

***AB v HM Advocate:***  
**Rationalising restrictions on the use of the ‘reasonable belief’ defence**

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On 5 April 2017, the UK Supreme Court issued its judgment in *AB v HM Advocate*.<sup>1</sup> The appeal concerned s.39(2)(a)(i) of the Sexual Offences Scotland Act 2009 (‘the 2009 Act’). This provision prevents an individual charged with a sexual offence against an older child from relying upon the s.39(1)(a) defence that he reasonably believed that the child had attained the age of 16 years in cases where he has ‘previously been charged by the police with a relevant sexual offence’. The Supreme Court was unanimous in its finding that the provision was incompatible with the appellant’s article 8 rights under the European Convention on Human Rights (‘ECHR’) and that accordingly, the provision lay outwith the legislative competence of the Scottish Parliament. This case comment sets out the factual background to the appeal and outlines the Supreme Court’s ruling, before considering the significance of the judgment and its wider implications.

### **Background to the appeal**

In 2015 the appellant, who was then aged 19, appeared on petition on charges of having engaged in sexual intercourse with a female child aged 14 years and 11 months, in contravention of ss.28 and 30 of the 2009 Act.<sup>2</sup> The appellant did not deny that sexual intercourse had occurred, but rather maintained that he reasonably believed that the child had attained the age of 16. Accordingly, he sought to raise the ‘reasonable belief’ defence contained in s.39(1)(a) of the 2009 Act, which can be pled where an accused is charged with one of the offences against older children contained in ss.28-37.<sup>3</sup> However, s.39(2)(a)(i) does not permit an individual to use this defence where they have ‘previously been charged by the police with a relevant sexual offence’, with the list of ‘relevant sexual offences’ being contained in Schedule 1 of the 2009 Act. In the appellant’s case, the effect of s.39(2)(a)(i) was therefore to bar him from pleading the defence. This was because, in 2009, when he was aged 14, the police had charged him with two offences of lewd and libidinous practices at common law and one offence of indecent behaviour towards a girl aged of or over the age of 12 years and under the age of 16 years under s.6 of the Criminal Law (Consolidation) (Scotland) Act 1995. The alleged behaviour to which one of the common law charges related was that the appellant had shown online pornographic images to a young male child. The alleged behaviour on which the other common law charge and the statutory charge were founded was that the appellant had exposed his genitals to, and chased after, three other female children aged 4, 12 and 13 respectively. The police had, at that time, reported the case to the Procurator Fiscal, who had taken the decision not to prosecute the appellant. The case had instead been referred to the Children’s Reporter, who appeared to have decided to take no further action in the circumstances.

The appellant challenged the compatibility of s.39(2)(a)(i) with articles 6 and 8 ECHR, and the issue was referred to the High Court by the Sheriff. In February 2016, the High Court issued

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<sup>1</sup> *AB v HM Advocate* [2017] UKSC 25.

<sup>2</sup> S.28 is the offence of having intercourse with an older child, and s.30 is the offence of engaging in sexual activity with or towards an older child.

<sup>3</sup> The 2009 Act draws a distinction between offences committed against young children, defined as those aged less than 13 years, and older children, defined as those aged 13 years or over but less than 16 years old. It should also be noted that offences committed against young children are strict liability and no defence is available (see s.27 of the 2009 Act).

an opinion to the effect that the appellant's ECHR rights were not engaged.<sup>4</sup> However, the High Court granted the appellant leave to appeal to the Supreme Court.

### Supreme Court judgment

In the Supreme Court, the appellant argued, amongst other points, that s.39(2)(a)(i) was incompatible with his article 8 ECHR right 'to respect for his private and family life, his home and his correspondence'. The appellant submitted that this was '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'.<sup>5</sup> In unanimously allowing the appeal, the Supreme Court held that s.39(2)(a)(i) was incompatible with ECHR rights in its application to the appellant because it amounted to a disproportionate interference with his article 8 right.<sup>6</sup> The lead judgment was delivered by Lord Hodge, with whom the other four Justices agreed and a further concurring judgment was given by Lord Reed, with whom Lord Kerr, Lord Wilson and Lord Hughes also agreed.

