

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. AXAHCV2025/0022

BETWEEN

[A. B.]

Claimant

and

ATTORNEY GENERAL OF ANGUILLA

Defendant

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Dwight Horsford with Mr. Carlyle Rogers of counsel for the claimant.
Mr. Theon Tross of counsel for the defendant.

2025: June 23;
July 31.

JUDGMENT (Redacted)

[1] **MOISE, J.:** This is a constitutional motion filed pursuant to section 16 of the Anguilla Constitution and Part 56 of the Civil Procedure Rules (Revised Edition) 2023. Essentially, the claimant faces charges before the criminal courts in Anguilla pursuant to section 148(c) and (f) of the **Criminal Code**¹. He submits that these sections are unconstitutional. I have considered the submissions of counsel for the parties and have determined that the sections under consideration are not inconsistent with the Constitution of Anguilla, and I have therefore dismissed the claim with no order as to costs. These are the reasons for my decision.

¹ R.S.A. c. C140

The Facts

[2] It is not necessary to outline the specific facts upon which the charges have been brought against [the Claimant]. What is under consideration is whether section 148(c) and (f) are unconstitutional. It is important to also note that [the Claimant] faces other charges against him. However, it is the specifics of section 148(c) and (f) which he challenges. The charge sheet states as follows:

(i) *"For that you on a day unknown between the 1st day of February 2024 and the 3rd day of July 2024 ... in the island of Anguilla did encourage ... a minor to importune for immoral purposes, Contrary to Section 148(c) of the Criminal Code, Revised Statutes of Anguilla Chapter C 140."*
And:

(ii) *"For that you between February 2024 to July 2024 ... in the island of Anguilla by intimidation, attempt to procure ... a minor, to have unlawful sexual intercourse, Contrary to Section 148(f) of the Criminal Code, Revised Statutes of Anguilla Chapter C 140."*

[3] It is important to note that the Criminal Code describes a minor as a person below the age of 18. The specific provisions in section 148(c) and (f) of the Criminal Code state as follows:

148. Any person who –

...

(c) persuades, aids, encourages or causes any minor to solicit or importune for immoral purposes ...

...

(f) by threats or intimidation, procures, or attempts to procure any minor to have unlawful sexual intercourse either in or outside of Anguilla ...

is guilty of an offence and is liable to imprisonment for 8 years.

[4] In his affidavit in support of his claim, [the Claimant] states that he has been advised by his attorneys and verily believes that the charges laid against him under sections 148(c) and 148 (f) of the Criminal Code of Anguilla, do not expressly provide for *mens rea* or any mental element of a guilty mind in their

proscription, neither do they expressly provide for him to mount a defence or give him an opportunity to raise certain exculpatory facts on his behalf. [The Claimant] does not go into any detail as to what exculpatory facts are contemplated in light of the nature of the charges. He goes on to state that, in accordance with these sections, once the crown establishes that he has committed a "wrongful act" his condemnation is secured. He states that the crown has no obligation to prove that he had a guilty mind, neither is he afforded any defence, statutory or otherwise, to these offences. [The Claimant] therefore insists that this infringes his right to a fair trial and a right to liberty pursuant to sections 3 and 9 of the Constitution of Anguilla.

[5] [The Claimant] goes on to state that his rights under section 9 of the Constitution are breached because:

- (a) by implication, he bears the burden of exculpating himself by proof wholly upon him, the accused;
- (b) the section precludes or excludes any form of defence to the allegation laid by the charge, so that the allegation is effectively the condemnation, and
- (c) the section creates an offence of strict liability at best, and an offence of absolute liability, at worst, which in any event, contravenes the fundamental protection of the presumption of innocence enshrined in section 9(5) of the Constitution, as his guilt is presumed by its operative effect, that is to say, that his guilt is presumed once the *actus reus* is established; thus entailing him being in jeopardy of an unfair trial and to self-incrimination; all of which is wholly disproportionate and an intrusion on the fundamental freedoms guaranteed to him by the Constitution of Anguilla and are devoid of any reasonable justification in a democratic society.

