OUTER HOUSE, COURT OF SESSION

[2024] CSOH 106

P122/24

OPINION OF LADY CARMICHAEL

In the Petition of

A

Petitioner

for

Judicial Review

Petitioner: Byrne KC, Allison, Blockley; Drummond Miller LLP
First Respondent (Principal Reporter): Moynihan KC; Anderson Strathern LLP
Second Respondent (Child's mother): Scott KC, Aitken; Balfour + Manson LLP
Third Respondent (*Curator ad litem* and safeguarder): Brabender KC, Laing; Millard Law
Lord Advocate: Crawford KC, M Hamilton; Scottish Government Legal Directorate

26 November 2024

Introduction

[1] The petitioner, A, is the natural father of a child, M, who was born in 2010. He does not have, and has never had, parental responsibilities and rights in respect of M. The second respondent, B, is M's mother. Some years after M was born, the petitioner was convicted of serious offences against B. He was sentenced to an order for lifelong restriction. He was sentenced in 2015. I do not understand there to be any dispute that he has been in custody since September 2013.

[2] A children's hearing convened on 23 November 2023 to review a compulsory supervision order ("CSO") relating to M. When it did so, it determined that the petitioner was not a relevant person in respect of M, and directed that he was not to participate in the proceedings on that day or afterwards.

[3] The petitioner challenges that decision. He says that he was and is a relevant person. In terms of section 200(1)(g) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") "relevant person" includes "any other person specified by order made by the Scottish Ministers". Orders made under that provision are subject to the affirmative procedure: section 200(3). That means that the subordinate legislation must not be made unless a draft of the statutory instrument has been laid before, and approved by resolution of, the Scottish Parliament: section 197.

[4] The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013 ("the 2013 order") provides, in article 3(2)(a), that a person is a relevant person for the purposes of section 200(1)(g) if the person is:

> "(a) a parent of the child other than –
>
> (i) a parent falling within paragraph (a) or (d) of section 200(1) of the Children's Hearings (Scotland) Act 2011;
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> (ii) a parent who had parental responsibilities and rights (or in England and Wales or Northern Ireland, parental responsibility) in relation to the child but, by virtue of an order of court, no longer has them."

[5] The petitioner is a parent who does not fall within paragraph (a) or (d) of section 200(1); that is, he is a parent who does not have parental responsibilities or rights in relation to M under Part 1 of the Children (Scotland) Act 1995 ("the 1995 Act"), nor does he have parental responsibility for M under Part 1 of the Children Act 1989.

[6] The 2013 order was made after the decision of the Supreme Court in *Principal Reporter* v *K* 2011 SC (UKSC) 91. Its effect was to extend the status of relevant person to parents who did not have parental rights or responsibilities, unless the reason why they did not have them was that they had been removed by the order of a court.

[7] The third respondent is the safeguarder appointed by the sheriff in relation to an appeal to him against an earlier decision of the children's hearing. When the Lord Ordinary granted permission for this petition to proceed, the question of whether or not there should be service on the child was held over. At a later stage I heard counsel in relation to that question. I considered the affidavit evidence of M's allocated social worker which contained information about a diagnosis relating to M and his particular vulnerabilities. I was satisfied in the light of that information that service on him should be dispensed with. All parties were agreed that M's participation in these proceedings should be through a curator ad litem, and that the third respondent should be appointed as curator ad litem. She was already known to M, and it would not be in his best interest to be required to speak to someone previously unknown to him.

[8] The answers for each of the first, second and third respondent included a plea that the petition was incompetent in respect that the petitioner had a right of appeal under section 151 of the 2011 Act. Only the third respondent insisted in that plea.

Proceedings in the children's hearing

[9] The first respondent, the principal reporter, referred M to a children's hearing. Grounds of referral were established, and a CSO was made, on 23 January 2023. At that hearing the panel accepted a non-disclosure request. The reason for doing so was:

> "M doesn't have a relationship with his father and this has been the case for many years. M is afraid of his father, therefore it is important that his personal and sensitive information is withheld from him as this would cause him emotional distress if shared."

The hearing also ordered that the place where the CSO required the child to reside must not be disclosed directly or indirectly to the petitioner. The order included a measure that the child was to have no contact with the petitioner. The reason for that was that M had had no contact with his father for a significant period of time and did not wish to have contact with him.

[10] On 17 April 2023 the petitioner requested a review of the CSO. As a result, a hearing took place on 20 June 2023. On 16 May 2023 the child's social worker made a non-disclosure request. She requested that no information be disclosed to the petitioner concerning M or B other than what was "a legal requirement". The reason for making the request was:

> "A has not been involved M's life and he has committed horrendous crimes against B that has had a massive impact on her life and she is still terrified of him to this day. B cannot live a normal life due to the trauma that has been inflicted on her which has then had an impact on M".

The social worker requested that the information on Form 4 be withheld.

[11] The decision of the hearing on 20 June 2023 was to defer the review of the CSO. The petitioner attended remotely and told the hearing that he could not be at the hearing in person because his transport had been cancelled at short notice. He wished to attend in person. B agreed that the hearing should be deferred. M did not attend that hearing.

[12] A further hearing took place on 30 August 2023. Prior to said hearing, both B and M asked to be excused. The panel decided to excuse them, giving the following reasons:

> "B let the panel know that she did not want to attend the upcoming hearing as she finds it emotionally distressing. Her view she stated could be well represented by … M's social worker. The panel accepted B's wishes as it met the criteria for excusal being it would be emotionally distressing. A supported this decision."

> "… M's allocated advocacy worker had spoken to M and confirmed with the panel that M had requested not to attend the upcoming hearing both in person and virtually. He found any attendance at a hearing emotionally distressing. [The advocacy worker] let the panel know that M had been very distressed after the last hearing, displaying emotional behaviour ie hitting his head etc. [The advocacy worker] let the panel know that he would be meeting with M a couple of times before the hearing to ascertain his views. The panel supported M's request to not attend his hearing on the view of it being 'emotionally distressing' and this meeting the criteria for excusal."

[13] The hearing considered the non-disclosure request, which it accepted. Its reasons were:

> "A full discussion took place and a decision to support the non disclosure was applied. Initially A was present, however he was excluded by the panel to allow the rest of the hearing to continue. The panel heard serious concerns from Social Work, that they believed there may be an ulterior motive to A seeking information about M and B, and their whereabouts. He was subsequently readmitted to the hearing to hear the decision, although the reasons for this decision were withheld from him."

The children's hearing continued the CSO, including the measure that M should have no contact with the petitioner. It gave these reasons:

> "The panel maintained the decision that M should have no contact with A . M has made it clear to his advocacy worker, … that he does not recognise or acknowledge A as his father, and has no wish to have contact with him, directly or indirectly. A had requested the panel to consider letterbox contact with M , but the panel felt this went against M's wishes and would likely cause M and his mother a great deal of emotional distress."

[14] The petitioner appealed to the sheriff. His central complaint was that the panel excluded him from the hearing without thinking about whether his presence would prevent proper consideration of the non-disclosure request. It had also excluded his solicitor from the hearing. He and she had both been excluded not only from the part of the hearing dealing with the non-disclosure request, but from the remainder of the hearing also. The sheriff appointed a safeguarder. The principal reporter accepted that there had been a procedural irregularity and conceded the appeal. The sheriff allowed the appeal, although the note to his interlocutor records that he was reluctant to do so, as he had difficulty in

seeing that remittal to the panel would have any prospect of a resulting in a different disposal.

[15] A children's hearing was convened on 23 November 2023. The matter of the petitioner's status as a relevant person came to the attention of the children's hearing because B's solicitor raised the matter in correspondence with the children's hearing three days before the hearing. The letter narrated that proceeding as if the petitioner were a relevant person would be incompatible with the article 8 rights of both B and M, with the following explanation.

> "Phrased in short terms, our reasons why Mr A is not a relevant person are as follows:
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> 1. While a simple reading of the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013/193 would suggest that Mr A as M's genetic parent, is a relevant person, that provision, along with s200 of the 2011 Act, has to be read in a way which is compatible with the Human Rights Act 1998 and, thus, the ECHR.
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> 2. Reading those provisions compatibly may require public bodies, including the children's hearing, to read in words to the provisions even if those words are not otherwise suggested within the provision itself. This has previously been done for the definition of relevant person in other circumstances by both the Inner House of the Court of Session and the UK Supreme Court.
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> 3. Mr A has not [*sic*] parental responsibilities and rights in relation to M. He has no rights in relation to M conferred by any order of court. He has no order regulating his relationship with M. As such, decisions made by the children's hearing do not determine any rights held by him in relation to M.
>
> 4. Mr A has no established family life with M. There is no 'real existence of close personal ties' between Mr A and M and there never has been. As such, decisions of the children's hearing do not interfere with any rights held by Mr A in terms of Article 8 ECHR, the right to respect for private and family life.
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> 5. As the children's hearing is not determining any civil rights held by Mr A Article 6, the right to a fair hearing, is not engaged for Mr A.
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> 6. It is readily evident that the children's hearing proceedings do interfere with the Article 8 rights of M and Ms B both in relation to respect for their family life and for their private life.

