

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37334/08
by G.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 30 August 2011 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
Sverre Erik Jebens,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 20 July 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, "G", is a British national who was born in 1988 and lives in Sudbury. He was represented before the Court by Mr M. Boyd, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms L. Dauban, Foreign and Commonwealth Office.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The offence, conviction and sentence

3. In September 2004, when the applicant was 15, he had sexual intercourse with a 12 year-old girl ("the complainant") at his home, using a condom.

4. Two 17 year-old friends of the complainant became concerned when she admitted to them that she had had sexual intercourse with the applicant. They took her to a family planning clinic. The clinic called the police. In a video-recorded interview the complainant gave the following account of what had occurred. After a casual meeting she spoke to the applicant on a couple of occasions by mobile telephone and they arranged to meet again. Because it was raining they went to the applicant's home. They went into his bedroom "to talk". The door was closed, and possibly locked. The applicant quizzed her about her school. Suddenly he took down her trousers and flung them across the room. She understood what was about to happen and, alarmed, made clear her objections. Despite these, the applicant proceeded to have vaginal intercourse with her. They remained about ten minutes in the room, then parted. They had no further contact.

5. On the basis of this evidence, the applicant was charged with rape of a child under 13, contrary to section 5 of the Sexual Offences Act 2003 ("the2003 Act": see below). He was advised that he had no defence to the charge.

6. On 20 April 2005 he pleaded guilty on the following basis, as recorded in writing:

> "i) The complainant willingly agreed to have sexual intercourse with the defendant.
>
> ii) At the time the defendant believed that the complainant was 15 years old. She told him so on an earlier occasion.
>
> iii) The defendant nonetheless pleads guilty to the ... offence having been advised that, by reason of the fact that the complainant was under 13 at the relevant time, the offence is committed irrespective of:
>
> a) consent
>
> b) reasonable belief in consent
>
> c) a reasonable belief as to age."

7. The prosecution were not, initially, prepared to accept this basis of plea and a "Newton" hearing was fixed for 9 and 10 June 2005 in order to determine the correct factual basis for the purpose of sentence. The complainant was, however, terrified of attending court and so, with the support of her mother, decided that she was content with the basis of plea.

On 25 May 2005, however, the prosecution informed the applicant's solicitors that they had decided to accept the basis of plea advanced because the complainant had accepted that she had told the applicant that she was 15 and she was reluctant to attend court to give evidence. The prosecution declined to consider, as they were invited to do by those representing the applicant, whether it was in the public interest to proceed with the prosecution.

8. On 8 July 2005 the applicant was sentenced to a 12-month detention and training order. He was detained for approximately five months before being granted bail on being given permission to appeal against sentence.

2. The Court of Appeal

9. The applicant appealed to the Court of Appeal against conviction and sentence on the grounds *inter alia* that (1) the conviction violated his right to a fair trial and the presumption of innocence under Article 6 of the Convention, because the offence was one of strict liability, and (2) it violated his right to respect for private life under Article 8 because it was disproportionate to charge him with rape under section 5 when he could have been charged with a less serious offence under section 13 of the 2003 Act, which deals with sex offences committed by persons under 18 (see below). On 12 April 2006 the Court of Appeal (Lord Phillips CJ, Andrew Smith J, Wilkie J) dismissed the appeal against conviction but allowed the appeal against sentence, substituting a conditional discharge (see *G v R* [2006] EWCA Crim 821).

10. The Court of Appeal held that the offence under section 5 of the 2003 Act was committed by a person having vaginal, anal or oral sexual intercourse with a victim under 13, whether or not the victim consented and regardless of whether the defendant reasonably believed that the child was 13 or over. It found that no issue arose under Article 6 § 2 of the Convention, which did not prevent a State from creating offences of strict liability. The Court of Appeal accepted that prosecution of a minor for an offence under section 5 of the 2003 Act in respect of "consensual" sexual intercourse might in certain cases give rise to a violation of Article 8 of the Convention. To prevent this, it would be possible for the trial judge to substitute a charge under section 13 of the 2003 Act (see below) once the full facts had emerged. Moreover, the judge's sentencing powers in relation to the conviction of a child of an offence under section 5 ranged from absolute discharge to detention for life. If it transpired that the facts of the offence were less serious than those that originally justified the charge, the judge should normally, by an appropriate sentence, be able to ensure that there was no unjustified interference with the defendant's Article 8 rights. On the facts of the applicant's case, the judge did not infringe Article 8 by proceeding to sentence the applicant under section 5.

