SHERIFF APPEAL COURT

[2023] SAC (Civ) 1

Sheriff Principal D Pyle
Sheriff Principal N Ross
Appeal Sheriff S Murphy KC

OPINION OF THE COURT

delivered by SHERIFF S F MURPHY KC

in appeals by

YL, WBL and RL

Appellants

In the cause

EAST LOTHIAN COUNCIL

Petitioner and Respondent

against

(First) YL and (Second) WBL

Respondents and Appellants

and

(First) ML and (Second) RL

Minuters and Appellants

First Appellant: Davidson, advocate; BCKM
Second Appellant: Aitken, advocate; Thorley Stephenson SSC
Second Minuter and Appellant: Mason, advocate; Hunter & Robertson
Respondent: Sharpe, advocate; JK Cameron

21 December 2022

[1] ZL was born on 26 October 2010. The appellant and first respondent, YL, is his mother and the appellant and second respondent, WBL, is his father. For convenience hereinafter we shall refer to YL as the first appellant and to WBL as the second appellant. The first minuter, ML, and the second minuter, RL, are his siblings as is SF. The first minuter did not enter an appeal.

[2] In 2015 the second appellant was convicted of two contraventions of section 52(1) of the Civic Government (Scotland) Act 1982. He was imprisoned for eighteen months and placed on the Sex Offenders Register for ten years. This led to social work department involvement with the family for the first time. Subsequently a compulsory supervision order ("CSO") was made in respect of ZL on the basis that he was a child likely to have close contact with a person who had committed an offence listed in Schedule 1 to the Criminal Procedure (Scotland) Act 1995.

[3] In the spring of 2016 ZL was diagnosed with Autistic Spectrum Disorder. His communication and social skills function at a very low range and he has complex learning needs. Concerns arose over the appellants' abilities to provide for his needs. At a Children's Hearing in June 2016 he was made subject to a CSO with a condition of residence with foster carers. AS and JS have been his foster carers since July 2016. Supervised contact took place fortnightly with the first and second appellants and unsupervised contact with ZL's siblings also occurred fortnightly.

[4] Various tensions arose between ZL's family and the social work team following upon the imposition of the CSOs.

[5] By interlocutor dated 28 March 2022 the Sheriff of Lothian and Borders at Edinburgh made a permanence order in respect of ZL which vested certain parental rights and

responsibilities in the present respondent. An ancillary order was made in terms of section 82 of the Adoption and Children (Scotland) Act 2007 (the "2007 Act") for bi-annual contact to take place between the first and second appellants and ZL under supervision of the social work department. A second ancillary order in terms of section 82 of the 2007 Act provided for ZL's siblings to have contact at the discretion of the social work department. Appeal has been taken against those ancillary elements of the sheriff's decision.

Grounds of Appeal

[6] The first appellant appealed on the basis (a) that the sheriff had erred in law by applying the law regarding post-adoption contact to a permanence order; (b) that the sheriff's decision had been incompatible with the appellant's rights under Article 8 of the European Convention on Human Rights ("ECHR"); and (c) that the sheriff had erred in failing to make certain findings in fact regarding contact.

[7] The second appellant appealed on the grounds that (1) the sheriff erred by (a) considering that the law regarding post-adoption contact was "equally apposite" to a permanence order (b) by starting from a presumption against contact and (c) applying factors relevant to post-adoption contact to a permanence order; (2) by making a decision incompatible with Article 8 of ECHR; and (3) by failing to make certain findings in fact relevant to the issue of post-permanence parental contact which should have been made from the evidence heard in the case and which should have informed his decision regarding contact.