> 7. In all the circumstances of this case, Mr A's involvement as a relevant person at children's hearings with all corresponding rights of attendance, participation and access to otherwise confidential papers and information in [sic] incompatible with the Article 8 rights held by M and Ms B.
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> 8. The necessary balancing of the rights at issue for M and Ms B and Mr A must fall in favour of protecting the rights of M and Ms B as Mr A has no right to protect.
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> 9. Accordingly, to avoid unlawfulness by way of acting incompatibly with such rights, the definition of relevant person must be read to exclude Mr A.
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> We propose that this can be achieved by reading the definition of relevant person 2013 Order by adding in a third category of excepted parent into Article 3(2)(a) being
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> (iii) a parent who (a) has no established family life with the child and (b) whose involvement as relevant person would be incompatible with ECHR rights of the child or a person who falls within the definition of relevant person.
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> If that exception is read in and then applied to the circumstances of this case, Mr A is not a relevant person. To avoid acting unlawfully, the children's hearing must read in such an exclusion and Mr A should not be treated as a relevant person."

The letter went on to say that in the event that the children's hearing concluded that the definition of relevant person could not be read in a way that excluded the petitioner, a devolution issue would arise. The children's hearing was said to be a tribunal as defined in section 126(1) of the Scotland Act 1998 ("SA"). Enclosed with the letter was a draft reference of that devolution. The letter invited the children's hearing to make a reference to the Inner House of this court if it were unable to read the legislation in the way that the writer asserted was compatible with B's and M's Convention rights.

[16] The draft reference included the following questions:

> "(a) Does the article 3(2)(a) of the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013 (SSI 2013/193) violate the right to family life under Article 8 of the European Convention on Human Rights of persons such as M and his mother B.
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> (b) Was making article 3(2)(a) of the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013

(SSI 2013/193) outside the devolved competence of the Scottish Ministers in terms of sections 54(2) and 57(2) of the Scotland Act 1998?

(c) Should article 3(2)(a) of the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013 (SSI 2013/193) be read down under section 3 of the Human Rights Act 1998 in order to bring it within competence, by the insertion as an exception to a person who is a (genetic) parent falling within the definition of 'relevant person' for the purposes of section 200(1)(g) of the Children's Hearings (Scotland) Act 2011:

> '(iii) a parent who (a) has no established family life with the child and (b) whose involvement as relevant person would be incompatible with Convention rights of the child or a person who falls within the definition of a relevant person.'"

[17] The children's hearing determined that A was not a relevant person and was not entitled to participate further in the children's hearing. It recorded its reasons:

> "As the Hearing progressed, (after the two non-disclosure requests had been accepted by the Panel) the Panel were required to make a decision relating to Mr A's relevant person status. This had been requested by M's mum's solicitor as their view is that Mr A continuing to be regarded as a relevant person potentially conflicts with the family's rights of a private life as afforded to them under the ECHR (a Devolution Issue).
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> The panel, by a majority, felt that Mr A should not be considered a relevant person on the following basis:
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> Whilst being M's biological father, he has no parental rights and responsibilities, he has no family life with M, he has never had any involvement with M was [*sic*] an infant, and that M has been previously asked if he wanted to know anything about his father and had declined, and that his continued attendance is impacting on B and M, actively participating in M's hearing.
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> This meant that Mr A was excluded from the remainder of the hearing.
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> The minority Panel Member view was that this appeared to be legally complex and felt that they wanted to deal with relevant person status in terms of the current act, and felt that this needed to be tested in the Inner House of the Court of Session."

[18] The children's hearing accepted a request from B that certain information about M and B not be disclosed to the petitioner. It accepted a request from the reporter that certain details not be disclosed to M. That included information about what happened to B which

could be very distressing to M. The order included a measure for no contact with the petitioner. The panel recorded:

> "Whilst being M's named biological father, he has no parental rights and responsibilities, he has no family life with M, Mr A has had no contact with him since he was an infant, and that M has been previously asked if he wanted to know anything about his father and had declined. It is clear that contact (direct or indirect) with his father will be of no benefit to M whatsoever, and would not be in his best interests.
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> Mr A's relevant person status was removed earlier in the Hearing, and this measure will protect M from any future attempts by Mr A to contact M."

Affidavits

[19] I was provided with affidavits from the petitioner and the second respondent which contain differing accounts of the petitioner's involvement in M's early life. I cannot resolve those differences. I note that on the petitioner's own account, he has had no contact at all with M since M was 10 months old.

[20] The child's social worker has provided an affidavit. She describes the hearing that took place on 23 January 2023. It was conducted using Teams. The child's social worker was to be in the room during the whole hearing, and the second respondent and M were to leave when the petitioner was in the hearing. That did not work as planned, and the petitioner was visible on the screen when the second respondent and the social worker logged on. The second respondent was very distressed by that. M was quiet and withdrawn. Both M and the second respondent were upset and distressed when the petitioner called an early review. Excusal from attending panel hearings took away a lot of the anxiety for M and the second respondent, but that did not take away the worry that the petitioner could call reviews. M was aware that his mother was terrified of the petitioner.

[21] The third respondent narrates that during the hearing on 30 August 2023 it became apparent that the petitioner had received a social work report that should not have been disclosed to him. It contained details of M's school and other personal information about M and the second respondent. The third respondent asked the petitioner about this. He said he would not return the papers, but that he would not be "doing anything" with them. In her capacity as safeguarder the third respondent made a non-disclosure request to the panel in relation to her own report for the hearing of 23 November 2023, as it contained personal information about the second respondent and M. She also prepared a separate report summarising the inquiries she had made with the petitioner.

Submissions

[22] I set out a summary of parties submissions, following the order in which they presented their submissions at the substantive hearing.

Petitioner

[23] The court should reduce the decision of the children's hearing. On a plain reading of the 2013 order the petitioner was a relevant person. The children's hearing had taken into account an immaterial consideration, namely that the petitioner did not have parental rights and responsibilities. It had misdirected itself in respect that it had no power to "undeem" as a relevant person someone in the petitioner's position. Most significantly, it had failed to have regard to a range of case management powers under the 2011 Act and also the Children's Hearing (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 (the 2013 rules) which, if exercised, would have prevented the potential mischief identified by B's agents.

[24] It was not clear from the decision of the children's hearing whether it had reached the conclusion it did by reading down the 2013 order. If it had done so, it had erred. It was not his status as a relevant person that might impinge on the article 8 rights of B or M, but the consequences of that status, and in particular his attendance at the hearing. The children's hearing had not considered whether any other consequence of that status was relevant.

[25] The reading down proposed by the second respondent would constitute amendment, not interpretation, of the 2013 order: *Principal Reporter* v *K* at paragraph 61, citing *Ghaidan* v *Godin-Mendoza,* paragraph 121. Parliament had made a legitimate choice not to anchor the status of relevant person to a threshold or quality of family life. The court should be slow to give the provision an effect quite different from that which Parliament intended: *R(Anderson)* v *Secretary of State* [2003] 1 AC 837, paragraph 30.

[26] If a father's participation were detrimental to the child, that could be addressed through case management powers: *Principal Reporter* v *K*, paragraphs 46, 47. The children's hearing had the power to exclude a relevant person from the hearing where that prevented the hearing from obtaining the views of the child or caused, or was likely to cause, significant distress to the child: section 76 of the 2011 Act.

[27] Rule 20D of the 2013 rules made further provision for the exclusion from a pre-hearing panel or children's hearing any person whose conduct was violent, abusive, or so disruptive that, if they were not excluded, the hearing would have to be adjourned or terminated. It also provided for the exclusion of a person whose presence prevented or was likely to prevent the panel from hearing from or obtaining the views of a relevant person, or caused or was likely to cause significant distress to a relevant person.

[28] Both a child and a relevant person might be excused attendance from all or part of a hearing: sections 73(3) and 74(3) of the 2011 Act.

[29] The petitioner himself had article 8 rights. The potential for relationship between a parent and child was within the ambit of article 8 where there was a demonstrable interest in and commitment towards the child, excluded where the parent did not know of, or care about, the child: *C* v *XYZ* [2008] Fam 54, paragraphs 53 to 55. A parent had procedural rights in relation to decisions bearing on the welfare of his child: *P, C & S* v *United Kingdom* 56547/00 paragraphs 117 to 120. Even if family life were not established, the petitioner's desire to participate in his son's life fell squarely within private life: *Lazoriva* v *Ukraine* (6878/14) [2018] ECHR 328, paragraphs 64 to 66.