3. The House of Lords

11. On 30 October 2006, the Appellate Committee of the House of Lords granted leave to appeal. On 18 June 2008, their Lordships (Lords Hoffmann, Hope of Craighead, Mance and Carswell and Baroness Hale) dismissed the appeal (see *G v R* [2008] UKHL 37).

12. The House of Lords unanimously held that Article 6 §§ 1 and 2 guaranteed fair procedure and the presumption of innocence but did not place any obligation on States as regards the substantive contents of domestic law, including the mental or other elements of offences under domestic criminal law.

13. They also rejected the applicant's complaint under Article 8 by a majority of 3 to 2 (Lords Hoffmann and Mance and Baroness Hale in the majority, Lords Hope and Carswell dissenting). The majority held that, even if the applicant's Article 8 rights were engaged, his prosecution, conviction and sentence were proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others.

14. Baroness Hale observed as follows:

> "44. Section 5 of the 2003 Act has three main features. First, it singles out penetration by the male penis as one of the most serious sorts of sexual behaviour towards a child under 13; secondly, it applies to such penetration of a child under 13 of either sex; and thirdly it calls this 'rape'. ... This is because the law regards the attitude of the victim of this behaviour as irrelevant to the commission of the offence (although it may, of course, be relevant to the appropriate sentence). Even if a child is fully capable of understanding and freely agreeing to such sexual activity, which may often be doubted, especially with a child under 13, the law says that it makes no difference. He or she is legally disabled from consenting.
>
> 45. ... It is important to stress that the object is not only to protect such children from predatory adult paedophiles but also to protect them from premature sexual activity of all kinds. They are protected in two ways: first, by the fact that it is irrelevant whether or not they want or appear to want it; and secondly, by the fact that in the case of children under 13 it is irrelevant whether or not the possessor of the penis in question knows the age of the child he is penetrating.
>
> ...
>
> 48. ... There was a great deal of anxiety in Parliament about criminalising precocious sexual activity between children. The offences covered by section 13 in combination with section 9 cover any sort of sexual touching however mild and however truly consensual. As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted. Indeed, section 9 expressly contemplates that the person penetrated may be the offender. Obviously, therefore, there will be wide variations in the blameworthiness of the behaviour caught by sections 9 and 13. Both prosecutors and sentencers will have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate. In many cases, there will be no reason to take any official action at all. In others, protective action by the children's services, whether in respect of the perpetrator or the victim or both, may be more appropriate. But the message of sections 9 and 13 is that any sort of sexual activity with a child under 16 is an offence, unless in the case of a child who has reached 13 the perpetrator

reasonably believed that the child was aged 16 or over. There are many good policy reasons for the law to convey that message, not only to adults but also to the children themselves.

49. Section 5 reinforces that message. Penetrative sex is the most serious form of sexual activity, from which children under 13 (who may well not yet have reached puberty) deserve to be protected whether they like it or not. There are still some people for whom the loss of virginity is an important step, not to be lightly undertaken, or for whom its premature loss may eventually prove more harmful than they understand at the time. More importantly, anyone who has practised in the family courts is only too well aware of the long term and serious harm, both physical and psychological, which premature sexual activity can do. And the harm which may be done by premature sexual penetration is not necessarily lessened by the age of the person penetrating. That will depend upon all the circumstances of the case, of which his age is only one.

...

54...The concept of private life 'covers the physical and moral integrity of the person, including his or her sexual life' (*X and Y v The Netherlands*, para. 22). This does not mean that every sexual relationship, however brief or unsymmetrical, is worthy of respect, nor is every sexual act which a person wishes to perform. It does mean that the physical and moral integrity of the complainant, vulnerable by reason of her age if nothing else, was worthy of respect. The state would have been open to criticism if it did not provide her with adequate protection. This it attempts to do by a clear rule that children under 13 are incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity. This does not in my view amount to a lack of respect for the private life of the penetrating male."

15. In his dissenting judgment, Lord Hope (with whom Lord Carswell agreed) observed as follows:

34. Article 8(1) guarantees to everyone the right to respect for his private life, and a teenager has as much to respect for his private life as any other individual. It is unlawful for a prosecutor to act in a way which is inconsistent with a Convention right. So I cannot accept Lord Hoffmann's proposition that the Convention rights have nothing to do with prosecutorial policy. How an offence is described and the range of sentences that apply to it are matters for the contracting state. But where choices are left to the prosecutor they must be exercised compatibly with the Convention rights. ...