The Lord Advocate conceded that s.39(2)(a)(i) did involve an interference with article 8 rights, because the prosecutor had relied on the previous police charges in the course of the criminal proceedings and disclosed these to the court.<sup>7</sup> The Lord Advocate, however, sought to justify the use of the previous charge to restrict the availability of the defence on the basis that the earlier charge amounted to an 'official warning about sexual offences with children'.<sup>8</sup> The Supreme Court found that the provision was in accordance with law because a prior charge can act as a relevant warning.<sup>9</sup> Therefore the Court accepted that a warning by a police officer that sexual activity with older children, including consensual activity, was an offence could, in principle, provide a basis for restricting the reasonable belief defence without contravening an accused's article 8 right.<sup>10</sup> However, the Court found that, in the appellant's case, the interference with his article 8 right was disproportionate because there did not seem to have been any such warning.<sup>11</sup> The 'relevant sexual offences' with which the appellant had previously been charged when he was aged 14 were offences that could only be committed against children and to that extent, the appellant had, at that stage, been given notice that certain sexual activity involving children was criminal. However, the charges, which pertained to the appellant showing online pornographic images and exposing his genitals to other children, 'did not involve consensual sexual activity with an older child and could not amount to an implicit warning that such activity was an offence'.<sup>12</sup> Given the nature of the prior charges, Lord Reed questioned, '[o]n 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?'.<sup>13</sup> Furthermore, there was

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<sup>4</sup> The High Court's opinion is discussed in *AB* at [15]-[17], per Lord Hodge.

<sup>5</sup> See *AB* at [18], per Lord Hodge.

<sup>6</sup> The Supreme Court rejected the argument that the provision was incompatible with article 6 ECHR and also, given its conclusion in relation to article 8, did not go on to consider a challenge under article 14 – see *AB* at [21] and [46] respectively, per Lord Hodge.

<sup>7</sup> *AB* at [23], per Lord Hodge and [56], per Lord Reed.

<sup>8</sup> *AB* at [58], per Lord Hodge.

<sup>9</sup> *AB* at [29], per Lord Hodge.

<sup>10</sup> *AB* at [42], per Lord Hodge.

<sup>11</sup> *AB* at [42], per Lord Hodge.

<sup>12</sup> *AB* at [43], per Lord Hodge. Also see, at [44], where Lord Hodge concludes that '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.'

<sup>13</sup> *AB* at [63], per Lord Reed.

nothing to indicate that the police officer had, at that time, given the appellant any explicit warning that the type of consensual activity currently at issue amounted to a criminal offence, or alerted him to the fact that any sexual activity with an older child in the future would attract strict liability as the reasonable belief defence would no longer be available.<sup>14</sup> The Court also noted that the appellant had not been brought to trial on these previous charges, but that the case had instead been referred to the Children’s Reporter, who appeared to have taken no further action.

The Court went on to consider the circumstances in which a prior charge could legitimately act as an official warning that would rule out the use of the reasonable belief defence. It considered that one such situation would have been if the appellant had previously been charged with an offence of engaging while an older child in consensual sexual conduct with another older child under s.37 of the 2009 Act. However, the Court noted that this offence was in fact excluded from the list of ‘relevant sexual offences’.<sup>15</sup> The Court also considered that the other situation where the prior charge could amount to an implicit warning was where an adult had been previously charged with the equivalent of a ‘like offence’ under the previous law.<sup>16</sup> However, the appellant’s case did not correspond to either of these scenarios.

Finally, Lord Hodge concluded that ‘the list of “relevant sexual offences” includes charges in which the age of the victim is not an essential component, [and] extends far beyond consensual sexual activity with an older child... 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’<sup>17</sup> – indeed, ‘[i]t is likely to do so in all other cases where the prior charge does not objectively give the relevant warning’.<sup>18</sup>

## Comment

In this author’s view, the Supreme Court’s decision is clearly correct based on the facts of the case. The decision is an important example of the Court using a rights based analysis to rein in what had become an overly inclusive approach to restricting the reasonable belief defence. That this approach has been curbed is perhaps not surprising, given that under the 2009 Act the limitation on the availability of the defence developed into something quite different to its original form. Under the previous legal framework, the restriction on raising the defence was confined to cases where there had been a prior charge at trial for a ‘like offence’, but this was expanded to include police charges for a wide range of dissimilar offences under the 2009 Act.<sup>19</sup> The Scottish Law Commission had, in its project on sexual offences which preceded the 2009 Act, recommended that the fact that an accused had raised the reasonable belief defence on a previous occasion should not be a bar to its subsequent use.<sup>20</sup> The Scottish Government, however, rejected this recommendation on the basis that it viewed a restriction on the availability of the defence as necessary to prevent the defence from being exploited by ‘serial

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<sup>14</sup> *AB* at [43], per Lord Hodge.