[30] Removal of the status of relevant person was a disproportionate measure, because the mischief said to be occasioned by his attendance could have been dealt with by less restrictive case management measures.

[31] If the petitioner's article 8 rights were engaged by the children's hearing's consideration or imposition of a CSO, a civil right was involved, and article 6 was engaged. Without the status of relevant person the petitioner would have no means of participating in decisions that affected his article 8 rights. It was unclear what procedural safeguards would be in place in relation to the determination of whether or not he was a relevant person on the basis of the proposed reading down of the 2013 order.

[32] The reading down would produce discrimination between mothers and fathers, because mothers automatically had parental responsibilities and rights. The discrimination removed by the 2013 order would be reintroduced. It was not possible to justify that difference in treatment, and it would be unlawful by virtue of article 14 ECHR read with article 8.

[33] There was a practical purpose to the remedy sought. What the petitioner sought to do was to present to the children's hearing an application for a modest form of contact, namely letterbox contact. That had not been lawfully determined, as the decision from August had been successfully appealed. The petitioner had been prepared to present it in November, but had been undeemed at that stage. The mechanism provided by the children's hearing was the only way in which he could ask the state to provide him with contact with his son. Senior counsel acknowledged that there might be legitimate comment as to the prospects of success for such an application, but it might be that, if properly considered, some form of letterbox contact might be acceptable to the hearing. The children's hearing was the "gateway to contact".

[34] In response to the plea to competency, senior counsel submitted that even assuming that the issue fell within the scope of the right of appeal in section 154, the appeal was not an effective remedy. The purported removal of the petitioner's status as a relevant person meant that he did not receive notice of the decision of the children's hearing. When he learned of it the time period for appeal had expired. It was in any event not obvious that the decision taken by the children's hearing was one specified in section 154(3).

Second respondent

[35] The court should refuse to reduce the decision of the children's hearing. If it were not possible to read down article 3(2)(a) of the 2013 order in the manner proposed by the second respondent, the court should declare it to be incompatible with the Convention rights of persons such as M and the second respondent.

[36] The petitioner's treatment of B left her severely traumatised. Any contact with him exacerbated that. The petitioner had no family life with M. No aspect of his private life was

engaged: *Paradiso and Campanelli* v *Italy* (2017) 65 EHHR 2, paragraphs 159 - 164; *Lazoriva* v *Ukraine* (6878/14) [2018] ECHR 328, paragraphs 64 - 70. In the absence of article 8 rights, the petitioner did not require to be involved in decision-making in the children's hearing.

[37] As he had no article 8 rights, the petitioner had no article 6 rights in decisions concerning M: see *Re X (A Child) (Care Proceedings: Notice to Father without Parental Responsibility)* [2017] EWFC 34. That case concerned proceedings initiated by a local authority. The relevant Practice Direction provided that the father, as "a person whom the applicant [believed] to be a parent without parental responsibility for the child" was entitled to receive a notice of proceedings to non-parties and to apply to be joined to the proceedings. The mother was fearful of him on the basis of a history of domestic violence and attempts to track her down after she relocated with the child. The local authority sought an order that the father should not be sent notice of the proceedings. The judge found that there was not a relationship of such a nature as to meet the threshold to invoke the protection of article 8 and article 6. The threshold for determining that it was not appropriate for the father to receive the notice was lower because he did not have the protection of articles 8 and 6, but a decision not to serve it on him needed to be justified. It was normally in the interests of a child for his birth father to be enabled to participate in the proceedings. There was, however, a moderate risk to the mother if the father received the form, and the court granted the local authority's application.

[38] M and the second respondent had the right under article 8 to protection of their private and family life, which included the protection of confidential information about their health, and other personal matters: *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, paragraphs 75 and 76. The petitioner was at best a stranger and at worst a malevolent and unwelcome intruder in the personal affairs of M. Even if the petitioner had any rights

protected under article 8, a fair balance would have to be struck with M's rights, which took precedence: *Strand Lobben* v *Norway* [2020] 70 EHRR 14, paragraphs 202-207.

[39] The various mechanisms said by the petitioner and the Lord Advocate to prevent any incompatibility with the second respondent's article 8 rights were of limited utility. Persons could be excluded only in the situations specified in the statutory provisions. In the circumstances of this case, where the presence of the petitioner caused trauma, the second petitioner and M were effectively prevented from attending. Even if the petitioner were excluded, he would still have to be told what had happened in his absence, and that information might include matters falling within the private lives of the M and the second respondent. Excusal of M or his mother frustrated the purpose of the hearing. Despite the terms of section 178, there was a real likelihood that the petitioner would require to be informed of matters private to M and the second respondent.

[40] By virtue of section 6(1) of the Human Rights Act 1998 ("HRA"), the children's hearing could not lawfully treat the petitioner as a relevant person.

First respondent

[41] The first respondent accepted that the petitioner's submission about competency was well-founded. It was no accident that the petitioner had not been notified as to the outcome of the hearing. The reporter had no power to intimate the outcome of the hearing to the petitioner, and made a deliberate decision not to do so.

[42] The making of a CSO and the procedures associated with it were a state interference with family life. The provisions conferring relevant person status were part of that state intrusion and required to be justified.

[43] In determining whether the definition of relevant person was Convention compliant, three principles were relevant. In all decisions concerning children, their best interests are of paramount importance. Where the interests of the child conflict with those of a parent, the interests of the child may override those of the parent.

[44] A parent cannot be entitled under article 8 to have such measures taken as would harm the child's health and development: *Strand Lobben* v *Norway*, paragraphs 204, 206, 207. The exclusion of a father could be justified to protect the rights of others, but the participation of the father might still be in the interests of the child in order to secure the most accurate information in order to make the best decisions for the child: *Principal Reporter* v *K*, paragraph 44. Article 3(2)(a) of the 2013 order made wider provision than the reasoning in *Principal Reporter* v *K* would support. That reasoning supported a narrower class.

[45] The Principal Reporter recognised that there were measures available to the children's hearing to limit the participation of an individual and the provision of information to him, but queried, first, why the status should be conferred if the rights flowing from it required such restriction, and, second, the justification for the unqualified right to seek a review, and the largely unqualified right to appeal.

[46] The outcome of a discussion about exclusion of a relevant person was unpredictable. The relevant person could not be excluded from the outset. The right to seek a review was unqualified. All the hearings in this case after 23 January 2023 resulted from the petitioner's exercising that right, and none had resulted in any discernible benefit to M.

[47] The right to private life of the petitioner was not engaged. The circumstances were distinguishable from those in cases such as *Lazoriva* v *Ukraine* and *Paradiso and Campanelli* v *Italy*.

[48] The first respondent did not support the reading down proposed by the second respondent. The words to be read in required that someone determine whether the involvement of an individual would be incompatible with the Convention rights of the child or another relevant person. While the answer might be plain in this case, it would not always be, and would require an evaluative judgment. It would fall to the reporter to make the decision. There would be no opportunity to appeal against the decision of the reporter. That contrasted with the scheme for deemed relevant persons, where the decision was one for a pre-hearing panel: sections 81 and 81A of the 2011 Act.

[49] In written argument, the first respondent submitted that article 3(2)(a) was incompatible with Convention rights. The court should decline to grant a remedy because it would be acting incompatibly with the Convention rights of M and the second respondent if it did so, or, alternatively, because there was no practical benefit to the petitioner from reduction of the decision: *King* v *East Ayrshire Council* 1998 SC 182, at 194C-H.

[50] In oral submissions senior counsel submitted that the children's hearing had been able to act in accordance with the Convention rights of M and of the second respondent. Its decision was lawful because it had done so, whether by reading down article 3(2)(a) or ignoring it because the reading down proposed to it was not possible.

[51] The principal reporter did not wish to bring down the whole scheme of the 2013 order, because it was the means by which all unmarried fathers without parental rights and responsibilities entered the children's hearing procedure.

[52] It was better that the children's hearing secure the compatibility of its acts with the Convention rights by ignoring article 3(2)(a) on a case-by-case basis in the event that applying it produced a breach of Convention rights than that it attempt to read the provision down. If the matter were contentious it should be the children's hearing that decided

whether or not someone was a relevant person than that the reporter should be required to do so. An analogy might be drawn with the procedures regarding deemed relevant persons.