[6] [The Claimant] states that the section does not fall into the exception to the protection assured to him in the proviso to section 9(5) of the Constitution, since those provisions in sections 148(c) and (f) do not answer the description of a law which imposes on him, a person charged with a criminal offence, the burden of proving a particular or particular facts. He also argues that the charges are based on a law which is vague, unclear and uncertain in its reach and scope in relation to the matters proscribed or made punishable.

[7] [The Claimant] goes on to state in his affidavit that Section 140 of the Criminal Code defines a "minor" as a person under 18 years of age. Sexual intercourse is only punishable in respect of sexual connection with a certain class of minors who are between the ages of 14 and 16. So far as is relevant, "sexual

offence" is defined in section 140 of the same Act to mean an offence committed against a minor under section 143 (Sexual intercourse with person under 14 years of age), 144 (Sexual intercourse with a person between 14 and 16 years of age).

- [8] He goes on to state that The Act (the Code) appears not to criminalise sexual connection with a person between the ages of 16 and 18, that is to say, a person of 17 years of age. This is both an incongruity and a lacuna, for had he achieved sexual connection (intercourse) with the Virtual Complainant, there would be no offence, as there is no provision under which a charge could be laid. In other words, the person aged 17 will be a minor only for the inchoate offence of procuration, but will not be a minor for the substantive offence of "*unlawful sexual intercourse*". Sexual intercourse with a consenting person of the age of 17 years is not punishable as an offence under the Code. In consequence, only the attempt is criminalised, while the substantive and effective object or effective purpose is not an offence.

The Law

- [9] [The Claimant]'s claim is that the legislation infringes various rights afforded him under the Constitution. In substance he claims that section 148(c) and (f) infringe his rights under section 3 of the Constitution which states that "**no person shall be deprived of his personal liberty save as may be authorised by law**" in any of the circumstances outlined in the section. Section 9 of the Constitution states that "**whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**" Of particular importance to the issues raised in this case is subsection (5) which states that:

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts."

[10] It is therefore not inherently unconstitutional for a law to shift the burden of proof of particular facts on the defendant. [The Claimant] also challenges the constitutionality of section 148(c) and (f) on the basis of section 9(10) which preserves his right against self-incrimination.

[11] The court's powers to review the constitutionality of legislation passed by the Parliament of Anguilla is contained in section 16. The section states as follows:

(1) If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, or is being, contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 2 to 15 (inclusive) to the protection of which the person concerned is entitled:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

[12] Although this court is empowered to determine the constitutionality of legislation, as was noted in the case of *The Chief of Police et al v Calvin Nias*² a person who claims that the provisions of any enactment infringes his constitutional rights "... **bears the burden first to show that the right was prima facie contravened by the impugned legislation.**" Before considering granting any of the remedies which [the Claimant] seeks, the court must first determine whether the sections under which he was charged are unconstitutional in the first place. The court must therefore embark on a process of interpretation so as to determine the meaning of the sections and then go on to consider whether they

²SKBHC VAP2007/010

are in breach of the Constitution. This was highlighted in the case of **Reyes v The Queen**³ where Lord Bingham noted that:

“When (...) an enacted law is said to be incompatible with a right protected by a Constitution, the court’s duty remains one of interpretation. If there is an issue (...) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not.”

[13] Insofar as the court’s powers are concerned, consideration must also be given to the presumption of constitutionality. As was noted in the case of **de Freitas v Permanent Secretary & Ors**⁴ “[i]t is also accepted that in the construction of statutory provisions which contravene human rights and freedoms there is a presumption of constitutionality (*Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C. 689) and that in construing constitutional provisions a liberal approach is required (*Minister of Home Affairs v. Fisher* [1980] AC 319.)” The Court of Appeal noted the following in relation to this presumption in the case of the **Attorney General of Grenada v. Muhammed Ehsan**⁵

“The presumption therefore requires that the court refrains from striking down a statutory provision if it can bring the provision into conformity with the Constitution by making reasonable adaptations, additions or modifications. This principle is borne out in *Greene Browne v The Queen*, at page 50E, where it was stated by Lord Hobhouse that the court must identify the element of unconstitutionality in the impugned provision and, having done this, seek to determine whether the provision can be amended, adapted or modified to bring it into conformity with the Constitution without affecting the meaning or purport of the provision.”