<sup>15</sup> *AB* at [44], per Lord Hodge and [65], per Lord Reed.

<sup>16</sup> A ‘like offence’ under the Criminal Law (Consolidation) (Scotland) Act 1995 s.5(6) included having or attempting to have unlawful sexual intercourse with a girl of or over the age of 13 years and under the age of 16 years, and permitting a girl under the age of 16 years to use premises for sexual intercourse.

<sup>17</sup> *AB* at [45], per Lord Hodge. See also at [66], per Lord Reed.

<sup>18</sup> *AB* at [47], per Lord Hodge.

<sup>19</sup> See discussion in *AB* at [5]–[9], per Lord Hodge.

<sup>20</sup> And that this issue should instead go to the accused’s credibility – see Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, 2007) at paras 4.60-4.64.

sexual predators’.<sup>21</sup> However, the regime enacted in pursuit of that policy justification in fact disqualified a much broader range of persons than those who had relied previously on the defence, or who could have feasibly done so.<sup>22</sup> As the Supreme Court pointed out, the legislative scheme adopted in the 2009 Act is therefore difficult to reconcile with that initial justification.<sup>23</sup> This is also evidenced by the fact that in *AB* the Lord Advocate instead defended an alternate rationale for the exclusion of the defence - that of the prior charge amounting to an official warning.<sup>24</sup> While the Court accepted the validity of this rationale, the issue in the present case was that the prior charges did not objectively give the relevant warning. The Court rationalised the breadth and scope of the list of ‘relevant sexual offences’ against the official warning justification, explaining why certain prior charges cannot properly be said to warn against other types of future conduct.<sup>25</sup> In *AB*, the Court has therefore set a precedent for other related challenges in cases where there is not a sufficient nexus between the prior charge and the warning, while also laying the groundwork in terms of the approach to be taken in future corrective legislation.

The decision can also be seen as progressive from a child-centred perspective in terms of reducing the extent to which children and young people are stigmatised as a result of early offending behaviour. The decision has been welcomed by those providing legal services to children and young people. The principal solicitor for Clan Childlaw, who intervened in the appeal, described the approach taken by the Supreme Court as ‘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’.<sup>26</sup> Clan Childlaw has also pointed out that the inadequacies in the legal framework illuminated by this case, when considered alongside those highlighted in other recent decisions, show that there is a need for ‘an urgent review of the effect of childhood offending behaviour later in life’.<sup>27</sup>

A further significant consideration in the context of this decision is that of s.37 of the 2009 Act, which contains offences committed by older children (those aged 13 to 15 years) engaging in consensual sexual intercourse or oro-genital sexual conduct with each other. During this appeal, the Supreme Court emphasised the fact that, if the rationale for the prior charge limitation was one of a warning, then it was anomalous that s.37 was not included as a ‘relevant sexual offence’ in Schedule 1. Lord Hodge commented that ‘it is striking that Schedule 1... 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’;<sup>28</sup> and Lord Reed described it as 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’.<sup>29</sup> These are valid points within the logic of the Court’s treatment and analysis of the issues arising in this case and the official warning

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<sup>21</sup> Scottish Government, *Sexual Offences (Scotland) Bill Policy Memorandum* (Scottish Government Corporate Body, 2008) at para 135.

<sup>22</sup> See also *AB* at [55], per Lord Reed.

<sup>23</sup> *AB* at [10]-[12], per Lord Hodge, and [54]-[55], per Lord Reed.

<sup>24</sup> This rationale, which differs to that advanced in the policy memorandum, was also offered by a representative of the Scottish Government Legal Directorate when giving evidence to the Parliament during the passage of the 2009 Act – see *AB* at [12], per Lord Hodge and at [57], per Lord Reed.

<sup>25</sup> See, in particular, *AB* at [55] and [62]-[64], per Lord Reed.

<sup>26</sup> A Reid, ‘Caught in the past’, *The Journal Online* (Edinburgh, 15 May 2017).