[53] The only merit of a "bright line" definition was the certainty that it produced as to who was a relevant person. While such definitions might produce "hard cases", that did not call into question the validity of the legislation, provided that there was a justification for where the line had been drawn: *R(P)* v *Secretary of State for Justice* [2020] AC 185; *Animal Defenders International* v *United Kingdom* (2013) 57 EHRR 21. The Lord Advocate offered no such justification. It was necessary to consider whether the legislation permitted a case-by-case analysis that would involve action incompatible with the Convention rights of persons such as B and M, or whether the Scottish Government had themselves reached a conclusion on broad grounds about who should qualify to be a relevant person. In the latter situation there might be hard cases about which nothing could be done. Senior counsel described the regime in the present case as a "hybrid". The broad legislative choice had not resolved all matters. Even on the Lord Advocate's analysis there was room for choice in the individual case as to the nature and extent of participation and what information ought to be disclosed to an individual relevant person.

Third respondent

[54] The third respondent submitted that the petition was incompetent because it would have been open to the petitioner to appeal against the decision of the children's hearing: *KL* v *Principal Reporter* 2021 SC 146. Section 154 of the 2011 Act provided for an appeal against a decision to make, vary or continue a CSO. The decision of the children's hearing that the petitioner was not a relevant person did not vitiate his right to appeal.

[55] So far as the merits of the petition were concerned, any definition of a relevant person must be such as to secure that a parent or other person whose family life with the child was at risk in the proceedings had a proper opportunity to take part in the decision making process. That decision making required to be limited to those who had established family life with the child, because of the private and sensitive information shared in the children's hearing. The mechanisms available to withhold information about M from a relevant person were insufficient to protect M's article 8 rights. The test in section 178 was a high one. The powers to exclude a relevant person were significantly circumscribed.

[56] The decision of the children's hearing that the petitioner was not a relevant person was consistent with M's article 8 rights. By excluding from the definition of relevant person those parents who had been deprived of parental responsibilities and rights by order of a court, the legislative scheme anticipated the exclusion of parents on a "qualitative basis". The reading down of article 3(2)(a) to exclude parents with no established family life was entirely consistent with the legislative scheme. If it had not been open to the children's hearing to make the decision that it did, it followed that article 3(2) was outside the competence of the Scottish Ministers with M's article 8 rights.

Lord Advocate

[57] Article 3(2)(a) was within competence. The automatic conferral of relevant person status on a parent was not inherently incompatible with the Convention rights. It might bear on the Convention rights of others, but that did not mean that there was an unjustifiable interference with those rights in all, or almost all, cases.

[58] In the context of an ab ante challenge, if a legislative provision were capable of being operated in a manner which was compatible with Convention rights in that it would not

give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself would not be incompatible with Convention rights: *Christian Institute*, paragraph 88; *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505, paragraphs 11-19.

[59] Any parent, including a person specified in section 200(1) might be violent and abusive, and their involvement in the proceedings might impact on the article 8 rights of a child or another parent. There was scope to control that impact.

[60] There was nothing inherently objectionable about a general measure drawing a "bright line" that might result in hard cases: *In re P* [2020] AC 185. The question of whether or not to confer relevant person status was not governed by the welfare of the child: *MT* v *Gerry* 2015 SC 359. There might be a variety of reasons as to why a father had never had parental responsibilities or rights that had no bearing on whether or not he was a "meritorious or unmeritorious" father.

[61] There had been a positive policy decision to confer relevant person status more broadly than in accordance with the reasoning in *Principal Reporter* v *K*, so as not to close off potential positive relationships. There was no document in which that policy decision or the reasons for it were recorded. Senior counsel made that submission on instruction and on the basis of her responsibility as counsel. The order was made eleven years ago, and processes of consultation then were not as they might be today. Article 3(2) was the response of the Ministers to *Principal Reporter* v *K*, and went beyond what the Supreme Court said was required.

[62] A broad and inclusive approach as to who was a relevant person with a view to including them in the decision making process was a justifiable policy. The Supreme Court

had drawn a distinction between interference with family life on the one hand and decision making powers leading up to that interference on the other: *K*, paragraph 44.

[63] Incompatibility in an individual case did not give rise to the conclusion that the order was outside competence. The Ministers had not acted outside their competence or unlawfully in terms of section 6 of the HRA when conferring relevant person status in the way they had done. That conferral did not result in a children's hearing acting incompatibly with the Convention rights.

[64] The correct focus was upon the consequences that flowed from the petitioner being a relevant person. The true complaint was in relation to the irreducible rights conferred on the petitioner. They did not result in an unjustified interference. A positively malevolent father could seek private law remedies, and there was no suggestion that that would represent an unjustified interference in the lives of the child or mother.

[65] Merely having the status of relevant person did not give rise to an unjustifiable interference with the Convention rights of anyone else. The extent and manner of a relevant person's participation could be controlled so that there was no unjustifiable interference. The children's hearing had the skills and experience to manage difficult cases, and a suite of powers under the 2011 Act and 2013 rules: sections 76, 77 and 178 and rules 16, 20C and 84. The children's hearing could require remote attendance. A pre-hearing panel could decide that matter in advance. The children's hearing might have to use its powers if a father with parental responsibilities or rights but who had been the perpetrator of domestic abuse were involved in a case. There would be a relatively small number of cases in which a father had no family life with a child. Only a relatively small proportion of unmarried fathers did not have parental responsibilities or rights.

[66] It was only necessary to embark on reading down if the legislation read and given effect to on ordinary principles would result in incompatibility: *S* v *L* 2013 SC (UKSC) 20, paragraphs 15-17. Public authorities required to act in a Convention complaint way, and what the second respondent sought was one involving undue and unnecessary precision: see *S* v *L*, paragraphs 48, 71.

[67] The focus on whether or not the petitioner had article 8 rights was a red herring. The correct focus was on the impact of his status as a relevant person on the Convention rights of others. If an individual had no Convention rights of his own to put in the balance, it might be easier for a children's hearing to impose controls and limitations on his participation. As a matter of pleading, it was not clear what was meant by the word "involvement" in the reading down, and whether it meant to refer to the status of relevant person or something else.

[68] The need for evaluation, and the fact that there was no ability to review or appeal a decision that a relevant person was not one, or should not be treated as one, militated against the proposed reading down and demonstrated the merit of the "bright line" approach chosen by the Ministers.

Decision

Competency

[69] Section 154 of the 2011 Act provides:

> "(1) A person mentioned in subsection (2) may appeal to the sheriff against a relevant decision of a children's hearing in relation to a child.
>
> (2) The persons are—
>
> (a) the child,
> (b) a relevant person in relation to the child,

(c) a safeguarder appointed in relation to the child by virtue of section 30.

(3) A relevant decision is—

(a) a decision to make, vary or continue a compulsory supervision order,
(b) a decision to discharge a referral by the Principal Reporter,
(c) a decision to terminate a compulsory supervision order,
(d) a decision to make an interim compulsory supervision order,
(e) a decision to make an interim variation of a compulsory supervision order,
(f) a decision to make a medical examination order, or
(g) a decision to grant a warrant to secure attendance.

(4) An appeal under subsection (1) may be made jointly by two or more persons mentioned in subsection (2).

(5) An appeal under subsection (1) must be made before the expiry of the period of 21 days beginning with the day on which the decision is made."

[70] The petitioner submitted that the decisions specified in subsection (3) did not include decisions to remove from an individual the status of relevant person. That is correct. There is in section 160 specific provision for appeal to the sheriff in relation to decisions of a pre-hearing panel as to whether a person is to be deemed, or continue to be deemed, a relevant person. That provision does not apply to a person such as the petitioner, who was not deemed a relevant person under section 84, but was one by virtue of a statutory provision.

[71] The decision of the children's hearing was, however, to continue and vary the CSO, and falls within the scope of subsection (3)(b). There is no reason in principle why the petitioner could not have appealed to the sheriff and argued that his exclusion on the basis of a purported, and on his analysis, unlawful decision that he was not a relevant person, was a procedural irregularity capable of vitiating the decision of the children's hearing.

[72] Judicial review is a remedy of last resort and is normally excluded where there is statutory provision for an appeal. The petitioner alleges, and the reporter accepts, that the

petitioner did not receive notification of the decision of the children's hearing so far as the CSO was concerned. He was provided with only the record of the hearing relating to non-disclosure and his status as a relevant person. The time period for appeal passed without the decision of the hearing being notified to the petitioner. If the petitioner's underlying contention in these proceedings - namely that it was unlawful for the children's hearing to refuse to treat him as a relevant person - is correct, the failure to notify him of the decision of the hearing is capable of being characterised as an irregularity of procedure on the part of one or more public authorities of the sort envisaged by Lord Clyde in *Tarmac Econowaste Ltd* v *Assessor for Lothian Region* 1991 SLT 77 at page 79 A-D. One of the reasons why a party must be notified of a decision adverse to him is to enable him to consider whether to appeal against it. In the particular circumstances of this case, I consider that the first and second respondents are correct to concede that the petition is competently brought, and I will repel the third respondent's plea to the competency.

