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Judgment: approved by the Court for handing down | *Delivered:* **8/09/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

KENNETH JOHN HAMILTON

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ

[1] The appellant was charged with 3 counts of unlawful carnal knowledge contrary to Section 5(1) of the Criminal Law Amendment Act 1885 in that on dates unknown between 1 September 2007 and 26 December 2007 he had unlawful carnal knowledge of LM, a girl under the age of 17 years. At his arraignment on 1 October 2008 he pleaded not guilty to all three counts. He was tried before His Honour Judge McFarland sitting with a jury in Omagh Crown Court on 23 March 2009 and convicted on all 3 counts on the same date. The case proceeded on the papers only and no witnesses were called. The appellant's challenge to the offences was confined to legal submissions. On 27 April 2009 His Honour Judge McFarland sentenced the applicant to 6 months imprisonment suspended for 3 years on each count concurrently and it followed that he was required to comply with the notification requirements of the Sexual Offences Act 2003 for 7 years.

[2] He appeals his conviction with the leave of Weir J on the grounds that he should have been allowed to raise a defence of reasonable belief in relation to the victim's age, that Section 5(1) of the Criminal Law Amendment Act 1885 was not applied in a Convention compliant manner or was incompatible with the Convention and that it contravened his Convention Rights for a defence to be unavailable to him which is available elsewhere in the United Kingdom. He seeks leave to appeal against sentence on the grounds that the sentence was manifestly excessive and wrong in principle in that he had no relevant previous convictions and the relationship was consensual. He asserts

that if the same facts arose today it is unlikely that he would be charged with a criminal offence.

Background

[3] In February 2008 Social Services received a referral from the child protection officer at a High School that LM, a 14 year old pupil, was pregnant. Social Services attended with LM and a family member with whom she was living and were informed that the father of the baby was the appellant, a 23 year old man. LM did not wish to make a complaint against him.

[4] Social Services spoke with the appellant and he admitted he had been in a relationship with LM for approximately 6 months and that they had had sexual intercourse before Christmas. He claimed that when he started the relationship with LM he believed that she was 17. He discovered that she was 14 after they had sexual intercourse on a couple of occasions and he then desisted from having further sexual intercourse with her. However they were still seeing each other.

[5] The matter was referred by Social Services to the police and the appellant was arrested. During police interview he stated that he and LM had been in a relationship for 6 months, they had had sexual intercourse two or three times before Christmas at a time when he believed that LM was 17 but that after he discovered she was only 14 they had not had sexual intercourse. At all times the relationship was consensual between them.

[6] Despite the fact that he and LM were living in the same small community he said he was not aware of her age. He was aware that she was studying but presumed she was at college. He acknowledged that he had failed to take reasonable precautions to establish her age. LM gave birth to a baby in 2008 and both LM and her child were still residing with LM's family member.

[7] The appellant has 9 previous convictions for driving offences including two for driving while unfit through drink or drugs. In 2003 he witnessed a fatal accident involving a friend. He thereafter began to abuse alcohol which resulted in poor timekeeping and absence from work resulting in his dismissal. He had received treatment at the alcohol addiction unit in a local hospital and had reduced the frequency of his drinking. He was in receipt of benefits. The applicant had another child aged 3 who lives with her mother. He stated he had monthly access to this child. At the time of the report he was in a relationship from December 2008 with a 22 year old woman and he stated that all his previous relationships had been age appropriate.

[8] The probation officer's assessment was that the applicant found it difficult to fully accept his responsibility for the offences or the implications of

registration under the Sexual Offences Act 2003. He was assessed as representing a medium risk of re-offending in general. There was no pattern of previous sexual offending and his sexual interests appeared to be age appropriate although his problems with alcohol use and his previous convictions for driving when unfit did evidence a willingness to engage in behaviour without consideration for its consequences.