Appellants' Submissions

[8] By agreement counsel for the second appellant led at the appeal hearing. He emphasised that it was not suggested that the sheriff was plainly wrong: if there was no error of law, the sheriff's decision was a reasonable one. However, the decision had been vitiated by the sheriff's error of law. Under reference to paragraph [11] of *J* v *M [2016] SC 835* it was clear that an appellate court could interfere with a sheriff's decision where he had made an error of law. The error in this case was the application of principles derived from adoption proceedings to a permanence order in relation to the question of parental contact. This had been the sheriff's starting point when he stated, at para [395] of his judgment, that the relevant factors identified in adoption cases were "equally apposite" in the circumstances of a permanence order. The two situations were different. The post-order legal status of both the child and the birth parents were wholly different; the post-order status of the carers with whom the child resides were wholly different; the post-order position regarding parental rights and responsibilities was different, as was the position regarding Article 8 rights. The sheriff had erred in particular by starting from a position of a presumption against contact derived from *AB and CD* v *LM [2019] SAC (Civ) 19* and *Mr and Mrs P* v *LD [2016] SC GLA 56*, which were adoption cases.

[9] There was an absence of authoritative guidance as cases such as *East Lothian Council, Petitioners, [2012] CSIH 3* and *AB and CD* v *LM* were ones where adoption was expected to follow from the making of a permanence order, unlike the present case. The two situations were essentially very different. With adoption, the birth parents' rights substantially came to an end as they were taken up by the adoptive parents but with a permanence order more of their rights remained in existence. There must be a reasonable basis for contact to be

refused, per the Opinion of the court in *J* v *M 2016 SC 835,* para 11(2) and there was no separate test of "necessity" (*ibid.* para [12])

[10] Under ECHR the child's interests were paramount regardless of any parental rights where a child had been removed from birth parents: *Strand Lobben* v *Norway (2020) 70 EHRR 14, per* paras 202, 204, 206 and 207. Everything had to be done to preserve personal relations and further limitations such as restrictions placed on parental access required to be the subject of " a stricter scrutiny". Adoption was a more far-reaching measure than fostering: *ibid.* para 209. The sheriff's starting point was incompatible with ECHR. There was no discussion of ECHR matters where consideration of Article 8 rights was essential.

[11] Any submission by the respondent that there was not a "no harm" test would be an incorrect interpretation of *East Lothian Council, Petitioners* and in particular of para [49] in that case, which was argued without reference to Article 8.

[12] The third ground of appeal would only be insisted upon if the first and second grounds were upheld, as it would require a transcription of evidence which had previously been refused. The sheriff had failed to consider the evidence of Dr Edward, a clinical psychologist who had reported in the case, that uncertainty and any change in ZL's situation was a risk factor in relation to his welfare. Reduction in contact was such a change which had not been weighed in the balance. Contact with his parents had been positive. As adoption was not contemplated here, there had been a failure to look to the future. There had been no consideration of the situation when ZL approached adulthood. The appellants remained his family. The absence of findings-in-fact in relation to positive evidence about contact with the appellants indicated that such factors had not been taken into account.

[13] The court was invited to uphold the appeal and to replace the sheriff's ancillary provisions with an order for fortnightly supervised contact and an order for fortnightly video contact.

[14] Counsel for the first appellant adopted the submissions made on behalf of the second appellant. She added that the sheriff had identified the correct test but had applied it incorrectly: the approach to the welfare test should differ between adoption and permanence situations which were different. The sheriff had wrongly started from the position of presuming there should be no contact. This was clear from his citation of the passage from *AB and CD v LM* at the outset of the critical part of his judgment.

[15] Parts of the evidence relating to the positive aspects of the first appellant's contact with the child were absent from the sheriff's findings-in-fact. These were pertinent to the type and frequency of contact. The sheriff had therefore erred by failing to take into account relevant and important evidence in making a decision to substantially reduce the first appellant's level of contact.

[16] Counsel for the second minuter adopted the submissions previously made. Essentially the position was that the sheriff had set off on the wrong path from the wrong starting point of the authorities relating to adoption which was the wrong test. She sought direct contact for a minimum period of two hours each fortnight.

Respondent's submissions

[17] The sheriff's starting point had been correct. He clearly recognised that he was not dealing with an adoption case before turning to the passage quoted from *AB and CD* v *LM.* The correct test was the welfare test and there was no "no harm" test, per Lady Smith in *East Lothian Council, Petitioners*. It was clear from what was said in para [395] of his judgment

that the sheriff had correctly identified the welfare test in the present case and that was the basis of his decision.