The merits

The Human Rights Act 1998 and the Scotland Act 1998

[73] The starting point is that on a plain reading of article 3(2)(a) of the 2013 order the petitioner is a relevant person.

[74] Sections 3 and 6(1) of the HRA provide:

> "3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

No issue arises under section 6(2) of the HRA. Article 3(2) of the order is subordinate legislation, and the 2011 Act, under which it was made, is not primary legislation as defined in the HRA, as it is an act of the Scottish Parliament.

[75] The interpretative obligation under section 3 is far-reaching, and may require the court to depart from the unambiguous meaning the legislation would otherwise bear. The court cannot, however, adopt a meaning that is inconsistent with a fundamental feature of legislation. Words implied or read in must go with the grain of the legislation. It is necessary to consider the essential principles and scope of the legislation in question: *Ghaidan* v *Godin-Mendoza* [2004] AC 557.

[76] Article 8 of the European Convention on Human Rights ("ECHR") is one of the Convention rights specified in Schedule 1 to the HRA:

"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."

[77] It is outside devolved competence to make any provision by subordinate legislation which would be outside the legislative competence of the Scottish Parliament if it were included in an Act of the Scottish Parliament: SA, section 54(1). A member of the Scottish

Government has no power to make any subordinate legislation or to do any other act so far as that is incompatible with any of the Convention rights: SA, section 57(2).

[78] Subordinate legislation must be read and given effect to in a way that is compatible with the Convention rights. If subordinate legislation cannot be so read, and is not mandated by primary legislation, section 6 of the HRA obliges a public authority to ignore it if and to the extent it would require the authority to act incompatibly with Convention rights: *R (W)* v *Secretary of State for the Home Department* [2020] 1 WLR 4420, paragraph 37 and authorities cited there.

[79] The issue in this case is whether the provision is incompatible with the Convention rights of M and the second respondent. This is not an *ab ante* challenge like those in *Christian Institute* or *Abortion Services*, and I do not need to consider how the provision operates in all, or almost all, cases.

[80] It is not clear from the decision of the children's hearing whether it:

(a) read down article 3(2)(a) so as to exclude from the definition of relevant person a father who had no established family life with the child; or

(b) determined that it could not do so, but took the view that it would be unlawful by virtue of section 6(1) for it to proceed on the basis that he was a relevant person, and so ignored article 3(2)(a) and its conferral on the petitioner of the status of relevant person.

The article 8 rights of the petitioner

[81] As I have already indicated, the petitioner in his affidavit asserted some involvement with M in the early months of his life. Those assertions are disputed and there is nothing to suggest that they were before the children's hearing. I have left them out of account. The

high point of the petitioner's submission was that he was committed to M's welfare and that the potential for relationship between a parent and child was within the ambit of article 8 where there was a demonstrable interest in and commitment towards the child. Alternatively, his strong desire to participate in M's life fell within the ambit of private life.

[82] The existence or non-existence of family life is a matter of fact depending on the real existence in practice of close personal ties, and biological kinship is not enough, although intended family life may exceptionally fall within the ambit of family life: *Lebbink* v *Netherlands* (2005) 40 EHRR 18. The fact that family life has not yet fully been established must not be attributable to the applicant: *Katsikeros* v *Greece* (Application no 2303/19), 14 November 2022, paragraph 44. That approach excludes the petitioner. There is no dispute that he has had no involvement in M's life since M was an infant. He has been in prison since 2013 and is subject to an order for lifelong restriction as a result of his own criminal conduct. He has taken no positive steps himself to try to establish a relationship, such as seeking a section 11 order.

[83] The right to private life may be engaged in respect of relationships which fall short of family life. In *Lazoriva* v *Ukraine* the applicant was already the guardian of a child who was the sister of the child with whom the application was concerned, and had informed the relevant authorities of her intention and willingness to care for the second child. That situation is far removed from the present case. *Paradiso* v *Italy* related to surrogacy where the applicants had a positive plan to become parents and believed that the child was the biological child of the male applicant. Again, the facts are significantly different from those in the present case.

[84] The petitioner does not have rights protected by article 8 either as relating to family life or to private life so far as any relationship between him and M is concerned.

The approach taken in the 2013 order

[85] There is nothing inherently objectionable about choosing to confer the status of relevant person on a person with no parental rights and responsibilities. Such a person may have a family life with the child. Even if he does not, there may be situations in which it is desirable that he be involved in the children's hearing. He may be the only living parent of the child. It may be in the child's interests that he develop some form of family life with the child.

[86] A legislator is in principle entitled to take a "bright line" approach. A provision which confers no discretion but imposes a duty to take action in every case will not fail the test of "foreseeability" that arises in the context of whether a provision is in accordance with the law simply because the categories to which it applies are too broad or insufficiently filtered: *R(P)*. That case was concerned with the lawfulness of a scheme for the disclosure of convictions by individuals applying for jobs involving contact with children or vulnerable adults. Although the scheme did fail to draw distinctions based on the relevance of a conviction to a potential employers on more general grounds, and did not provide a mechanism for the independent review of disclosure, those factors did not deprive the legislation of the quality of law. It was not disproportionate as a matter of principle to legislate by reference to pre-defined categories, although that might result in cases which individually would be regarded as disproportionate. A system that allowed for examination of the facts in individual cases would have had a cost in relation to the protection of children and vulnerable adults, foreseeability, consistency, practicality, delay and expense. The Supreme Court found that the scheme drew the boundaries in an acceptable place with two exceptions.

[87] Unless a measure has sufficient clarity and precision for its effect to be foreseeable from its terms, it is impossible for a court to assess its proportionality as applied to particular cases. The effect of article 3(2)(a) on its face is clear. It appears to confer no discretion. It means that a parent with no parental rights and responsibilities, unless deprived of them by a court, will benefit from the consequences that come with the status of relevant person.

[88] The legitimacy of legislating by reference to defined categories, or "bright lines" is recognised in the Strasbourg jurisprudence. In *R(P)*, at paragraph 46 and following, the Supreme Court considered *Animal Defenders*:

> "46. […] Accordingly, two questions fall to be decided. The first is whether the legislation can legitimately require disclosure by reference to pre-defined categories at all, as opposed to providing for a review of the circumstances of individual cases. If it can, then the second question is whether the boundaries of these categories are currently drawn in an acceptable place. It is common ground that, for the purpose of assessing the proportionality of the scheme, the legislature and ministers exercising statutory powers have a margin of judgment, within limits.
>
> […]
>
> 48. In principle, the legitimacy of legislating by reference to pre-defined categories in appropriate cases has been recognised by the Strasbourg court for many years. The fullest modern statement of the law is to be found in its decision in *Animal Defenders International* v *United Kingdom* (2013) 57 EHRR 1, where the court summarised the effect of a substantial body of earlier case law. At paras 106–110, the court observed:
>
> > '106. … It is recalled that a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases …
> >
> > 107. The necessity for a general measure has been examined by the court in a variety of contexts such as economic and social policy and welfare and pensions. It has also been examined in the context of electoral laws; prisoner voting; artificial insemination for prisoners; the destruction of frozen embryos; and assisted suicide; as well as in the context of a prohibition on religious advertising.

> 108. It emerges from that case law that, in order to determine the proportionality of a general measure, the court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation. It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the state to assess. A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality.
>
> 109. It follows that the more convincing the general justifications for the general measure are, the less importance the court will attach to its impact in the particular case …
>
> 110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.'

49. The court's reference in para 108 to the risk of uncertainty is supported by a footnote citation of its earlier decision in *Evans v United Kingdom* (2007) 46 EHRR 34. In that case, it held that the absence of any provision for individual scrutiny in legislation requiring the consent of both parties to the implantation of stored embryos was consistent with article 8 of the Convention. The Grand Chamber found (para 60) that

> 'strong policy considerations underlay the decision of the legislature to favour a clear or 'bright-line' rule which would serve both to produce legal certainty and to maintain public confidence in the law in a sensitive field.'

It went on to observe, at para 89:

> 'While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with article 8. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material

> without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as 'entirely incommensurable' interests. In the courts view, these general interests pursued by the legislation are legitimate and consistent with article 8.'
>
> 50. In those cases where legislation by pre-defined categories is legitimate, two consequences follow. First, there will inevitably be hard cases which would be regarded as disproportionate in a system based on case-by-case examination. As Baroness Hale PSC observed in *R (Tigere)* v *Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening)* [2015] 1 WLR 3820 , para 36, the Strasbourg court's jurisprudence 'recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it'. Secondly, the task of the court in such cases is to assess the proportionality of the categorisation and not of its impact on individual cases. The impact on individual cases is no more than illustrative of the impact of the scheme as a whole. Indeed, as the Strasbourg court pointed out at para 109 of *Animal Defenders* 57 EHRR 21, the stronger the justification for legislating by reference to pre-defined categories, the less the weight to be attached to any particular illustration of its prejudicial impact in individual cases. In my judgment, the legislative schemes governing the disclosure of criminal records in England and Wales and Northern Ireland provide as good an example as one could find of a case where legislation by reference to pre-defined categories is justified."

