully in accordance with the 1995 Act, which was an enactment of a kind not mentioned in section 6(2)(b). On remedy, desertion would be premature. The question of remedy could

not be decided in a vacuum. It was only capable of being answered by reference to the specifics of whatever breach of the UNCRC requirements the Court finds to have occurred.

The Commissioner for Children and Young People in Scotland

[28] When deciding upon and proceeding with a prosecution, the Lord Advocate is exercising a "relevant function" in terms of section 6(1). This is in contrast to when the Lord Advocate acts or fails to act in a way that is required or permitted by words falling within section 6(4), including those of the 1995 Act. The Lord Advocate's power to prosecute on indictment arose from the common law. The functions of the Lord Advocate and the Procurators Fiscal had been drawn together. The Procurators Fiscal were the Lord Advocate's representatives in both summary and sheriff and jury proceedings. The 1995 Act did not confer prosecutorial powers on the Lord Advocate in terms of her title and interest to prosecute.

[29] The question was one of statutory construction. The court required to identify the purpose of the provision in its statutory and broader context (*R (Quintavalle)* v *Secretary of State for Health* [2003] 2 AC 687 at para 8; *R (O)* v *Home Secretary* [2023] AC 255 at paras 29 to 31; *R (PACCAR Inc)* v *Competition Appeal Tribunal* [2023] 1 WLR 2594 at paras 40 to 43). When interpreting the provisions in section 6, the UNCRC Act should be considered as a whole. The Act, by its short and long titles, made it clear that the intention of the Scottish Parliament was to incorporate the rights and obligations contained in the UNCRC into Scots law. Article 40 dealt with children who are accused of criminal acts. The decision to accuse a child of such an act fell within the article. All of Article 40 was relevant to the exercise by the Lord Advocate of her prosecutorial function.

[30] The amendment of the 1995 Act by section 33 of the Children (Care and Justice) (Scotland) Act 2024, indicated that the Scottish Parliament intended the 2024 scheme to apply to the Lord Advocate (*Bloomsbury International* v *Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546 at para 10). The amendment restricted judicial remedies in circumstances in which, *inter alia*, a court found that the prosecutor has acted unlawfully in terms of section 6(1) by bringing proceedings against the child. That amendment, which was promoted in order to protect the prosecutor, was predicated upon the understanding that the Lord Advocate's prosecutorial function was a relevant function under section 6(1).

[31] The Lord Advocate had long had the function of deciding whom and whether to prosecute. The fact that the Lord Advocate already had the function of deciding whether to prosecute crime did not mean that the Scottish Parliament lacked the legislative competence to restate or to re-confer that function. Re-statement of an existing rule of law was not only within legislative competence, it was something that legislatures regularly do in order to confirm, codify or modify existing rules of law. Such re-statement would not breach the prohibition against conferring that function on a person other than the Lord Advocate. It would not imperil the traditional independence of the Lord Advocate (Scotland Act 1988 ss 29(2)(e) and 48(5)).

[32] Section 6(4) constituted an exception that operated only where section 6(1) applied. If a provision of the 1995 Act required or entitled the Lord Advocate to act procedurally in a particular way, then so acting would not be unlawful. Section 6(4) did not re-categorise the prosecutorial function as procedural.

Minuters

[33] The prosecutorial functions of the Lord Advocate in respect of summary criminal

proceedings were "a relevant function" in terms of section 6(2) of the UNCRC Act. The public authorities had acted in a manner which was unlawful under section 6(1). Articles 3, 12 and 40 of the Convention had been breached. The only remedy was desertion *simpliciter*, which failing, an order should be pronounced whereby all future hearings will be held in private in compliance with section 142(1) of the 1995 Act.

[34] Section 6(1) was structured as a prohibition that removed the power of a public authority to act in a way that is incompatible with the UNCRC. It was an amended version of section 6 of the UNCRC (Incorporation) (Scotland) Bill that was considered in *UNCRC (Incorporation) (S) Bill* 2022 SC (UKSC) 1. The primary change was the addition of subsections (2), (3) and (4). The effect was that, when it could be shown that a public authority had acted in respect of relevant functions in a manner which was incompatible with the UNCRC requirements, that act was unlawful. Section 7(1)(b) permitted an accused child to rely on section 6(1) in these proceedings. Section 8(1) restricted the available remedies to those already within the court's power. In a summary criminal case that involved taking procedural steps to remove the incompatibility by deserting the complaint either *pro loco et tempore* or *simpliciter*.

