



lawyers for
children & young people

AB v HMA UKSC 2016/0083

Judgment – 5 April 2017

The Supreme Court today ruled that section 39(2)(a) of the Sexual Offences (Scotland) Act 2009 was incompatible with the European Convention on Human Rights and that it was outwith the legislative competence of the Scottish Parliament. Clan Childlaw intervened in this case to put forward a child law perspective and supported the argument that prevailed.

When the appellant was aged 14, the police charged him with lewd and libidinous practices and contravention of section 6 of the Criminal Law (Consolidation)(Scotland) Act 1995. The alleged behaviour involved him showing online pornographic images to a young boy, and exposing himself to three other children. The matter was referred to the Children’s Reporter who, it is understood, took no further action.

When the appellant was aged 19, he was charged with engaging in sexual intercourse with a girl who was under 16 years. He did not deny that sexual intercourse took place. He wished to rely on the defence that he reasonably believed that the girl had attained the age of 16 years. However, he was not able to rely on this defence as the statute does not allow the use of this defence if the person has previously been charged with a “relevant sexual offence”. The offences with which he was charged when he was aged 14 are listed as “relevant sexual offences”.

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The appellant therefore challenged the legality of the statutory provision by arguing that it was incompatible with ECHR.

The Supreme Court held that the relevant section was incompatible with ECHR as it interferes disproportionately with the appellant's article 8 right. The rationale behind the legislation put forward by the Lord Advocate was that when an accused has been previously charged by the police with a relevant sexual offence, the individual has previously received an "official warning". This "official warning" means that they must make sure that any future sexual partner is aged 16 or over.

Lord Hodge concluded:

"...[T]he use of prior charges 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..." [44]

"...[T]he list of "relevant sexual offences" includes charges in which the age of the victim is not an essential component, extends far beyond sexual activity with an older child and excludes charges relating to sexual conduct... This suggests that... [it] is likely in many other cases to give rise to infringements of article 8 because of the absence of a warning." [45]

Alison Reid, Principal Solicitor at Clan Childlaw said: "We are pleased with this decision which is consistent with the approach taken in Scotland in the Children's Hearings System that children who are charged with offending behaviour are considered having regard to their welfare and not on a punitive basis. The Scottish Government are looking afresh at the disclosure of early childhood offending to enable young people to move beyond early mistakes. We intend to continue working with them to ensure that the law in Scotland operates in a proportionate way to allow this to happen in relation to offending and alleged offending behaviour."

The case will now be remitted to the High Court of Justiciary.