[18] The sheriff had quoted the passage from *AB and CD* v *LM* in full to put matters in context but it was clear from what followed that he had in fact relied upon the factors highlighted by Sheriff Anwar in *Mr and Mrs P* which were quoted with approval in *AB and CD* v *LM,* making his own decision in the present case as he discussed each of those elements in turn in para [397] of his judgment, describing his use of those elements "as a framework" for his decision.

[19] It would have been helpful if the sheriff had drawn a clear distinction between adoption and permanence and the way he had set matters out had led to the appellants drawing an inference that he had applied the approach appropriate to adoption in the wrong situation. However, when his judgment was read in whole, from para [394] onwards, it was clear that he appreciated that there was no adoption aspect to the permanence order in this case. Accordingly the inference ought not to be drawn. In fact, it is clearly seen that he based his decision on the evidence of the clinical psychologist, and the social workers.

[20] The sheriff's actual starting point was the welfare test which was the correct place to start. Thereafter the decision was a matter for the sheriff and the evidence. It was open to him to provide increased contact but his decision was based on the evidence. The appellants were understandably unhappy at the significant reduction in contact but it was a matter for the sheriff, applying the welfare principle. If he had made no contact order on the basis of a presumption against it the position would be difficult to sustain. However, he had made an order for contact and he had made no error in law. The appeals should be refused.

Decision

[21] The present appeals are restricted to the question of post-order contact and do not challenge the making of the permanence order itself. The case is concerned with an application by the petitioner and respondent for a permanence order without provision for the granting of adoption, in terms of section 80 of the Adoption and Children (Scotland) Act 2007, which is in these terms:

> "**80 Permanence orders**
> (1) The appropriate court may, on the application of a local authority, make a permanence order in respect of a child.
> (2) A permanence order is an order consisting of—
> (a) the mandatory provision,
> (b) such of the ancillary provisions as the court thinks fit, and
> (c) if the conditions in section 83 are met, provision granting authority for the child to be adopted."

No authority for the child to be adopted was sought in the present case. The mandatory and ancillary provisions are set out within ss. 81 and 82:

> "**81 Permanence orders: mandatory provision**
> (1) The mandatory provision is provision vesting in the local authority for the appropriate period—
>
> (a) the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act (provision of guidance appropriate to child's stage of development) in relation to the child, and
> (b) the right mentioned in section 2(1)(a) of that Act (regulation of child's residence) in relation to the child.
>
> (2) In subsection (1) "the appropriate period" means—
>
> (a) in the case of the responsibility referred to in subsection (1)(a), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 18,
> (b) in the case of the right referred to in subsection (1)(b), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 16.
>
> **82 Permanence orders: ancillary provisions**
> (1) The ancillary provisions are provisions—

(a) vesting in the local authority for the appropriate period—

(i) such of the parental responsibilities mentioned in section 1(1)(a), (b)(i) and (d) of the 1995 Act, and

(ii) such of the parental rights mentioned in section 2(1)(b) and (d) of that Act, in relation to the child as the court considers appropriate,

(b) vesting in a person other than the local authority for the appropriate period—

(i) such of the parental responsibilities mentioned in section 1(1) of that Act, and

(ii) such of the parental rights mentioned in section 2(1)(b) to (d) of that Act, in relation to the child as the court considers appropriate,

(c) extinguishing any parental responsibilities which, immediately before the making of the order, vested in a parent or guardian of the child, and which—

(i) by virtue of section 81(1)(a) or paragraph (a)(i), vest in the local authority, or

(ii) by virtue of paragraph (b)(i), vest in a person other than the authority,

(d) extinguishing any parental rights in relation to the child which, immediately before the making of the order, vested in a parent or guardian of the child, and which—

(i) by virtue of paragraph (a)(ii), vest in the local authority, or (ii) by virtue of paragraph (b)(ii), vest in a person other than the authority,

(e) specifying such arrangements for contact between the child and any other person as the court considers appropriate and to be in the best interests of the child, and

(f) determining any question which has arisen in connection with—

(i) any parental responsibilities or parental rights in relation to the child, or

(ii) any other aspect of the welfare of the child.