[35] The Interpretation and Legislative Reform (Scotland) Act 2010 provided that the Crown are bound by an Act of the Scottish Parliament. The carrying out of prosecutions was a "relevant function" within subsection (2). The independence of the Lord Advocate was not threatened by the development of additional rights for children and a legislative requirement that the Lord Advocate should not act in a way that was incompatible with the Convention. Given the legislative history of the UNCRC Act and The Children (Care and Justice) (Scotland) Act 2024, the Lord Advocate was "personally barred" from arguing that the Crown were not a public authority.

[36] The Lord Advocate's powers to prosecute arose from the common law. The inclusion of subsection 6(2)(b)(iv) of the UNCRC Act meant that the list covered her powers and duties as prosecutor under the common law. *UNCRC (Incorporation) (S) Bill* held that section 6 of the Bill was outwith devolved competency. The Bill returned to the Scottish Parliament and was amended. There was no mention at the Parliamentary debates of criminal prosecutions. The statements of the Scottish Ministers (of which the Lord Advocate was a member), when the clause that added section 288BZA to the 1995 Act was introduced at Stage 3 of the Children (Care and Justice) (Scotland) Bill, was of assistance in understanding why the Lord Advocate was personally barred from presenting her argument. Section 288BZA(1)(b) was focused on how the court should act when faced with a decision by the prosecutor that would have been caught by section 6(1). Parliament thought that it was necessary to have procedural rules that provided for the courts finding that a decision of the prosecutor had been incompatible with the UNCRC requirements. The Lord Advocate was involved in the preparation of the amendment. The Scottish Ministers introduced it on the understanding that prosecutorial decisions were covered by section 6(1).

[37] *Thom* v *HM Advocate* 1976 JC 48, as explained in *HM Advocate* v *Cooney* 2022 JC 108, confirmed that the Lord Advocate had a virtually absolute power. The Scottish Ministers and the Scottish Parliament had acted on the advice of the Lord Advocate that section 6(1) encompassed the decision to prosecute and to continue to prosecute persons under 18 years of age. Section 288BZA would be rendered unnecessary if the Crown's argument was correct. The Cabinet Secretary for Justice and Home Affairs was correct when she stated that, "the UNCRC requirements are far reaching and will provide new grounds for challenging prosecutorial decision making". In order to give effect to the intention of

Parliament, the court should approach the legislation with that ministerial statement in mind.

[38] The proper approach to the Article 40(2)(b)(vii) right to privacy was to see this as a means of ensuring fair trial rights for children. The additional guarantee of privacy was necessary in cases involving children for the reasons related to maturity already recognised in the *Sentencing Guideline: Sentencing young people* (para 10). Assistance with the proper interpretation of the UNCRC rights could be found in the General Comments prepared by the UN Committee on the Rights of the Child on Articles 3, 12 and 40. The best interests of the child in Article 3 had three aspects: a substantive right to have their rights assessed; a fundamental principle that legislation should be interpreted in a manner which best served the child; and a rule of procedure, whereby any decision must be considered and justified. The Comments in relation to Article 12 included a need for closed proceedings. This was reiterated in the Comment on Article 40. These Comments highlighted the connection between the right to be heard and the right to privacy. It required the creation of an atmosphere that actively enabled the child to participate.

[39] The right to effective participation in Articles 3.1 and 12 made new demands on the how the police, Crown and courts should behave when children were arrested, interviewed, charged, appeared in court to have their liberty determined pre-trial and in the trial itself. It was not enough to treat children as mini-adults. There was a robust right for children to a trial in private. The need to envisage rehabilitation of a child who was accused of a crime had to be recognised. As the Scottish Sentencing Council recognised, children "will generally have a lower level of maturity, and a greater capacity for change and rehabilitation". Such rehabilitation will be made harder if the trial has taken place in public

or in a court building in which other court users can see the child waiting for, or leaving after, court.