The submissions of the parties

[9] The appeal against conviction was based on the non-availability of the "young man's defence" to the appellant where it is available in other parts of the UK. He argued that this contravened his rights under Articles 6, 8 and 14 of the European Convention on Human Rights and discriminated unjustifiably against him as a heterosexual male resident in Northern Ireland. He also argued that the judge failed to take into account the significance of the fact that Parliament has since spoken in article 16 of the Sexual Offences (NI) Order 2008 to import the defence into the law here. He argued that he was morally blameless and yet has been made subject to a serious criminal offence and to a punishment which includes the stigma of the notification requirements under Part 2 of the Sexual Offences Act 2003 in circumstances where the mental element of an offence under Section 5 of the 1885 Act is nonexistent.

[10] As a consequence, he argued that the court failed to act in a manner compliant with Section 6(1) of the Human Rights Act 1998 and should, under s. 3(1) of the Human Rights Act 1998, have read Section 2 of the Criminal Law Amendment Act (NI) 1923 so as to be Convention compliant. The defence of reasonable belief as to age should have been left to the jury. The 1923 Act is in any event subordinate legislation and can be disregarded if it is contrary to the ECHR. Consensual sexual behaviour is within the ambit of ECHR Art 8 and any interference with it must be proportionate in the pursuit of a legitimate aim. The appellant asserted that s. 2 of the 1923 Act is disproportionate and that the court as a public authority must protect the appellant's convention rights.

[11] As the offence under s. 5 of the 1885 Act can only be committed by a male, he also argued that Arts 8 and 14 are engaged on the basis of his gender. He noted that the offence under Art 16 of the 2008 Order may be committed by a male or a female. He also considered that Arts 8 and 14 are engaged by his sexual orientation as the reasonable belief defence is available to someone charged with the offence of buggery of a male under 17 years by virtue of R v K [2002] 1 Cr App R 13.

[12] The respondent argued that Article 6 of the ECHR has no application in this case since it is concerned with procedural rather than substantive rights. It was also submitted that this was an area of social policy in which the

objective of parliament was to protect young girls from the consequences of inappropriate sexual behaviour and that any differentiation between the treatment of males and females was justifiable.

Discussion

[13] Section 5 of the Criminal Law Amendment Act 1885 establishes the offence.

> "5. Any person who-
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> (1) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl under the age of seventeen years; shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years or to be fined or both."

Although section 2 of the Criminal Law Amendment Act 1922 established the young man's defence based on reasonable cause to believe that the girl was over sixteen years old for a man aged 23 or under for England and Wales the position in Northern Ireland was governed by section 2 of the Criminal Law Amendment Act (Northern Ireland) 1923.

> "2. Reasonable cause to believe that a girl was of or above the age of seventeen years shall not be a defence to a charge under sub-section (1) of section five or under section six of the Criminal Law Amendment Act, 1885"

These provisions were repealed with effect from 2 February 2009 and replaced by Article 16(1) of the Sexual Offences (Northern Ireland) Order 2008.

> "16.—(1) A person aged 18 or over (A) commits an offence if—
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> (a) he intentionally touches another person (B),
>
> (b) the touching is sexual, and
>
> (c) either—
>
> (i) B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii) B is under 13."

The position was, therefore, that the appellant was tried under the 1885 legislation for offences committed in 2007 although by the time of his trial the statutory provisions had been repealed and replaced by provisions which introduced a reasonable belief defence.

[14] Although the notice of appeal relies on an alleged breach of Article 6 of the Convention the argument advanced on appeal did not pursue this point. In our view that was entirely correct. Article 6 is concerned with procedural propriety and not with the substance of the offence except insofar as the substance may affect trial procedures (see E v DPP [2005] EWCA 147 (Admin) at paragraph 7 and R v Craig Kirk and others [2002] EWCA Crim 1580 at paragraph 15).

[15] The appellant argued first that consensual sexual intercourse falls within the ambit of his Article 8 rights to enjoy a private life. It was submitted that if the applicant reasonably believes that a 14 year old girl is over the age of consent and he has intercourse with her any interference by the state as a result of that act engages that Article. The appellant's case is that although the legislative regime did not necessarily constitute a breach of Article 8 it was discriminatory on grounds of residence and nationality and on grounds of gender.