(2) In subsection (1), "the appropriate period" means—

(a) in the case of the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act, the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 18,

(b) in any other case, the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 16"

[22] These provisions clearly contrast with those relating to adoption. Under section 35 of the 2007 Act the parental rights and responsibilities of birth parents are extinguished:

> "**35 Effect of order on existing rights etc.**
> (1) Where an adoption order is made on the application of a member of a relevant couple by virtue of subsection (3) of section 30, the making of the order—
>
> (a) does not affect any parental responsibilities and parental rights which immediately before the making of the order were vested in the other member of the relevant couple,
>
> (b) does not extinguish any duty owed to the child by that other member—
> (i) to pay or provide aliment in respect of any period occurring after the making of the order,
> (ii) to make any payment arising out of parental responsibilities and parental rights in respect of such a period.
>
> (2) Otherwise, the making of an adoption order—
>
> (a) extinguishes any parental responsibilities and parental rights relating to the child which immediately before the making of the order were vested in any person,
>
> (b) subject to subsection (3), extinguishes any duty owed to the child immediately before the making of the order—
> (i) to pay or provide aliment in respect of any period occurring after the making of the order,
> (ii) to make any payment arising out of parental responsibilities and parental rights in respect of such a period."

Section 40 confirms the status conferred:

> "**40 Status conferred by adoption**
> (1) An adopted person is to be treated in law as if born as the child of the adopters or adopter.
>
> (2) If an adopted person is adopted—
>
> (a) by a relevant couple, or
> (b) by virtue of section 30(3), by a member of a relevant couple,
>
> the adopted person is to be treated as the child of the couple concerned.
>
> (3) An adopted person adopted by virtue of section 30(3) by a member of a relevant couple is to be treated in law as not being the child of any person other than the adopter and the other member of the couple.

> (4) Otherwise, an adopted person is to be treated in law as not being the child of any person other than the adopters or adopter."

[23] In relation to a permanence order, section 82(1)(e) clearly envisages that contact arrangements may be made by way of an ancillary order to the permanence order.

[24] It is against that background that the appellants' submissions that the sheriff has applied a presumption against contact fall to be considered. Section 84(4) of the Act states:

> "(4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration."

This subsection plainly sets the welfare test at the core of any decision as to whether or not to make a permanence order and any ancillary provision relating to it. In the present case there was no suggestion that adoption would follow from the granting of the permanence order.

[25] The first ground of appeal for each appellant was based upon the premise that the sheriff had erroneously based his decision on an irrelevant matter by applying to a permanence order a consideration relevant to an adoption case by starting from a presumption against contact. He had accordingly made an error of law and this error was said to vitiate the entire decision. This submission arose from what is stated at para [395] of the sheriff's decision:

> "Having reviewed the case law in respect of the relevant criteria for assessing whether an ancillary order for contact with the respondents and the siblings would safeguard and promote [ZL]'s welfare throughout his childhood and whether it would be in his interests, the most helpful case is *AB and CD* v *LM [2019] SAC (Civ) 19.* Whilst this case dealt with post-adoption contact (and no authority to adopt is sought here), the relevant factors for the court to consider are equally apposite:
>
> '[36] In the normal course there will be no such contact. In each case where the matter is put in issue, the court must determine the matter in the best interests of the child concerned considering whether such contact will safeguard and promote the welfare of the child throughout the child's life.'"

[26] *AB and CD* v *LM* was a case which was concerned with post-adoption contact. We agree with the appellants' submission that adoption is a very different situation from a permanence order because the subject of adoption becomes in law the child of the adopters exclusively, by virtue of ss. 40(1) –(4)) of the Adoption and Children (Scotland) Act 2007. The birth parents' parental rights and responsibilities relating to the child are extinguished on adoption (*ibid* ss. 35(2)). By contrast, with a permanence order, only certain limited parental rights and responsibilities transfer automatically to a local authority, these being the "mandatory provisions" specified within section 81 of the 2007 Act, the responsibility to provide guidance to the child and the right to regulate the child's place of residence. Other parental rights and responsibilities may be the subjects of ancillary orders made at the court's discretion under s. 82 of the 2007 Act. In each case the welfare principle is the paramount consideration: s. 14(3) of the 2007 Act with regard to adoption and s. 84(4) of the same Act with regard to a permanence order.