36. ... The offences which the 2003 Act has created are expressed in very broad terms. They recognise that the circumstances in which mutual sexual activity may take place between children of the same or the opposite sex, and the acts that they may perform on one another as fashions change, will inevitably vary greatly for case to case. But there is great force in the point that McLachlin J made in *R v Hess; R v Nguyen* [1990] 2 SCR 906 about the need for children to be protected. Their need to be protected against themselves is as obvious as is their need to be protected from each other. There is much to be said for the view that where acts are perpetrated on children under 13 by children of a similar age intervention of some kind is necessary for the protection of their physical and moral health. My noble and learned friend Baroness Hale of Richmond offers a unique insight into these issues, and I agree with all she says about the dangers of under age sexual activity. The fact that there was consent is to this extent simply irrelevant. ...

38. The Children's Hearing system provided for in Chapters 2 and 3 of the Children (Scotland) Act 1995 is not available in England and Wales. So sexual activity between children of the kind described in this case cannot be dealt with outside the criminal law. I am not suggesting that it should be decriminalised here. That would be to condone it which, as McLachlin J's observations about the risks to vulnerable young people so clearly indicate, would not be acceptable. But this still begs the question whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults. There are grounds for thinking that the sanctions that can be imposed under section 13 for mutual sexual activity by a person under 18 with a child under 13 provide all that is needed by way of punishment that is proportionate to the offence. The message that this is an offence can be conveyed to children as well as adults very effectively by the use of these sanctions, as anyone who has exercised the responsibility of sentencing children in cases of that kind knows.

39. Section 5, the rape of a child under 13, on the other hand is designed for a different and much more serious situation. The offence is one which only a male person can commit. It may be committed by a male person of any age, and he is liable on conviction to life imprisonment. The description of the offence as rape, and all the consequences that go with that description, are entirely appropriate where the act has been committed upon a child under 13 by a person over the age of 18. It may also be appropriate where the person who committed it was under that age. But the lower the age, the less appropriate it will be. The question in such a case, given the choice that is available, must be whether in all the circumstances to proceed under section 5 would be proportionate. The Court of Appeal said that the judge should have taken the view, having regard to the basis of the plea, that the offence in this case fell properly within the ambit of section 13 rather than section 5: para 51. I agree, but I would go further. I think that it must follow that, as the offence fell properly within the ambit of section 13, the appellant's conviction of rape under section 5 was disproportionate."

B. Relevant domestic law and practice

1. Sections 5 and 13 of the Sexual Offences Act 2003

16. Section 5 of the 2003 Act provides:

"**Rape of a child under 13**

(1) A person commits an offence if-

(a) he intentionally penetrates the vagina, anus or mouth of another person with his penis, and

(b) the other person is under 13.

(2) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life."

17. Section 13 provides:

"Child sex offences committed by children or young persons

(1) A person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 [sexual activity with a child] if he were aged 18.

(2) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years."

18. The judge's sentencing powers in relation to the conviction of a child under section 5 of the 2003 Act range from absolute discharge to detention for life. Conviction under section 13 is subject to a maximum sentence of five years' detention.

19. In *R v Corran and other appeals* [2005] EWCA Crim 192 the Court of Appeal gave guidance as to sentencing in respect of the offence created by section 5, as follows:

"6. Against that background, we turn to the offence of rape of a child under 13, contrary to section 5 of the Act. We say, at once, that no precise guidance can be given. The appropriate sentence is likely to lie within a very wide bracket, depending on all the circumstances of the particular offence. There will be very few cases in which immediate custody is not called for, even in relation to a young offender because the purpose of the legislation is to protect children under 13 from themselves, as well as from others minded to prey upon them. ...

8. Although absence of consent is not an ingredient of the offence, presence of consent is, in our judgment, material in relation to sentence, particularly in relation to young defendants. The age of the defendant, of itself and when compared with the age of the victim, is also an important factor. A very short period of custody is likely to suffice for a teenager where the other party consents. In exceptional cases ... a non-custodial sentence may be appropriate for a young defendant. If the offender is much older than the victim a substantial term of imprisonment will usually be called for."