[16] In light of the decision of the House of Lords in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37 it can be argued that discrimination on the grounds of residence falls within Article 14 as an "other status". It seems to us that this rather than nationality was the true basis for this aspect of the claim. There is no element of the offence which treats differently those of different nationality. The claim proceeds on the basis that there is an obligation to ensure that where the state has dealt with the social problem of how to protect young girls from inappropriate sexual harm in one way which is favourable to an accused it is not open to another part of the United Kingdom to respond in a different way.

[17] We do not accept that argument. The devolution arrangements within the United Kingdom are designed to provide the devolved legislatures with the responsibility to determine their response to social problems. As a matter of law the provisions enacted must not contravene convention rights. Carson, however, recognises that the intensity of review will depend on the nature of the difference in treatment alleged. Where the legislature is dealing with a social problem and the alleged discrimination does not touch on the suspect grounds described by Lords Hoffmann and Walker in Carson it will generally be entitled to a wide area of discretionary judgment.

[18] The method chosen by the legislature in Northern Ireland has been to make criminally liable those who have sexual intercourse with underage children. This represents a high measure of protection for the child but of course as this case demonstrates the consequences for the child of a pregnancy at fourteen are potentially damaging for the child victim and the newly born child. In our view the legislature was entitled to make this social judgment. It is not invalidated by the fact that a different judgment has been made elsewhere nor by the fact that a different solution has now been arrived at in this jurisdiction for acts on or after 2 February 2009. The amendment to the law made on that date does not invalidate the legislative provisions which governed the earlier period.

[19] The second part of the argument alleges discrimination based on gender. We accept that gender is one of the suspect grounds and if persons of different gender in the same situation are being treated differently that different treatment would require very weighty reasons to justify it. The basis of the argument is that a woman in her twenties who had penetrative sexual activity with a fourteen year old girl would most probably have been charged with the offence of indecent assault contrary to s52 of the Offences Against the Person Act 1861. In light of R v K [2002] 1 Cr App R 13 the Crown would have been obliged to prove the absence of a genuine belief that the victim was of age. On a similar basis it is contended that if a male in his twenties had penetrative sex with a fourteen year old boy he also would be entitled to rely on this defence. That was the basis of the sexual orientation claim.

[20] The allegation of gender discrimination was considered by the English Court of Appeal in R v Craig Kirk and others [2002] EWCA Crim 1580. In that case the analogy was with a woman in her late twenties who had sexual intercourse with a fourteen year old boy. Such a woman would have been entitled to the defence of honest belief whereas a man of the same age who had sex with a fourteen year old girl would not.

[21] The court concluded that the vice at which the provision was aimed was the protection of young girls and recognised that such protection could also have been extended to young boys. There is, however, a critical difference and that is that young girls run the risk of an unwanted pregnancy. They are, therefore, in a different situation to young boys and in our view there is nothing discriminatory about not treating those different situations the same. The principle of such different treatment has also been recognised by Lord Bingham in R v K at paragraph 33 and by the majority in R v G [2008] UKHL 37. Indeed in R v G Lord Mance concluded that the strict liability provisions in that case represented the carrying out of the state's positive obligation to provide effective protection for those vulnerable to the sexual attention of others.

[22] In our view none of the grounds advanced on the appeal against conviction have been made out and we dismiss that appeal.

Appeal against sentence

[23] The fact that the sexual activity was consensual and the appellant believed that the victim was seventeen at the time is, of course, relevant to mitigation. Appropriate mitigation represents one way in which the state responds proportionately to the commission of the offence. No complaint is made about the factors taken into account by the trial judge. He took into account that the law had subsequently changed to afford a defence of which the appellant might have availed. He recognised that the acts were entirely consensual. He acknowledged that the appellant made full and frank admissions and that he stopped the intercourse when the girl told him her true age. He also noted that there was no risk of re-offending. He declined to make a Sexual Offender's Prevention Order.

[24] The appellant was 23 years old at the time of the offences and the victim was just fourteen. This is not a case of two teenagers who had developed a relationship from a virtuous friendship. The pregnancy of the victim was an aggravating factor and a custodial sentence was certainly in play. We cannot fault the outcome reached by the trial judge which in our view was neither wrong in principle or manifestly excessive. We dismiss the appeal against sentence.