[27] In *East Lothian Council, Petitioners,* a permanence order with authority to adopt was made. Direct contact was sought by the child's birth parents post-adoption. This was refused by the sheriff at first instance and on appeal by the sheriff principal but granted by the Inner House of the Court of Session. In its Opinion the Court stated, at para [49]:

> "[49] Regarding the matter of contact, first, we note that at its highest, the submission for the appellants was that there was no evidence of [the child] having come to harm from there being ongoing contact. That, however, is not the test. The issue was whether or not ongoing contact would safeguard and promote [the child]'s welfare."

In our view this passage clearly reaffirms that the relevant test to be applied in relation to any question of parental continuing contact after the making of a permanence order is that of the welfare of the child.

[28] The sheriff began his consideration of ancillary orders for contact at para [393] of his judgment. At para [395] he stated that the factors relevant to adoption were "equally apposite" to permanence. This statement was made in the context of a dearth of authority dealing specifically with permanence orders, reflected in the fact that all the cases cited before us related to adoption. Although the quotation from *AB and CD v LM* selected by the sheriff began with the sentence, "In the normal course there will be no such contact", the remainder of the paragraph relates to the application of the welfare principle to the consideration of the question of contact in an adoption situation, indicating that even if there was a presumption against contact it may still be considered by reference to the welfare principle.

[29] The appellants' principal argument depends upon interpreting this part of the sheriff's judgment as showing that the sheriff's starting point was a presumption against contact derived from the reference to para [36] of *AB and CD v LM.* We do not agree with that interpretation. The expression "In the normal course there will be no such contact" does not necessarily imply that there is a presumption against contact. It may, as counsel for the respondent suggested, simply be a statement to the effect that contact orders are rare in adoption cases.

[30] Furthermore, it seems to us that the sheriff was simply quoting the paragraph in full at the beginning of a critical part of his decision which was based firmly on guidance contained within *AB and CD* v *LM.* He proceeded to quote further from the case at some length. The next section of *AB and CD v LM* refers with approval to the judgment of Sheriff Anwar in *Mr and Mrs P* v *LD & Others,* in particular para [112] of that decision in which Sheriff Anwar, having reviewed a number of authorities, sets out eight considerations to be taken into account by a court when considering the question of post-adoption contact.

These are: (a) the nature of the child's bond with, and attachment to, the members of the birth family seeking contact; (b) the age and if appropriate, the views of the child; (c) the level and nature of the contact currently enjoyed by the birth family, if any; (d) the benefit derived by the child from such contact, if any; (e) the risks to which the child may be exposed during such contact, if any; (f) the ability, or otherwise, of the birth family to commit to contact and to heed the advice of professionals in relation to how to manage contact; (g) the ability, or otherwise of the birth family to accept the terms of the adoption order, to be fully supportive of it, and to refrain from undermining the adoption process or engaging in future litigation; and (h) the views of the adoptive parents to such contact.

[31] Each of these elements is relevant to proper consideration of the welfare principle in relation to the best interests of the child. Within para [397] of his decision the sheriff sets out his consideration of each of these matters in turn. Immediately thereafter he stated:

> "[398] Against this background, I agree with the petitioner's position that the opportunity for [ZL] to benefit from the new found stability and security provided by the permanence order must be prioritised over birth family contact. While that is not something that ZL's family agree with, they must understand that it is not their interests that the court is considering – the court is focused on [ZL] and his best interests."

In these words the sheriff made it clear that his decision to reduce the level of contact between ZL and his birth family was based on these considerations and therefore that the decision was based upon the welfare principle. Accordingly he correctly applied the terms of section 84(4) of the 2007 Act.

[32] This ground of appeal depends entirely upon para [395] of the sheriff's judgment. Nowhere else is there any other possible indication that he may have considered there to be a presumption against contact or that he took any such consideration into account. At the outset of his discussion of the applicable law at para [338] and again within para [395] itself

the sheriff specifically noted that this was not an adoption case which indicates that he clearly drew a distinction between the circumstances pertaining to adoption and those relating to a permanence order.