[89] *Animal Defenders* related to statutory prohibitions against advertising of a political nature using broadcast media. The court had regard to the legislative background to the provision, including earlier legislation, the work of the Committee on Standards in Public Life, consultation on the Communications Bill, the work of the Joint Committee on Human Rights in relation to the bill, the introduction of the Bill to Parliament, and related debates: paragraphs 35-55. As is apparent from the passages quoted in *R(P),* and in particular paragraphs 108 and 109 of the judgment of the Strasbourg court, in assessing the proportionality of a "bright line" or general measure, it is necessary to assess the legislative choices underlying the prohibition. The quality of the parliamentary and judicial review of the necessity of the measure are of particular importance to the relevant margin of appreciation.

[90] In this case the Lord Advocate offers no material regarding any consideration of whether or why it was thought necessary to have a "bright line" measure. She offers no material suggesting that the possibility of disproportionate interferences with the privacy rights of children or others resulting from the legislative choice was considered at all. A consultation was carried out. The Scottish Government received two responses to the consultation so far as the definition of relevant persons was concerned, but had not retained them and could not say what they were. That is the first difficulty with any contention that article 3(2)(a) is a bright line measure, and that any hard cases that result do not give rise to incompatibility with the Convention rights. There is simply no material to justify the place in which the line has been drawn. The second difficulty with it is the Lord Advocate's own analysis that compatibility with the Convention rights falls to be achieved in some cases by further steps by one or more public authorities to mitigate the consequences of the status of relevant person by taking decisions using case management powers under the provisions of the 2011 Act and the 2013 rules. That involves a recognition that simply applying the criteria in article 3(2)(a) will not necessarily be sufficient to avoid incompatibility with the Convention rights of others involved in the children's hearing.

Is it necessary to read down or ignore the provision to avoid acting incompatibly with a Convention right?

[91] There is a prior question as to whether either approach is necessary in order to avoid an act (including a failure to act) on the part of the public authority which is incompatible with a Convention right.

[92] I begin by considering *Principal Reporter* v *K*. It is the backdrop to the promulgation of article 3(2)(a). Some of the submissions in this case focused on what was said to be the

significance of the fact that article 3(2)(a) went further than what had been considered necessary to remedy the incompatibility identified in *Principal Reporter* v *K*. *ABC* v *Principal Reporter* is a recent Supreme Court case also relating to the question of who should be a relevant person for the purpose of proceedings in the children's hearing. I set out some of the reasoning in that case before turning to the operation of the statutory scheme.

Principal Reporter v *K*

[93] K was the father of a child in respect of whom he did not have parental rights and responsibilities. He raised proceedings under section 11 of the 1995 Act seeking parental rights and responsibilities and a contact order. The child was referred to a children's hearing. The sheriff granted K parental rights and responsibilities "to the extent that he becomes a relevant person in the Children's Referral relating to the child". The principal reporter then began proceedings in the Court of Session for suspension of the sheriff's order. The principal reporter succeeded before the Lord Ordinary and in the Inner House.

[94] At that time the definition of "relevant person" was contained in section 93(2)(b) of the 1995 Act. It was not in dispute that K had enjoyed family life with the child: paragraph 39. He was living with the child's mother at the time of the birth and was heavily involved with her medical treatment in hospital. He had contact with the child after he separated from her mother.

[95] The court noted that the decision of a children's hearing to impose a supervision requirement empowering a local authority to intervene in the child's life would constitute an interference with the family life of the child and the resident parent, and was also likely to interfere with the family life of the child and the non-resident parent. An order prohibiting contact between them manifestly did so. There was a positive obligation to enable parents to

play a proper part in the decision-making process before the authorities interfered in their family life with their children. The point of procedural safeguards was to ensure that the interference with family life was a proportionate response to a legitimate aim.

[96] The justification advanced for excluding a father without parental responsibilities and rights from the children's hearing process was that the hearing was meant to be an informal round-table discussion with only those present who could make a meaningful contribution to the debate: paragraph 45. The court concluded that a parent or other person whose family life with the child is at risk in the proceedings had to be afforded a proper opportunity to take part in the decision-making process, and that the children's hearing system at the time violated K's article 8 rights and those of the child.

[97] The facts fell within the ambit of article 8. There was a difference of treatment in the law as it stood at the time between unmarried and married fathers, and between mothers and unmarried fathers. The court was not disposed to find that the automatic imposition of a burdensome procedural hurdle before some unmarried fathers (those without parental rights and responsibilities) could be involved in decision making about children's lives could be justified under article 14. It would be different if the father had been unable to establish family life with the child.

[98] The court decided that in order to cure the incompatibility it had detected, it was necessary to read down section 93(2)(b) by inserting the words "or who appears to have established family life with the child with which the decision of a children's hearing may interfere": paragraph 69. It rejected a reading down by deleting the words "enjoying parental responsibilities or parental rights under Part I of this Act". It did so because it would (i) break the link between automatic participation and parental responsibilities; (ii) include parents who had been deprived of all parental responsibilities and parental

rights by order of a court; and (iii) go further than was necessary to cure the incompatibility identified by the court: paragraph 66.

ABC v *Principal Reporter*

[99] Individuals in two cases contended that their article 8 rights required that they be given the status of relevant person in children's hearings convened in respect of their respective siblings. The Supreme Court rejected that proposition.

[100] The court held that the interference with the article 8 rights of parents and of others who had a significant involvement in the upbringing of a child was qualitatively different from the interference with the article 8 rights of siblings: paragraph 46. Respect for the interest of a sibling was shown if the sibling were enabled to have an involvement in the decision-making process to a degree sufficient to protect his or her interest: paragraph 30.

[101] It would not be appropriate to impose on every sibling the obligation to attend a children's hearing or confer on them the power to agree or not agree to the grounds of a referral. Those measures were not obviously appropriate to a sibling who had not had significant involvement in bringing up the child and could result in unnecessary and disruptive referrals to the sheriff court: paragraph 47.

[102] A relevant person would have comprehensive access to the papers before the children's hearing, which might give a detailed account of the child's life, including confidential information about the child's education and health, abuse that the child might have suffered and possibly the involvement of the child in criminal and anti-social behaviour, and the child's confidentiality was protected only by section 178, and there was no protection for the confidentiality of the parents: paragraph 48. The rights to privacy of the referred child and parents and others must be respected. There were matters about a

child that a parent might need to know, but not every sibling. The requirement to respect the privacy of others, the concerns about the dissemination of sensitive information and the statutory requirement on the chairing member to take all reasonable steps to keep to a minimum the number of persons present at a children's hearing at the same time, in terms of section 78(4), militated against reading down the statutory definition of a relevant person so as to confer the status of relevant person on anyone who appears to have established family life with the referred child with which a decision of the children's hearing may interfere: paragraphs 49, 50.

[103] In assessing whether the children's hearing operated compatibly with the article 8 rights of siblings, the court considered not just the whole statutory scheme, but the way in which the children's hearing operated, the common law, and the procedural rights under article 8 which governed the behaviour of public officials: paragraphs 32-42. The measures included practice directions; the power of the National Convener to provide legal advice to children's hearings about procedural matters; and the terms of the Children's Hearings Scotland *Practice and Procedure Manual*: paragraphs 33-35. None of those measures gave a sibling access to the papers: paragraph 34. The court was persuaded in the light of those measures that the system could operate compatibility with the rights of siblings and other family members.

Can the system operate compatibly without reading down or ignoring article 3(2)(a)?

[104] Article 3(2)(a) goes further than the decision of the Supreme Court in *Principal Reporter* v *K*. The provision deals with the need, identified by the Supreme Court, to exclude parents from whom parental rights and responsibilities had been removed by a court order. It does not interfere with the link between parental responsibilities and automatic

participation. What it does not do is require that a father without parental rights and responsibilities have an established family life with the child with which the decision of the children's hearing may interfere. The Scottish Government decided to confer the status of relevant person on a broader class than that identified by the Supreme Court to be necessary in order to cure the incompatibility it detected. It does not follow from that that the provision in the order is incompatible with the rights of a child or other person involved in a children's hearing. While a person with an established family life must be provided with the procedural protections given to a relevant person, it does not follow that the conferral of the status of relevant person will be incompatible with the Convention rights of those others.