[14] The court is therefore empowered to interpret the words of an enactment in such a way as to conform with the Constitution. However, as was noted in the case of **de Freitas v Permanent Secretary & Ors** the court should not strain in order to secure the validity of legislation which is clearly unconstitutional.

³ [2002] 2 WLR 1034

⁴ [1998] 3 WLR 675

⁵ GDAHCVAP2019/0020

The Privy Council, therefore, endorsed the approach of South African and Canadian jurisprudence as highlighted below:

“In determining whether a limitation is arbitrary or excessive he said that the court would ask itself – ‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.’”

[15] I have already outlined the specific provisions of the Criminal Code which [the Claimant] claims to be offensive to his constitutional rights. However, it is important for the purposes of this decision to place section 148 of the Criminal Code in its proper context. Firstly, the section falls within Part 14 of the Code which deals specifically with Sexual Offences. In legislating sexual offences, the legislature first adopted an interpretation section and for the purposes of this decision there are specific definitions which are relevant.

[16] Firstly, the sections defines an “adult” as a person 18 years of age or more. It also defines a minor as a person below the age of 18. As such, a clear distinction is to be drawn between an adult and a minor. The section also defines “unlawful sexual intercourse” as sexual intercourse outside of the bond of marriage. Therefore, where the sections within this part refer to unlawful sexual intercourse it is not referring to sexual intercourse which is inherently criminal but rather sexual intercourse outside of marriage. To put it differently, despite the use of the word “unlawful”, the term “unlawful sexual intercourse” in this part of Code is in and of itself not a crime. The law prescribes the circumstances in which it is a crime to engage in “unlawful sexual intercourse”.

[17] Between sections 143 and 160 of the Code, parliament created specific sexual offences relating to minors. It is of note that only two sections make it a defence to prove that the minor was 16 years or older at the time of the offence and consented to the act. Section 143 makes it a strict liability offence to have unlawful sexual intercourse with a minor who is below the age of 14. Once the act of unlawful sexual intercourse is proven, there is no defence which can be mounted.

[18] Section 144 makes it an offence to have unlawful sexual intercourse with a minor above the age of 14 but below the age of 16. However, if the minor is 16 or older, he or she can consent to unlawful sexual intercourse and consent is a defence. However, in order to properly assess parliament's intention in this regime in general, it is important to give some detailed consideration to the specific provisions of section 144. The section states as follows:

- (1) Any person who has unlawful sexual intercourse with a minor 14 years of age, or with a minor above 14 years of age but under 16 years of age, whether with or without the consent of that minor, is guilty of an offence and is liable to imprisonment for 20 years.**
- (2) Any person who attempts to have unlawful sexual intercourse with a minor 14 years of age, or with a minor above 14 years of age but under 16 years of age, whether with or without the consent of that minor, is guilty of an offence and is liable to imprisonment for 7 years.**
- (3) Where a marriage is void under the Marriage Act because the wife is under the age of 16 years, the invalidity of the marriage does not make the husband guilty of an offence under this section because he had sexual intercourse with her, if at the time he believed her to be his wife and had reasonable cause for that belief.**
- (4) A man shall not be convicted of an offence under this section because he has unlawful sexual intercourse with a girl under the age of 16 years if he is under the age of 21 years, and has not previously been charged with a like offence, and he believes her to be of the age of 16 years or over and has reasonable cause for the belief.**

