



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 12
HCA/2024/553/XC and
HCA/2024/554/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

SUPPLEMENTARY OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in the references by His 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; the Crown Agent
Minuters: Mackintosh KC ; PDSO Dundee
Interveners: Mure KC**

20 February 2025

[1] In references by the Lord Advocate to this court under section 288AB(4) of the
Criminal Procedure (Scotland) Act 1995, in relation to summary prosecutions by the

Procurator Fiscal, Dundee against JH and LL, in delivering the opinion of a court comprising also Lord Armstrong and Lord Beckett, the Lord Justice General (Carloway) made certain references, *obiter*, at paragraphs [11] and [52], to section 142 of the 1995 Act. The opinion was issued on 17 January 2025; [2025] HCJAC 2. It was thereafter drawn to the court's attention that part of what was stated may be wrong.

[2] The court's error related to the definition of a "child" within section 307 of the 1995 Act.

[3] Section 307, as amended from 24 June 2013, provides that "child", except in section 46(3) and Schedule 1 to the 1995 Act has the meaning assigned to that expression for the purposes of section 199 of the Children's Hearings (Scotland) Act 2011'. Section 46(3) creates a presumption in certain criminal proceedings concerning the age of a child. Schedule 1 specifies certain sexual offences against children under 17 years of age to which special provisions apply.

[4] As enacted, section 199(1) of the 2011 Act stated, generally, that a "child" means a person who is under 16 years of age.

[5] Section 12 of the Children (Care and Justice) (Scotland) Act 2024, when fully implemented, will alter the definition of a "child" for the purposes of criminal proceedings. Section 307 of the 1995 Act, will be amended, by section 12 of the 2024 Act, to provide that "child" has the meaning given by section 199 of the Children's Hearings (Scotland) Act 2011. The meaning of a "child" as set out at section 199 of the 2011 Act is also to be amended by section 1 of the 2024 Act. The effect of these amendments will be to alter the meaning of a "child" as a person under 16 years of age to one under 18 years of age.

[6] Section 12 is only partially in force, to the extent provided for in The Children (Care and Justice) (Scotland) Act 2024 (Commencement No 1 and Transitional Provision)

Regulations 2024 which came into force on 28 August 2024. In terms of these regulations, the appointed day, 28 August 2024, applies only to certain sections of the 2024 Act.

Paragraph 2 specifies:

“(b) section 12 (meaning of "child"), for the purpose of its application to the amendments to the 1995 Act made by sections 18 and 19 of the Act,
(c) section 18 (remand and committal of children before trial or sentence),
(d) section 19 (detention of children on conviction),”

[7] Section 18 of the 2024 Act makes certain amendments to section 51 of the 1995 Act, governing remand and committal before trial, or sentence, of children and young persons.

Section 19 of the 2024 Act is concerned with detention of children on conviction.

[8] Until the outstanding amendments set out in the 2024 Act come into force, the meaning of a “child” for the purposes of the 1995 Act remains a person under 16 years of age save for the exceptions referred to in the transitional provisions. Section 142 of the 1995 Act is not referred to in the transitional provisions. It follows that a “child” continues to mean a person under 16 years of age for the purposes of section 142.

[9] We drew the attention of parties to the situation and convened a hearing on 6 February 2025. Senior counsel for the Commissioner had helpfully prepared a written submission setting out his reasons for agreeing there was an error. All parties agreed that there was an error at paras [11] and [52] and that it was appropriate to issue a supplementary opinion to explain how those paragraphs should be read.

[10] We were surprised and troubled to hear that in neither case is a new trial diet fixed. Given the already protracted history of proceedings, we expect early trials to be fixed for both cases, involving child complainers, against JH and LL each of whom is a child under UNCRC Article 1.

[11] In order to assist courts and practitioners who may be misled by *obiter* remarks in the opinion issued on 17 January 2025, paragraphs [11] and [52] should be understood as if they stated:

“[11] UNCRC Article 1 defines a child as meaning:

“every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.”

However, unless and until further provisions are commenced, for the purposes of the 1995 Act section 142, the age of a “child” remains a person who is under 16 years of age.

[52] UNCRC Article 40 applies generally. Art 40(2)(b)(vii) requires that the privacy of each accused, whilst a child as defined in Art 1 of the Convention, is fully respected. This would be achieved by trial taking place behind closed doors, but allowing the press or other specially authorised persons to be present.”