[40] There had been a breach of the UNCRC requirements in several ways; notably that both JH and LL had appeared in a public hearing which was not compliant with section 142 of the 1995 Act in that it took place in a room usually used by the sheriff on a day in which other criminal business was taking place. In the case of JH, further hearings took place without safeguards that would ensure compliance with Article 40(2)(b)(viii). Initially JH had appeared in court without access to legal advice and a solicitor to represent him in court.

[41] The minuters' principal position is that the harm has been done. The right to privacy had been breached. That could not be undone. The effect, in terms of effective participation in a fair trial, has happened. Given the lack of acceptance by the Crown that section 6(1) applies to the Lord Advocate, there was no reasonable prospect of criminal proceedings being brought against either minuter in a way that was compatible with the UNCRC requirements. Section 288BAZ(3) permitted the court to desert both complaints *simpliciter*.

Decision

[42] The principal legal issue is the correct interpretation of section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024. The court requires "to ascertain the meaning of the words used … in the light of their context and the purpose of the statutory provision" (*In Re JR222* [2024] 1 WLR 4877, Lord Stephens at para 73). As it was put in *R (O)* v *Home Secretary* [2023] AC 255 (Lord Hodge at para 29):

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider group of sections. Other provisions in a statute and the statute as a whole may

> provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained".

The language used should be interpreted in a way which best gives effect to the purpose of a particular provision (*Barclays Mercantile Business Finance* Lord Nicholls at para 28 cited by Lord Stephens in *In Re JR 222* at para 75). External aids to interpretation may disclose the background to a statute and assist in the identification of the mischief addressed. They must nevertheless play a secondary role in the exercise (*In re JR222* Lord Stephens at para 77, citing *R (Project for the Registration of Children)* Lord Hodge at para 30).

[43] It is not disputed that the Lord Advocate is a public authority for the purposes of section 6(1) of the UNCRC Act. In deciding to prosecute a child, and in continuing the prosecution, she is carrying out a public function. She is not required to do so by the Criminal Procedure (Scotland) Act 1995. Section 6(4) of the UNCRC Act is not engaged. The court has not found it easy to grasp the intricacies of the Crown's submission that the Lord Advocate's function as prosecutor is not a relevant one. In particular, it was not clear to the court what the relevance of the origins of the office of Lord Advocate or its independent status had to what is a relatively straightforward issue of interpretation.

[44] The original terms of section 6(1) in the relative Bill were that it was:

> "unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements".

There was no reference to "relevant function". Were that section to have been within the legislative competence of the Scottish Parliament, there can be little doubt that it would have applied to the Lord Advocate when exercising her power to prosecute.

[45] The reason for the inclusion of the additional words, ie "relevant function" and its somewhat convoluted definition, was because *UNCRC (Incorporation) (S) Bill* 2022 SC

(UKSC) 1 had determined that the original section 6(1) in the Bill was outwith legislative competence because they would have applied to, for example, UK ministers who were carrying out reserved functions in Scotland (see Lord Reed at paras 59 and 80). It was then necessary to redraft the section so that it only applied to matters within devolved legislative competence. That appears to be all that was intended. It cannot have been intended that the Lord Advocate, who was a public authority under the original legislation, was to be excluded under a re-drafted provision which was intended to have the same effect.

[46] The new section is intended to confine its reach to, putting matters broadly, devolved areas acts or omissions. Seen in that light, there is little question that it applies to the Lord Advocate when deciding whether or not to prosecute a child and to the conduct of the prosecution, other than where the latter is, for example, dictated by the terms of the 1995 Act (see s 6(4). As already noted there is no such dictation in the present context.