[19] It is important to note that from age 16 a minor's consent to unlawful sexual intercourse is a defence. However, the provisions of sub-section (4) are worthy of note. I appreciate that this section is written in gender specific terms. However, here, the law created a defence for any man below the age of 21 who has been proven to have had unlawful sexual intercourse with a girl below age 16 if he had reasonable cause to believe that the minor was 16 years or older. It is this court's view, that parliament is here giving consideration to a specific age range within which minors are likely to interact. If an adult man is over the age of 21 he has no defence for having unlawful sexual intercourse with a minor under this section. The law clearly places a greater burden on older adults when it comes to sexual relations with minors.

[20] Sections 145 and 146 create strict liability offences to have unlawful sexual intercourse with minors suffering from mental disorders and dependent minors. Again, it is important to give consideration to the details of section 146, as it assists in placing the entire regime of sexual offences against minors into context. The section states that:

- (1) Any adult who has unlawful sexual intercourse with a dependent child of the adult, whether with or without the consent of the child, is guilty of an offence and is liable to imprisonment for life.**
- (2) Any adult who attempts to have unlawful sexual intercourse with a dependent child of the adult, whether with or without the consent of the child, is guilty of an offence and is liable to imprisonment for 7 years.**
- (3) In this section, “dependent child”, in relation to an adult, means a minor who is not related by blood to the adult but—**
 - (a) is the adopted child, stepchild, foster child or ward of the adult;**
 - (b) has been treated by the adult as a child of the family of the adult;**
 - (c) is being maintained, either wholly or partly, by the adult;**
 - (d) is in the actual possession, custody, care or charge of the adult; or**
 - (e) in relation to whom the adult holds a position of trust.**

[21] It will be readily observed that although 16 is often colloquially described as the age of consent, the law, when placed in its proper context, continues to ensure that the sexuality of minors below age 18 is not exploited. In the case of [the Claimant], for example, he is 37 years old and has described himself as a youth worker. If a parent trusts him enough to allow a minor child below the age of 18 to sleep over or spend time at his residence, he would do well to consider the fact that he may be considered to be in actual possession or care of a minor in accordance with subsection (d) of section 146(3) and may also be considered to be in a position of trust in accordance with subsection (e). I appreciate that [the Claimant] has not been charged under this section. However, to place the general regime of this part of the Criminal Code into context, it shows that the law clearly does not shut its eyes against the possibility

that minors between 16 to 18 may be exploited for sexual purposes and continues to send a clear message to the contrary.

[22] Section 147 of the code makes it an offence to indecently assault a minor. This is also a strict liability offence up to age 16. The section goes on to state that it is no defence to a charge of an indecent assault committed on a minor under 16 years of age to prove that that minor consented to the act of indecency. It is against this backdrop that we come now to consider section 148 of the Code. However, before doing so, I make three general points.

[23] Firstly, there is nothing anomalous, even within this part of the Code, for strict liability offences to exist. In fact, the vast majority of the sections in this part of the Code are relatively strict or absolute in the actions which infringe the law. Secondly, for reasons which I will explain later on, there is no lacuna insofar as section 148 of the Code is concerned. Thirdly, within the context of the preceding sections it would seem clear that parliament clearly intends to continue to afford specific protection to persons below age 18 against the prospect of sexual exploitation.

[24] Section 148 is headed “procurement of minor”. In this section of the Code, parliament sought to criminalize certain specific actions relating to soliciting or procuring sexual activity from minor children. It is one thing for a 17-year-old to be able to consent to sex, especially with persons within their own age range. However, it is another thing for adults, especially older adults, to specifically target minors in order to illicit various sexual activities. The section uses terms such as procuring, persuading, aiding, encouraging, soliciting, threatening, intimidating and false pretense. It is clear that parliament is creating different types of offences and did not think that these types of behaviour were acceptable in relation to persons below the age of 18.