2. Crown Prosecution Service Guidance

20. In relation to the 2003 Act, legal guidance contained in the Code for Crown Prosecutors provides that, insofar as child defendants (under 18) are concerned:

"[P]rosecutors may exercise more discretion where the defendant is a child. The overriding public concern is to protect children. It was not Parliament's intention to punish children unnecessarily or for the criminal law to intervene where it is wholly inappropriate. During the passage of the bill, Lord Falconer said:

'Our overriding concern is to protect children, not to punish them unnecessarily. Where sexual relationships between minors are not abusive, prosecuting either or both children is highly unlikely to be in the public interest. Nor would it be in the best interests of the child....'

21. The Code sets out a number of factors that prosecutors should take into account in deciding whether or not to prosecute, including *inter alia* the age and understanding of the offender, whether the complainant entered into sexual activity willingly, the relationship between the parties, whether there was any element of exploitation, coercion or threat, deception, grooming or manipulation in the relationship and the nature of the activity. In addition,

the best interests and welfare of the complainant and defendant must be taken into account.

COMPLAINTS

22. The applicant complained under Article 6 §§ 1 and 2 of the Convention that his conviction of the offence under section 5 of the Sexual Offences Act 2003 ("the 2003 Act") was not compatible with the presumption of innocence. He also complained that the criminal proceedings amounted to a disproportionate interference with his right to respect for private life.

THE LAW

A. Article 6 §§ 1 and 2 of the Convention

1. The parties' submissions

23. The applicant's first complaint concerned his right to the presumption of innocence under Article 6 §§ 1 and 2 of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

24. He submitted that the creation of strict criminal liability would always engage a consideration of compatibility with the presumption of innocence. This proposition, he argued, found support in *Salabiaku v. France*, 7 October 1988, Series A no. 141-A. In that case, the Court had interpreted Article 6 § 2 as permitting the creation of offences of strict liability provided it did so within "reasonable limits", striking a balance between the public interest and the rights of the defence. Those rights, the applicant argued, must include the right not to be convicted of a criminal offence in the absence of blameworthy conduct. The applicant submitted that the reason why the Court had found no violation of Article 6 § 2 in *Salabiaku* was that the French courts had read a defence of *force majeure* to the otherwise strict liability criminal offence of illegally importing narcotics, which was at issue in the case. This approach was confirmed by the Court's inadmissibility decision in *Hansen v. Denmark* (dec.), no. 28971/95, 16 March 2000, which concerned the compatibility of a strict

liability tachograph offence with the requirements of Article 6 § 2 of the Convention. The Court had considered that the offence at issue related to road safety, which was an area where the Contracting States were well within the reasonable limits and had declared the application inadmissible. The applicant contended that if the "reasonable limits" test did not have any application to the creation of strict liability offences, it was surprising that the Court had not said as much in clear terms in the stark circumstances of the *Hansen* case. He concluded that the imposition of strict liability on a 15 year old boy who reasonably believed that the complainant was also 15 and had consented to sex plainly did not satisfy the *Salabiaku* "reasonable limits" test. In this respect, the applicant pointed out that a conviction for the section 5 offence carried with it seriously adverse consequences. Moreover, he submitted that this form of absolute liability was unlikely substantially to advance the legitimate aim of protecting children under thirteen, particularly where the parties were young persons. Finally, he noted that the offence was applicable to all persons and was therefore quite different from the imposition of strict liability in the conventional regulatory field.

25. The Government relied on the reasoning of the domestic courts and submitted that Article 6 § 1 of the Convention, read together with Article 6 § 2 , was concerned with procedural fairness and not with the content of the substantive law. In this regard, a distinction had to be drawn between innocence of a criminal offence and innocence of blameworthy conduct. The absence of blameworthy conduct was a matter ordinarily to be taken into account at the stage of sentencing and was ordinarily irrelevant to criminal liability. The offence at issue pursued the legitimate aim of protecting children under the age of 13 from sexual abuse and so far as possible, from the trauma of giving evidence. The facts set out in the applicant's basis of plea had properly been taken into account by way of mitigation. For the Government, the applicant's complaint in fact amounted to an assertion that he should have been prosecuted for an offence contrary to section 13 of the 2003 Act rather than the offence contrary to section 5. However, the only practical difference between the two provisions was the maximum penalty. As the applicant had been sentenced to a conditional discharge, the difference between the offences became irrelevant.