[105] In *ABC* the Supreme Court determined that the nature of a sibling relationship did not require all the procedural protections that attach to being a relevant person, and that the article 8 rights of siblings could be protected adequately in other ways. It also identified factors that made it positively undesirable that siblings should not become relevant persons, and among those were the dissemination of sensitive material involved in sharing the papers for the children's hearing with them. The analysis at paragraph 49 recognises that parents may need to know about sensitive matters, but siblings may not. The concept of private life covers the disclosure of personal data about matters such as health, criminal offending and other personal matters: *Christian Institute*, at paragraphs 75-76. A child's privacy is also protected by article 16 of the UNCRC. Although the Supreme Court did not put it this way in *ABC*, it may be proportionate to interfere with the article 8 privacy rights of a child in the context of the procedural protections afforded to a parent but not those afforded to a sibling. The Supreme Court was not considering the situation of a parent who has no established family life with a referred child.

[106] The prospect of a disproportionate interference with the privacy rights of a referred child increase where the status of relevant person is conferred on persons who do not have an established family life with a referred child. Again, it does not necessarily follow that article 3(2)(a), because it makes no reference to established family life, will give rise to a disproportionate interference with those rights.

[107] In considering how the legislation may operate, it is necessary to analyse what the consequences are of the conferral on an individual of relevant person, in the context of the whole statutory scheme, including the measures available to remove or limit the entitlements that would normally accompany that status.

[108] In submissions the reporter posed the rhetorical question as to why the status should be conferred if so many steps might be necessary to mitigate its consequences. That is not the correct approach. The Supreme Court in *ABC* recognised the need to assess the operation of the scheme in the context of the statutory provisions, the common law, the duties of public authorities to act in a Convention rights compliant manner, and published guidance.

[109] The Lord Advocate in this case emphasised particular features of the statutory regime. The statutory scheme recognises that limitations may be required in a range of situations, and not only where a relevant person is a parent without parental rights and responsibilities and has no established family life with the child. That is not surprising. Cases involving parents who are relevant persons because they have parental rights and responsibilities may in practice give rise to issues similar to those in this case. A father named on a birth certificate may in fact have had no involvement in the life of the child. He may have committed serious crimes against the child's mother.

The statutory provisions

The 2011 Act

[110] The child must attend the children's hearing unless excused on one of the grounds in section 73(3). Section 74(2) imposes a duty on a relevant person to attend a children's hearing unless excused or excluded. Excusal may arise under section 74(3) because it would be unreasonable to require the person's attendance or because the person's attendance at the hearing, or part of it, is not necessary for the proper consideration of the matter before the hearing.

[111] A relevant person may be excluded under section 76(2) for as long as necessary where the children's hearing is satisfied that his presence is preventing the hearing from obtaining the views of the child or is causing or is likely to cause significant distress to the child. The representative of a relevant person may be excluded under section 77 on similar grounds. If a relevant person or his representative is excluded, the chairing member of the hearing must explain to that person what has happened in his absence.

[112] A relevant person who is required to attend a children's hearing under section 74(2) and fails to do so is guilty of an offence: section 74(4). A children's hearing may, however, proceed where a relevant person required to attend does not do so: section 75.

[113] Section 78(1)(c) entitles a relevant person, unless excluded, to attend a children's hearing.

[114] At the opening of a grounds hearing, the chairing member must explain the grounds to each relevant person, and ask them whether they accept the grounds: section 90. Where none of the grounds are accepted, or there are not sufficient grounds accepted for the grounds hearing to make a decision on whether to make a CSO on the accepted grounds,

there must be a reference to the sheriff, or a discharge of the referral: section 93. A relevant person may apply to the sheriff for a review of a grounds determination: section 110.

[115] A relevant person may require a review of a CSO by giving notice to the Principal Reporter: section 132(3). The terms of section 132(4) mean that they can call a review three months after any decision making, continuing or varying a CSO. A relevant person may also, as I have already noted, appeal to the sheriff under section 154. The right to appeal is subject to limitation in terms of section 159 to the extent that if a sheriff hears an appeal and is satisfied that it is frivolous or vexatious he or she may order that there can be no further appeal within 12 months without leave from the sheriff.

[116] Section 178 provides:

> "(1) A children's hearing need not disclose to a person any information about the child to whom the hearing relates or about the child's case if disclosure of that information to that person would be likely to cause significant harm to the child.
>
> (2) Subsection (1) applies despite any requirement under an enactment (including this Act and subordinate legislation made under it) or rule of law for the children's hearing –
>
> (a) to give the person an explanation of what has taken place at proceedings before the hearing, or
>
> (b) to provide the person with –
>
> (i) information about the child or the child's case, or
> (ii) reasons for a decision made by the hearing."

<u>The 2013 rules</u>

[117] Rule 16 provides for the reporter, when arranging the hearing, notifying persons of the hearing, issuing information or documents for the hearing or taking any action required as a consequence of the hearing, to withhold information about the whereabouts of the child

where disclosure of that would be likely to cause significant harm to the child or any relevant person.

[118] In terms of rule 20C a pre-hearing panel may determine that a relevant person should be allowed to attend a children's hearing only by electronic means if satisfied that the person's physical presence at the hearing or any part of it is likely to prevent the hearing from obtaining the views of the child or a relevant person, or cause significant distress to the child or a relevant person.

[119] Rule 20D permits the chairing member to exclude a relevant person from a children's hearing or pre-hearing panel for as long as is necessary where the person's conduct is violent or abusive, or otherwise so disruptive that without his exclusion the chairing member would consider it necessary to end or adjourn the panel or hearing. The chairing member may also exclude a relevant person for as long as is necessary where in the chairing member's opinion the person's presence is preventing or likely to prevent the panel or hearing from obtaining the views of a relevant person, or is causing or likely to cause significant distress to a relevant person attending the hearing.

[120] A relevant person is amongst the persons entitled to be notified that a children's hearing is to be held: rule 22. The reporter when issuing a notice under rule 22 must also give to each relevant person the information specified in rule 23. A number of rules provide what information must be given to a relevant person in connection with different sorts of hearings. Depending on the nature of the hearing, the information may include reports by safeguarders, reports by the local authority, and reports including the views of the child, and records of proceedings from earlier hearings.

[121] Part 18 of the rules relates to "general issues". Rule 84 relates to non-disclosure requests and provides:

"(1) In this Part a 'non-disclosure request' is a request made by any person that any document or part of a document or information contained in a document relating to a pre-hearing panel or to a children's hearing should be withheld from a specified person falling within the categories specified in section 177(2)(i)(ii) to (iv) of the Act on the grounds that disclosure of that document or part of the document or any information contained in it would be likely to cause significant harm to the child to whom the hearing relates.

(2) The following documents may not be the subject of a non-disclosure request—

(a) the statement of grounds;
(b) a copy of any relevant remit by a court under section 49 of the Criminal Procedure (Scotland) Act 1995;
(c) a copy of any relevant requirement by a sheriff under section 12(1A) or statement under section 12(1B) of the Antisocial Behaviour etc. (Scotland) Act 2004;
(d) any order or warrant to which the child is subject under the Act or these Rules.

(3) A non-disclosure request must—

(a) specify the document or part of the document or information for which non-disclosure is requested and give reasons in each instance for non-disclosure; and

(b) specify the persons to whom the document or part of the document or information is not to be disclosed and give reasons in each instance for non-disclosure.

(4) In this Part reference to 'children's hearing' includes pre-hearing panel, where the non-disclosure request relates to documents or information to be considered at a pre-hearing panel."

[122] Rules 85-87 make further provision in relation to non-disclosure requests. The reporter must refer any request to a children's hearing, and may submit a request on the reporter's own initiative. The person to whom it proposed the documents not be disclosed may be excluded where his presence would prevent proper discussion of the request, but must be invited to return to the hearing and be advised of the outcome of the discussion.

The effect of the statutory provisions

[123] The consequences of relevant person status fall into three broad categories. These are the right and duty to attend hearings; the right to be provided with information; and the procedural rights to challenge grounds, seek reviews, and to appeal to the sheriff.

[124] There is ample provision in the 2011 Act and in the rules for the exclusion of a relevant person where that is necessary to allow a child or another relevant person to provide views to the hearing, or to prevent distress to the child or relevant person: section 76, rule 20D. A person may be prevented from physically attending, and be required to attend by electronic means for the same purposes: rule 20C. The second respondent drew attention to the fact that on one occasion the remote attendance of the petitioner had not operated as it was meant to, so as to prevent her and the child from seeing him. The fact that a measure may not operate properly on a particular occasion is not a proper ground for finding that the available measures are inadequate. The children's hearing has at its disposal a range of measures to ensure that the physical presence of a relevant person does not impede the participation of a child or other relevant person, or cause them significant distress.