[25] Although [the Claimant] has singled out subsections (c) and (f) as the sections under which he has been charged, it is important to outline the full extent of section 148. This will assist in applying the contextual and purposive interpretation to the sections as would be required in cases such as these.

[26] Section 148 states therefore, that:

148. Any person who –

- (a) procures or attempts to procure any minor to have unlawful sexual intercourse, either in or outside of Anguilla, with any other person;
- (b) procures or attempts to procure any minor to become, either in or outside of Anguilla, a prostitute;
- (c) *persuades, aids, encourages or causes any minor to solicit or importune for immoral purposes:*
- (d) procures or attempts to procure any minor to leave Anguilla with intent that he may become an inmate of or frequent a brothel elsewhere;
- (e) procures or attempts to procure any minor to leave his usual place of abode in Anguilla with intent that he may, for the purposes of prostitution, become an inmate of or frequent a brothel either in or outside of Anguilla;
- (f) *by threats or intimidation, procures, or attempts to procure any minor to have unlawful sexual intercourse either in or outside of Anguilla:*
- (g) by false pretences or false representations, procures any minor to have any unlawful sexual intercourse either in or outside of Anguilla; or
- (h) applies, administers or causes to be taken by any minor any drug, matter or thing with intent to stupefy or overpower, so as thereby to enable any other person to have unlawful sexual intercourse with such minor;

is guilty of an offence and is liable to imprisonment for 8 years.

[27] Counsel for [the Claimant] argues firstly that at a glance, the adjectival phrase "*for immoral purposes*" is disfavouredly ambiguous. Counsel argues that morality and the law are not coextensive. All immoral acts are not criminal; neither are they necessarily violative of normative conduct. It is also submitted that the phrase "*for immoral purposes*" introduces vagueness into the offences created and impairs the law's requirement of legal certainty. According to counsel for [the Claimant], it is arguable that, "immoral purposes" may indicate an act that is an affront to acceptable standards of decency, but that does not

improve the normative quality or the clarity of the proscription in section 148(c), particularly, when the substantive object of "immoral purposes" is not definitively a crime in and of itself, or even known to the law. It is hopelessly vague.

[28] Counsel relies on the decision of the Caribbean Court of Justice in the case of **McEwan v Attorney-General of Guyana**⁶ for the proposition that a penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct. It must not be vaguely worded. It must define the criminal offence with sufficient clarity that ordinary people can understand what conduct is prohibited. It should not be stated in ways that allow law enforcement officials to use subjective moral or value judgments as the basis for its enforcement.

[29] Counsel goes on to recognize that broad provisions expressed in broad terms are not necessarily vague and do not inherently offend the rule of law requirements for certainty and clarity. However, it is argued that section 148(c) and (f) of the Criminal Code of Anguilla do not satisfy the test. In fact, counsel goes as far as to argue that subsection (f) descends into hades. I do not agree.

[30] It is important to appreciate the context within which the legislation is passed. Firstly, it must be observed that section 148 is contained within the part of the Code dealing with sexual offences. Insofar as that is the case, if a contextual approach is taken, one is capable of narrowing down the "immoral purposes" of which the section relates to as acts of a sexual or indecent nature. Secondly, the section relates to immoral acts of a sexual nature in relation to minors. Insofar as that is the case a distinction can generally be drawn between the facts of the case of **McEwan** and what is currently before the court. The opening paragraph of that judgment is helpful in addressing this point. The paragraph states:

"Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order. It is these simple verities on which this case is premised."

⁶ (2018) 94 WIR 332 (CCJ)

[31] The circumstances of *McEwan* touched on issues of gender identity. Criminalizing differences of personal expression of human identity on the basis of morality is inherently subjective and vague. The CCJ also noted that to do so in cases where a person's personal sense of expression poses no threat to public safety or order is definitely unconstitutional. However, it cannot be said that the aiding, persuading, causing or encouraging a minor to importune for immoral sexual purposes can fall into the same category. There are clear issues of public order and safety, especially of minors, to consider. Further, as it relates to subsection (f) I find it difficult to accept that there is anything vague or offensive in parliament criminalizing any action which uses threats or intimidation in order to procure, or attempt to procure a minor into unlawful sexual intercourse.