2. The Court's assessment

26. The Court recalls that a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is specifically mentioned in Article 6 § 2 and also forms part of the general notion of a fair hearing under Article 6 § 1 (see *Phillips v. the United Kingdom*, no. 41087/98, § 40, ECHR 2001-VII). The presumption of innocence requires, *inter alia*, that the burden of proving the elements of the offence charged against the

accused is on the prosecution. However, the burden of proof may shift to the accused to establish the elements of any defence available under domestic law. Moreover, Article 6 §§ 1 and 2 do not prevent domestic criminal law from providing for presumptions of fact or law to be drawn from elements proved by the prosecution, thereby absolving the prosecution from having to establish separately all the elements of the offence, provided such presumptions remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see, by way of example, *Salabiaku v. France*, 7 October 1988, Series A no. 141-A; *Radio France and Others v. France*, no. 53984/00, ECHR 2004-II; *Hardy v. Ireland* (dec.), no. 23456/94, 29 June 1994; see also, *mutatis mutandis, H. v. the United Kingdom* (dec.), no. 15023/89, 4 April 1990).

27. At the same time, the Court underlines that in principle the Contracting States remain free to apply the criminal law to any act which is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. It is not the Court's role under Article 6 §§ 1 or 2 to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused (see *Salabiaku*, cited above, § 27; see, *mutatis mutandis, Radio France and Others v. France*, no. 53984/00, § 24, ECHR 2004-II; see also, with reference to the content of substantive civil rights and obligations, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 87, ECHR 2001-V).

28. The Court notes that Parliament created the offence under section 5 of the 2003 Act in order to protect children from sexual abuse. As the domestic courts confirmed, the objective element (*actus reus*) of the offence is penile penetration, by any person old enough for criminal responsibility, of the vagina, anus or mouth of a child aged 12 or under. The subjective element (*mens rea*) is intention to penetrate. Knowledge of, or recklessness as to, the age of the child or as to the child's unwillingness to take part in the sexual activity are not elements of the offence.

29. In the instant case, the prosecution was required to prove all the elements of the offence beyond reasonable doubt. The Court does not consider that Parliament's decision not to make available a defence based on reasonable belief that the complainant was aged 13 or over can give rise to any issue under Article 6 §§ 1 or 2 of the Convention. Section 5 of the 2003 does not provide for presumptions of fact or law to be drawn from elements proved by the prosecution. The principle considered in *Salabiaku* (cited above) therefore has no application here.

30. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention.

B. Article 8 of the Convention

1. The parties' submissions

31. The applicant also complained that his continued prosecution, conviction and sentence, taken individually or together, constituted a disproportionate interference with his right to respect for private life, in breach of Article 8 of the Convention. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

32. The applicant submitted that Article 8 of the Convention applied, since sexual relationships are an aspect of private life. He accepted that the initial decision to charge him with an offence under section 5 of the 2003 Act could not be criticised, but he argued that the proper course for the prosecuting authority to have taken once the basis of plea had been accepted was to seek leave to withdraw the section 5 charge and to abandon the prosecution or substitute a charge under section 13 of the 2003 Act. To impose a conviction for rape on a 15 year-old boy in circumstances where he reasonably believed that the complainant was also 15 and that she had consented to sexual intercourse was not necessary in a democratic society. In this regard, the applicant adopted the reasoning of the minority in the House of Lords and pointed to the very serious consequences of stigmatising a child as a "rapist". In particular, the applicant pointed out that he remained at risk of re-sentencing for the section 5 offence in the event that he was convicted of some other offence during the twelve-month period of his conditional discharge. The applicant further noted that, despite the imposition of a conditional discharge, an employer or prospective employer was not prevented from requesting disclosure of any previous convictions. There was thus a real possibility that this would impede the applicant's successful employment. Moreover, the conviction for rape would inevitably have a negative impact upon his interaction with his peers and members of the community generally.

33. Relying on the decision of the majority in the House of Lords, the Government argued that there was no interference with Article 8 rights in the present case. Although the Government accepted that the concept of private life could include sexual life, this did not mean that every sexual act that an individual performed or wished to perform was capable of engaging Article 8. Even if the applicant's Article 8 rights were engaged, the Government argued that the prosecution were justified in treating the conduct of the applicant as unlawful and the offence itself was a justifiable