<sup>27</sup> *ibid*, discussing also the recent Outer House decision in *P (AP) v Scottish Ministers* [2017] CSOH 33, where it was held that the automatic disclosure of an offence handled by Children’s Hearing system constituted an ‘unlawful and unjustifiable interference’ with the petitioner’s rights under article 8.

<sup>28</sup> *AB* at [34], per Lord Hodge.

<sup>29</sup> *AB* at [65], per Lord Reed.

justification. However, it is worth noting that there is a legitimate question as to whether s.37 is in itself an appropriate offence – a question which is particularly salient when a case such as this highlights the many consequences which the commission of a sexual offence can have. The 2009 Act exempts sexual activity between older children from the ambit of the criminal law where it falls short of penetrative intercourse or oro-genital contact.<sup>30</sup> However, s.37 criminalises both older children where they engage in consensual sexual intercourse and oro-genital contact, despite the fact that such behaviour is empirically common and blanket criminalisation of these activities is regarded by many to be a disproportionate response.<sup>31</sup> The Scottish Law Commission previously concluded that, ‘for many teenage children sexual experimentation is regarded as a normal part of growing up’ and it ‘seems quite inappropriate to criminalise consensual activities which in themselves involve no discernible social wrong’.<sup>32</sup> Many other jurisdictions have decriminalised consensual sexual intercourse between close in age adolescents, in recognition of the fact that it is a normal part of adolescent development and because decriminalisation prevents the involvement of the criminal law and attendant consequences where this is inappropriate.<sup>33</sup> Jurisdictions have commonly set the permitted age difference at two years.<sup>34</sup> Some jurisdictions, however, permit an even larger age gap<sup>35</sup> and also provide additional safeguards, such as limiting the decriminalisation with a provision that the relationship must not have been exploitative.<sup>36</sup>

In *AB*, the Supreme Court found s.39(2)(a)(i) to be incompatible with article 8 ECHR and therefore outwith the legislative competence of the Scottish Parliament. The Scottish Government is currently considering the implications of the judgment and it remains to be seen how they will respond, including the details of corrective legislation.<sup>37</sup> This case has also highlighted the need for further consideration to be given to the effects of early offending behaviour later in life, and the way in which these effects can and should be moderated. Furthermore, it is considered that the case demonstrates the need for more detailed consideration to be given to the activities that should be considered ‘offending’ behaviour amongst children and young people in the first instance.

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<sup>30</sup> With this exemption also extended to a party aged 16 years or over provided they are not more than two years older than the older child – see the 2009 Act s.39(3).

<sup>31</sup> See I Callander, *Improving the Statutory Regulation of Consensual Sexual Behaviour between Adolescents in Scotland* (PhD thesis, University of Glasgow, 2017).

<sup>32</sup> Scottish Law Commission (n 20) at para 4.52.

<sup>33</sup> See e.g. Tasmania Law Reform Institute, *Sexual Offences Against Young People: Issues Paper* (TLRI No 17, 2012) at para 3.4.2.

<sup>34</sup> Examples include Victoria (Crimes Act 1958 s.49V) and Australian Capital Territory (Crimes Act 1900 s.55).

<sup>35</sup> For example, the age of consent is 16 years in Canada, but the Canadian Criminal Code allows for consensual sexual activity between 14 to 15 year olds and a partner less than five years older and 12 to 13 year olds and a partner less than two years older, by allowing the defendant to raise consent as a defence (Criminal Code 1985 (Canada) ss.150.1(2) and 150.1(2.1)). In the case currently under discussion the appellant was aged 19 years and the female child aged 14 years and 11 months, and it is therefore interesting to note that the Canadian position would actually have allowed the appellant to plead consent as a defence because the age difference was likely less than five years. However, it should be noted that five years is a substantial gap and Canada is unusual in allowing it.

<sup>36</sup> The close in age consent defences in the Canadian Criminal Code, for example, exist provided that the defendant is not in a position of trust or authority towards the complainant; is not a person with whom the complainant is in a relationship of dependency; and is not in a relationship with the complainant that is exploitative of the complainant.

<sup>37</sup> See Parliamentary Question (No S5W-08843) answered by Secretary for Justice Michael Matheson on 3 May 2017, see <http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5W-08843&ResultsPerPage=10>.