[32] I therefore agree with the submissions of counsel for the respondent in their reliance on the case of *Dharmarajen Sabapathie v The State*⁷, where Lord Hope stated the following:

“So the principle of legality applies, and legislation which is hopelessly vague must be struck down as unconstitutional. **But the precision which is needed to avoid that result will necessarily vary according to the subject matter.** The fact that a law is expressed in broad terms does not mean that it must be held to have failed to reach the required standard. In an ideal world it ought to be possible to define a crime in terms which identified the precise dividing line between conduct which was, and that which was not, criminal. But some conduct which the law may quite properly wish to prescribe as criminal may best be described by reference to the nature of the activity rather than to particular methods of committing it. It may be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalised will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. **The application of that description to the various situations as they arise will then be a matter for the courts to decide in the light of experience. In this way the law as explained by its operation in practice through case law will offer the citizen the guidance which he requires to avoid engaging in conduct which is likely to be held to be criminal.**”

⁷ [1999] 1 WLR 1836

[33] The court is therefore to consider the subject matter and the undesirable rigidity in attempting to outline all of the circumstances under which the law may be infringed with any measure of precision. In essence one must consider the context of the legislation in question. Here, the protection of minor children from sexual exploitation is indeed a sufficiently important objective to justify the strict nature of the liability offences which generally exist in this part of the Criminal Code. However, if a contextual or purposive approach is taken in interpreting the sections, then a number of issues stand out.

[34] Firstly, the fact that we are dealing with sexual offences against minors here must be factored into the equation. An individual having to choose his personal manner of dress and expressing his sexual identity is one thing, but encouraging minors to engage in any form of sexual activity raises significant public policy and public interest issues. If one applies contextual approach to interpret the section, then the provisions of section 148 outline the general nature of the types of activities which the section speaks about. It speaks of sexual intercourse, prostitution and other types of activities. "Immoral purposes" for the purpose of sub-section (c) must be read in that light.

[35] In my view, it is not difficult to envisage the types of actions which are prohibited by this section. There are very few, if any, activities of a sexual nature which an adult can be morally justified in persuading, aiding or encouraging a minor child into soliciting. In any event, if an adult is in doubt, the law places the duty on him to consider the risks of his behaviour. There are clear public policy reasons for such laws to exist and the common law in effect in Anguilla is capable of addressing whether the facts of the individual case should be considered to fall within the definition of an immoral purpose in the context of sexual offences against minor children without striking down the legislation altogether. Take for example a circumstance where an adult persuades, aids or encourages a minor to solicit his friends, all minors, for the purpose of video recording sexual activities. The motive may clearly be for exploitative purposes. A jury may have little difficulty in finding that this is immoral, even though the minor and his friends are all age 17. The issues are fact sensitive and it is not desirable to include any rigidity in the interpretation of this section in order to find that it is not in breach of the Constitution.

[36] Counsel argues that sexual intercourse with a minor is age specific and that it is not unlawful to have sexual intercourse with a 17-year-old. As such, subsection (f) creates a lacuna. However, counsel appears to have ignored a number of important issues raised within the legislation itself. Firstly, the legislation defines what unlawful sexual intercourse is. That is not a circumstance where the sexual

intercourse is itself a crime. The interpretation section defines unlawful sexual intercourse as sex outside of marriage. That is not to view sex outside of marriage as itself immoral, but especially in relation to sexual offences in the Criminal Code that is the definition.

[37] Take for example sexual intercourse between a 25 year old and a stepfather. Whilst this may not be considered to be moral it is not against the law and the Criminal Code does not penalize it. However, the Code criminalizes sexual intercourse between a 17 year old and a stepfather, regardless of whether the minor consents or not. Taken in context, therefore, the law clearly seeks to include protection for minor children even though the colloquial age of consent is 16 and places a greater burden on the adult to ensure that the nature of the relationship is age appropriate.