interference with private life. In this regard, the Government stressed that the applicant had accepted that the initial decision to charge him with rape under section 5 of the 2003 Act was appropriate in the light of the complainant's account that the sexual intercourse had not been consensual. The Government submitted that whether or not to substitute the charge under section 5 of the 2003 Act for a less serious offence under section 13 of the 2003 Act was a matter falling within the discretion of the prosecuting authorities, which was not ordinarily subject to the Court's consideration. In any event, the discretion had been exercised appropriately in this case. The basis of plea had been taken into account and given full weight by the domestic courts. In particular, the Court of Appeal had quashed the applicant's custodial sentence and replaced it with a conditional discharge for a period of 12 months. In this regard, the Government relied on *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, *Reports of Judgments and Decisions* 1997-I and *K.A. and A.D. v. Belgium*, no. 42758/98 and 45558/99, *Reports* 1997-I in support of the proposition that the Court's approach was to consider the question of proportionality after taking into account the sentence actually imposed. The conviction had no practical continuing effect once the conditional discharge had expired and the applicant could benefit from the protection of the Rehabilitation of Offenders Act 1974. The position would have been no different had the applicant been convicted of an offence contrary to section 13 of the 2003 Act.

2. The Court's assessment

34. The Court must first determine whether Article 8 is applicable. It recalls that the concept of "private life" is a broad one and includes an individual's sexual life (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *S.L. v. Austria*, no. 45330/99, ECHR 2003-I), although the Court has observed that not every sexual activity carried out behind closed doors would necessarily fall within the scope of Article 8 (see *Laskey, Jaggard and Brown*, cited above, § 36). The concept of private life also covers the physical and moral integrity of the person, respect for which the state may be required to secure through its domestic law (see *X and Y v. the Netherlands*, no. 8978/80, § 22, 26 March 1985).

35. The Court notes that at the time of the events in question, the applicant was 15 years old and the complainant was 12. The applicant was convicted and sentenced on the basis that both parties had consented to sexual intercourse and that the applicant had reasonably believed the complainant to be the same age as him. In these circumstances, the Court is prepared to accept that the sexual activities at issue fell within the meaning of "private life" (see, *mutatis mutandis*, *S.L. v. Austria*, no. 45330/99, ECHR 2003-I). The Court therefore concludes that the criminal proceedings

against the applicant, which resulted in his conviction and sentence, constituted an "interference by a public authority" with his right to respect for private life.

36. It was undisputed by the parties that the interference was "in accordance with the law". Moreover, the measures at issue were intended to protect young and vulnerable children from premature sexual activity, exploitation and abuse. There is therefore no doubt that the interference with the applicant's private life pursued the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others.

37. It remains for the Court to determine whether the continued prosecution, conviction and sentencing of the applicant were "necessary in a democratic society" within the meaning of the second paragraph of Article 8. The Court recalls that, according to its established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the national authorities (see, among many authorities, *Laskey, Jaggard and Brown*, cited above, § 42).

38. The scope of this margin of appreciation is not identical in each case and will vary according to the context. Thus, where the activities at stake involve an intimate aspect of private life, the margin allowed to the State is generally narrow (see, *mutatis mutandis*, *Dudgeon*, cited above, § 52; and *A.D.T. v. the United Kingdom*, no. 35765/97, § 37, ECHR 2000-IX). On the other hand, in this case the countervailing public interest was the need to protect the complainant and other children in her position against premature sexual activity, exploitation and abuse. As the domestic courts pointed out, the State is under a positive obligation under Article 8 to protect vulnerable individuals from sexual abuse (*X and Y v. the Netherlands*, cited above; compare *K.A. and A.D. v. Belgium,* cited above). The Court has found that the Contracting States enjoy a wide margin of appreciation as regards the means to ensure adequate protection against rape (*M.C. v. Bulgaria*, no. 39272/98, § 154, ECHR 2003-XII). Given the nature of the public interest at stake, the Court concludes that the State authorities' margin of appreciation in the present case must be wide.

39. As Baroness Hale observed, the consequences of penetrative sex for a child of 12 or under may be very harmful. The Court does not consider that the national authorities can be said to have exceeded the margin of appreciation available to them by creating a criminal offence which is called "rape" and which does not allow for any defence based either on apparent consent by the child or on the accused's mistaken belief about the child's age. Nor does the Court consider that the authorities exceeded their margin of appreciation by deciding to prosecute the applicant for this offence, particularly since the legislation permitted for a broad range of sentences

and the mitigating circumstances in the applicant's case were taken into account by the Court of Appeal.

40. In conclusion, the Court considers that the complaint under Article 8 must be rejected as manifestly ill founded, pursuant to Article 35 §§ 3 and 4 of the Convention

For these reasons, the Court by a majority

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President