[47] That this was the intention of Parliament is confirmed by the UNCRC Act's sister statute; the Children (Care and Justice) (Scotland) Act 2024 which came into force on the same day. Section 33 introduced section 288BZA into the Criminal Procedure (Scotland) Act 1995. This provides what is to happen if the court finds that the prosecutor, by bringing criminal proceedings against a child, has acted in a way which is made unlawful by section 6(1) of the UNCRC Act and is considering deserting the diet or dismissing the complaint. This provision would be devoid of meaning if the Lord Advocate was not carrying out a relevant function. For completeness, personal bar is not relevant to this question of interpretation. What the Lord Advocate has said or done previously cannot bar an argument on the correct interpretation of a Parliamentary Act.

[48] *Quantum valeat*, the purpose of section 6(1) is also confirmed by the Ministerial Statement by the Cabinet Secretary for Justice and Home Affairs when the amendment to

the 1995 Act was being addressed. Angela Constance MSP referred to the UNCRC Act extending:

> "beyond the fairness of criminal proceedings and into prosecutorial decision making. We are talking about a new ground of challenge which does not exist at the moment…".

[49] Having established that the Lord Advocate is carrying out a relevant function when making prosecutorial decisions, the next step is to answer the questions posed in the References. These both ask, first, whether the Lord Advocate, in raising the proceedings, had acted in a way which was unlawful by virtue of section 6(1) of the UNCRC Act. It is narrated in the Statements of Fact (paras 3) contained in the References that, when reaching a decision to prosecute in the public interest, the Crown considered the best interests of the minuters and the child complainers as primary considerations. This is not in the least surprising. Although the minuters are both under 18 and therefore classified as children, so too are the several complainers. The complainers fall under the protection of the UNCRC. The offences, especially the omnibus charges libelling a course of abusive behaviour under section 1 of the Domestic Abuse (Scotland) Act 2018, are relatively serious. They might, but for the youth of the minuters, have been prosecuted on indictment. It must follow that the Crown did not act in an unlawful manner in deciding to initiate the prosecutions. The decision to prosecute JH was, in any event, taken in advance of the UNCRC Act's commencement.

[50] The second question is whether the Crown have acted unlawfully in continuing to prosecute the minuters. It must be said *in limine* that the appearances of the minuters at a public hearing would constitute a potential breach of Articles 12 and 40 of the Convention where these hearings took place after the UNCRC Act came into force on 16 July 2024. In the case of JH, this excludes the hearings on 6 June, or 1 and 15 July. There was no breach in

respect of the hearing of 9 August because JH did not attend it. The hearing of 16 August appears to have taken place at 9.30 am before the other business of the court. The appellant was subsequently excused attendance. In LL's case, he appeared at public hearings on 26 July and 16 August, although that may have taken place under the same conditions as JH's appearance. At all events, it can be said therefore that someone may have acted unlawfully in terms of section 6(1) of the UNCRC Act in respect of one or more of the procedural hearings.

[51] The Crown contend that the arrangements for the calling of the cases were not made by the Crown but by Dundee Sheriff Court. If that is correct, it would be difficult to find that it was the Crown who had acted unlawfully. Even if they had, any breach would have been of a minor or technical nature. It cannot be said that these hearings, which were purely procedural in nature, affected either JH or LL in respect of the presentation of their defences or in their ability to express their views. Deserting the diets would not be an appropriate or just remedy, especially given the rights of the complainers and the wider interests of justice. Both minuters will, if the cases proceed to trial, have an opportunity to express their views, if they wish to do so, and to prepare and present their defences. They will have legal representation. In this respect, the proceedings as a whole have to be looked at.

[52] What is certainly correct is that the forthcoming trials ought to take place in compliance with section 142 of the 1995 Act. That means that they must call at least in a different room from that in which the sheriff usually sits or on days when criminal proceedings are not taking place. The proceedings should be behind closed doors, but allowing the press or other specially authorised persons to be present. The court does not consider that a declarator requires to be pronounced to that effect. It is in the 1995 Act and both the court and parties should ensure that the section is complied with. It is surprising

that the terms of section 142 appear not to have been complied with and that this occurred without intervention by the parties.

[53] In all these circumstances, the court does not consider that, in continuing with the prosecutions, the Crown would be acting in a way which would be unlawful.

[54] The questions in the References are both answered in the negative.