[38] Secondly, especially insofar as it relates to subsection (f), one must also take into consideration the actions which lead to the committing of this offence. The section seeks to prohibit sexual intercourse with a minor if it is procured by threats or intimidation. To my mind, a comparison simply cannot be drawn between a 17-year-old consenting to sexual intercourse and one who is threatened or intimidated into the act. By virtue of the section itself the threats and intimidation negate any argument that there was consent or that the intercourse is lawful. [the Claimant]'s assertion, therefore, that there is something offensive or unconstitutional about the fact that it is legal for him to have sexual intercourse with a 17-year-old but illegal for him to threaten or intimidate one into having sex, or attempting to do so, is at best an uncomfortable proposition and one which the court is not prepared to endorse. Subsection (f) is not vague or ambiguous in any way and sets a clear parameter that is discernable. Placing any burden on an adult to be aware of the broad risks of inappropriate association with a minor child in this way is, to my mind, reasonably justifiable in a democratic society.

[39] It is the court's considered view that section 148 in general seeks to address a specific issue relating to sexual offences against minors. The legislation does not seek to criminalise sexual intercourse where there is consent between the ages of 16 to 18 but makes it an offence in certain circumstances to procure sexually related activities from minors. That is a completely different issue. Therefore, regardless of the defence provided in section 144 and 147 of the Code, persons, especially adults of [the Claimant]'s age, should not solicit or procure sexual activity from a minor, regardless of age. This seems to fulfill a public policy of shielding minors from potentially predatory behaviour. An adult therefore should take no comfort

in saying that merely because a 17-year-old can consent to sex, he should interpret this as a license to specifically target minors for the purpose of sexual related activities. Parliament thought this to be wrong, and the court sees nothing offensive or unconstitutional about it. It is worth repeating that whatever ambiguity may exist in the legislation, insofar as it places a burden on adults to seek to protect rather than violate minors, it is in the public interest for parliament to do so.

Lack of *Mens Rea*

[40] It is therefore left for the court to consider whether there is a lack of *mens rea* which renders the sub-sections unconstitutional. It is to be recognized that strict liability offences do exist and are not inherently unconstitutional. It is a matter of proportionality and whether there are public policy reasons for the legislation in question. It is appreciated that in most instances strict liability offences relate to regulatory breaches such as driving without a valid license or insurance policy. However, strict liability offences have also existed where public policy dictates that a particular class of persons are to be afforded special protection and that some of those who do not fall within that class generally bear the burden of ensuring that their behaviour seeks to protect rather than undermine the other's vulnerabilities. For example, in the very part of the Criminal Code which the claimant seeks to impugn, it is an offence to have sexual intercourse with a minor child under the age of 14. It matters not whether the defendant was of the view that the minor consented. Once the act of intercourse and the child's age has been proven the liability is strict. This is said to be for the express purpose of protecting minor children of a particular age and is perfectly acceptable in a free and democratic society.

[41] Counsel for [the Claimant] argues that neither of those two provisions under scrutiny expressly provides for *mens rea* or any defence (be it of honest belief or mistaken belief). It is submitted that it is debatable whether they are offences of strict liability or of absolute liability. However, it is acknowledged that there is a presumption of *mens rea* at common law. In citing the case of ***Sweet v Parsley***⁸ it is acknowledged that the presumption of *mens rea* is, in effect, a presumption against strict liability. In that case the following was noted:

"Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very

⁸ [1969] 2 WLR 470 (HL).

large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.

[42] It is my considered view that the issue is resolved by a proper interpretation of the section itself. Section 148 is headed procurement of a minor. The ensuing subsections must be viewed in that context. The term procurement is not unknown to the criminal law. In the ***Attorney-General's Reference No 1 of 1975***⁹ the Court of Appeal of England and Wales stated that ***“to procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.”*** It is within this context that section 148(c) and (f) must be considered. These are therefore offences for which the *mens rea* is intent.