[125] The power not to disclose information in terms of section 178 is not circumscribed other than in relation to the requirement that disclosure would be likely to cause significant harm to the child. It is not subject to the limitation in rule 84 as to the nature of the documents that may be withheld. The principal reporter submitted that the requirement in both provisions that disclosure of the information or document be likely to cause significant harm to the child was a high bar. That requirement would, however, require to be read in a manner compatible with the Convention rights of the child.

[126] There is no provision for the non-disclosure of information where its disclosure would represent an unlawful interference with the rights of a relevant person. There may be situations in which the disclosure of information about the child's case but which relates to a relevant person would be likely to cause significant harm to the child. The present case includes information about the relevant person which cannot be disclosed to the child for that reason. Harm to a relevant person may in some cases give rise to harm to a child. Even without express provision, if a relevant person requested that information about him or her not be disclosed to another person, the children's hearing would require to deal with that request in a manner compatible with the Convention rights of the person making the request.

[127] The right to challenge grounds and the right to seek a review are entirely unqualified. There is nothing to limit their exercise by a relevant person, regardless of the existence or otherwise of family life with the child. There is a filter in relation to appeals if the sheriff is of the view that an appeal that has been brought was frivolous or vexatious.

[128] Senior counsel for the Lord Advocate made the point that the law allows a person in the position of the petitioner to bring persons in the positions of the second respondent and the child to court by raising section 11 proceedings, and that there was no question of his doing so representing an interference with their article 8 rights. There was nothing disproportionate about providing a person such as the petitioner with the rights referred to in the preceding paragraph.

[129] The analogy between the position of a pursuer in section 11 proceedings and a relevant person in a children's hearing is not exact. It is true that an individual such as the petitioner could initiate proceedings under section 11 of the 1995 Act. Service of those on the second respondent would probably be distressing for her, and for the child, as would

involvement in the proceedings. She might decide that she wished to enter the process. If she did not, the court might appoint a curator to safeguard the interests of the child. There is, however, a difference between initiating proceedings oneself and choosing to access the court in that way, and being invited into a different procedure, initiated by the state, which has as its focus the welfare of the child, and in which the involvement of the child and relevant persons is positively promoted by the legislative scheme. A relevant person does not have to initiate proceedings, whether with or without the assistance of a lawyer. He does not have to pay court fees or seek exemption from court fees. He cannot be declared a vexatious litigant.

Conclusion

[130] The inclusion, as relevant persons, of parents who have no parental responsibilities or rights and no established family life with a child increases the risk of a disproportionate interference with the article 8 rights of a referred child and his other parent, and others, including members of their household, to privacy and the maintenance of the confidentiality of personal information relating to them.

[131] Article 3(2)(a) is capable of being operated in a Convention compliant manner, at least so far as the conduct of a children's hearing is concerned, because of the case management powers available to the children's hearing. The children's hearing has ample powers to prevent a person such as the petitioner from being in the same physical location as a referred child and his mother. It can require remote attendance and exclude him from all or part of the hearing if that is necessary to allow the child or another relevant person to participate effectively, or to avoid significant distress to them. It can also excuse the child and the other relevant person, although that is not a matter to which I attach much weight.

The hearing is supposed to centre on the child, and his absence is on the face of it undesirable, as is that of a relevant person who is his main carer.

[132] Decisions about how to use case management powers require to be taken in relation to each hearing. That means that there will be a degree of uncertainty for the referred child or a person such as the second respondent as to what the children's hearing will decide to do, and anxiety associated with that uncertainty. That does not, however, mean that the system cannot operate in a manner compatible with their rights.

[133] The provision of personal information to a relevant person plainly engages the article 8 rights of the child and another relevant person. The children's hearing has an extensive power under section 178 to decline to disclose to a person any information about the child or about the child's case if disclosure of that information would be likely to cause significant harm to the child. It must read and give effect to section 178 in a manner that is consistent with the child's Convention rights. A parent cannot require measures to be taken that would harm the child's health and development and where the interests of parent and child conflict, the child's interests must take precedence: *Strand Lobben*, paragraph 206. The disclosure of information necessary to protect the interests of a relevant person who has an established family life with a child may not be identical to those necessary to protect the interests of a relevant person who does not have an established family life with a child.

[134] The children's hearing must approach any request for non-disclosure by any other person in a manner compatible with that person's Convention rights.

[135] The most potentially unpalatable consequences of the conferral of the status of relevant person are the rights that that person acquires to require procedure in the sheriff court in relation to disputed grounds, and by way of appeal, and the right to require a review three months after the children's hearing has made, continued or varied an order.

That last right is the most problematic, because it can be exercised repeatedly, and there is no filter in relation to its exercise comparable to that which would apply in the case of a frivolous or vexatious appeal to the sheriff. A relevant person can call reviews in situations where there is no real prospect that the review will result in variation of a CSO. That causes state intervention in the life of the child and other relevant persons which will be of no benefit to the child. The child and other relevant persons are called to hearings which they must attend, unless excused. The unfettered potential for calling repeated reviews where there has been a background of domestic abuse of one relevant person by another is particularly troubling. That potential does not, however, arise because of the terms of article 3(2)(a), but from the provisions of the 2011 Act itself.

[136] I am concerned in this case only with the lawfulness of the decision of the children's hearing on 23 November 2023. I am not satisfied it required to read down article 3(2)(a) in the manner proposed by the second respondent in order to render it compatible with the Convention rights of M or of the second respondent, or that the children's hearing required to ignore it in order to avoid acting incompatibly with those rights. So far as the conduct of the hearing was concerned, it could operate the provision in a manner compatible with those rights by exercising its case management powers.

[137] I record that reading down the provision in the manner proposed by the second respondent would give rise to a number of practical problems. It would require the reporter to read down the provision when determining to whom to give notice of a hearing. I recognise that in *Principal Reporter* v *K* the Supreme Court considered that reporters would be able to apply the established caselaw about established family life, and that in a borderline case the reporter would be able to take an inclusive approach. The situation here is rather different. The reporter would be required to apply the established case law in order

to exclude, rather than include, an individual. It would be acting to deprive the individual of a status that legislation had given him, on the basis of an assessment of matters of fact - and potentially disputed matters of fact - going to whether there was established family life between him and the child. The reporter's decision would preclude his involvement in the proceedings. A removal of status of that sort would normally be a task allocated to someone fulfilling a judicial role.

[138] I record that in relation to the reading down proposed by the second respondent, I did not find the case of *Re X (A Child) (Care Proceedings: Notice to Father without Parental Responsibility)* [2017] 4 WLR 110 to be of direct assistance. It relates to a different statutory regime. It is also notable that it was a judicial office holder who carried out the balancing exercise which led him to conclude that the father should not receive notification of the proceedings. The reading down proposed in this case would impose obligations on other, non-judicial, public authorities.

The decision of the children's hearing

[139] It follows from the view that I have taken that the children's hearing did not require to decide, or purport to decide, that the petitioner was not a relevant person in order for it avoid acting incompatibly with the article 8 rights of M and the second respondent.

[140] What the children's hearing did was to find that the petitioner had no family life with M, and had not had involvement since M was an infant. It did not follow from that conclusion that there would be an unlawful interference with the article 8 rights of M or of the second respondent if the petitioner were a relevant person. The children's hearing noted that the attendance of the petitioner was impacting on M's and the second respondent's participation in the hearing. It did not consider whether or how to exercise its extensive

powers of case management so as to avoid the petitioner's attendance doing so. In leaving out of account its case management powers under statute it erred in law at common law.

[141] There is nothing in the decision of the children's hearing to indicate that potentially unlawful disclosure of personal information about M or the second respondent to the petitioner could not have been avoided by its exercising its powers to refuse to disclose information to the petitioner. The interference with M's article 8 rights, or those of the second respondent, by way of the disclosure of personal or confidential information does not feature at all in the reasoning of the children's hearing.

[142] Unless it were necessary to read the provision so as to exclude the petitioner from the definition of relevant person, or to ignore the provision, in order to avoid acting incompatibly with a Convention right, there is no lawful basis on which the children's hearing could decline to treat the petitioner as a relevant person, or remove his status as a relevant person. It was not necessary for the children's hearing to read down or ignore the provision, and its decision was unlawful.

Remedy

[143] I will reduce the decision of the children's hearing. I reject the submission for the first respondent that it would be incompatible with the rights of M and the second respondent for me to do so. The matter will return to the children's hearing which I am confident has sufficient powers to avoid the unlawful disclosure of private information to the petitioner. It also has case management powers to prevent any interaction between the petitioner and M or the second respondent.

[144] I have considered also the submission by the first respondent that it would serve no practical purpose for me to reduce the decision. The prospects of a decision on the merits of

contact that favour the petitioner are very remote. I consider, however, that if I were to do that, I would in effect be assuming a role which belongs properly to the children's hearing.