[43] Here the offences are not in the immoral acts solicited or procured by the minor child or the sexual intercourse but, in the case of subsection (c) it is in persuading, assisting or encouraging the minor do we find the substance of the offence. In sub-section (f) it is in procuring a minor through threats or intimidation do we find the key ingredient of the offence. In such circumstances, it is more than possible to interpret the section by implying the requirements as set out in the broad definition of what procurement offences constitute. In subsection (c) the requirement is that the crown must prove that the defendant set out to persuade, assist, encourage and that he took the appropriate steps to cause ***any minor to solicit or importune for immoral purposes***. These are, to my mind, acts of intent and in criminal law, a person is deemed to have intended the natural consequences of his actions.

[44] As it relates to subsection (f) what is required of the crown is to prove that the defendant set out and took the appropriate steps by ***threats or intimidation, to cause any minor to have unlawful sexual intercourse either in or outside of Anguilla*** or that he attempted to do so. I also note that attempts at committing an offence are well known to the criminal law and the ingredients need no special mention here. Therefore, it must be proven that the defendant's actions and endeavours either caused or attempted to cause the minor to have unlawful sexual intercourse. If the crown proves this, then the jury

⁹ 1975] EWCA Crim 1 (25 April 1975)

is to be taken to have accepted that the defendant had the intention to produce the outcome which is offensive to the law in that section. Again, this is a crime of intent.

[45] [The Claimant] can therefore defend himself by arguing that he took no endeavours or any steps to aid, persuade, encourage or cause a minor child to solicit or importune for an immoral purpose. In addition, in light of the ingredients of the offence under subsection (f) he can argue that he did not endeavour to cause a minor child to have sexual intercourse. He took no steps to threaten, intimidate or procure or attempt to do so in order to cause a minor child to have sexual intercourse. This would prove his lack of intent. To put it differently, what is essential to prove here is not merely that the minor felt threatened or intimidated, it is whether the defendant is guilty of procurement. The burden rests on the crown to prove. [the Claimant] is however, capable of mounting a defence.

Conclusion

[46] I therefore do not accept that the provisions of section 148(c) are vague. The immoral purposes which the section speaks to are sexually immoral purposes. Given that we are dealing here with minors, a jury would be well capable of determining what a sexually immoral purpose in the context of Anguilla is and a right-thinking adult bears the risk of ensuring that his actions do not encourage such behaviour among minors in much the same way he bears the risk in most if not all of the other sexual offences contained in this part of the Criminal Code. Even if there were to be some compromise to his rights under the Constitution, the objective of the legislation when balanced against his capacity to adequately defend himself, are reasonable and proportionate to the issue. If he wishes to know what is likely to infringe the law, he bears some risk as an adult in not engaging in inappropriate interactions with minors.

[47] In both section 148(c) and (f) the proof which is required by the crown is fact sensitive. The facts may prove intent or may fall short of the standard. The criminal justice process has a number of filters in order to assess whether the specific facts led by the prosecution are sufficient to constitute the offence. In a preliminary inquiry the magistrate may find that the facts do not meet the standard of proof. He or she may also find that even if the facts are proven they are insufficient to show that the minor child solicited or importuned anyone for immoral purposes or that [the Claimant] persuaded, aided or encouraged this. In the case of subsection (f) proof of threats, intimidation and procurement are not uncommon features in the criminal law and the filtering process is sufficient to provide opportunities for [the Claimant] to mount his defence.

[48] I also find that there is no breach of [the Claimant]'s constitutional right to a fair hearing. He is capable of mounting a defence to the allegations against him and the burden has not been shifted to him. There is nothing inherently vague or unconstitutional about the provisions he seeks to impugn.

[49] In the circumstances the case is dismissed with no order as to costs.

Ermin Moise
High Court Judge



BY THE COURT

REGISTRAR