[33] It is clear from the 2007 Act that the two situations are different, although it is recognised that adoption may follow the making of a permanence order. The provisions of the Act which relate to ancillary orders contain no presumption against birth-family contact.

[34] We consider for these reasons that the sheriff did not start from a presumption against contact. In our view he correctly applied the provisions within the 2007 Act relating to contact as an ancillary order to the permanence order. It follows that he did not make an error of law and we repel the first ground of appeal for each appellant.

[35] Article 8 of ECHR as incorporated into UK law by the Human Rights Act 1998 ("1998 Act") states:

> "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."

It is unlawful for a public authority such as the present petitioner to act in a way which is incompatible with rights under the Convention, in terms of section 6 of the 1998 Act.

[36] In *Strand Lobben* v *Norway* the European Court of Human Rights, in considering a case in which a young mother challenged a decision to take an infant into public care, commented on Article 8 in this way, at paras 202 - 204:

> "202 The first paragraph of art. 8 of the Convention guarantees to everyone the right to respect for his or her family life. As is well established in the Court's case-law, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such

> enjoyment amount to an interference with the right protected by this provision. Any such interference constitutes a violation of this article unless it is 'in accordance with the law', pursues an aim or aims that is or are legitimate under its second paragraph and can be regarded as 'necessary in a democratic society'.
>
> 203 In determining whether the latter condition was fulfilled, the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of para.2 of art.8. The notion of necessity further implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests.
>
> 204 In so far as the family life of a child is concerned, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations."

The court considered the position where, as here, the interests of a child came into conflict with those of the parents at para 206:

> "206 In instances where the respective interests of a child and those of the parents come into conflict, art.8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents."

[37] The application of the welfare principle within the 2007 Act clearly reflects this approach. At para 204 of *Strand Lobben* v *Norway* the court specified that in all decisions concerning children, the child's best interests "are of paramount importance", the same test which is applied under section 84(4) of the 2007 Act. Where the interests of the child conflict with those of the parents, "particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents" (*Strand Lobben* v *Norway,* at para 206).

[38] At para 207 in *Strand Lobben* v *Norway* the court considered the termination of ties between parents and child:

> "207 Generally, the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under art.8 to have such measures taken as would harm the child's health and development. An important international consensus exists to the effect that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In addition, it is incumbent on the Contracting States to put in place practical and effective procedural safeguards for the protection of the best interests of the child and to ensure their implementation."

While the court spoke of separation "necessary for the best interests of the child", in *J* v *M* the Inner House of the Court of Session emphasised that there is no separate "necessity test", at para 12:

> "'Is there a separate 'test of necessity?'
>
> [12] Under reference to passages in the opinion of the court in M v K, and to a discussion of Sheriff Sheehan in JGC v NW, in which she quotes at length a passage in a judgment of Sheriff Holligan, there were submissions at the appeal hearing as to whether it is proper to apply a distinct and separate test, described as 'a test of necessity', before refusing an order for parental contact. Having reviewed the opinion of the court in *M* v *K*, we are not persuaded that the court had any intention to go beyond the proposition that, since in general it is strongly in the interests of a child to maintain a relationship with both parents, before a contrary position is taken, the court must, after carefully weighing all the relevant circumstances, identify factors which justify such a serious step and demonstrate that it is conducive to the welfare of the child. This is no more than one would expect in a proper application of sec 11(7) of the 1995 Act. In short, we agree with Sheriffs Holligan and Sheehan that *M* v *K* did not lay down a separate test of necessity as a basis for refusing contact, and we endorse the careful reasoning of Sheriff Holligan on this point (*HTJH* v *FM*)."

[39] In the present case the separation is not absolute but the levels of contact with ZL in relation to both his birth parents and his siblings have been very substantially reduced by the sheriff from fortnightly to twice a year. This is a very significant reduction. However, the sheriff considered the matter with great care. As we have noted, he applied the welfare

principle specifically under reference to the eight factors derived from *Mr and Mrs P* v *LD & Ors*. He concluded, at para [398] of his judgment:

> "Against this background, I agree with the petitioner's position that the opportunity for [ZL] to benefit from the new found stability and security provided by the permanence order must be prioritised over birth family contact. While that is not something that ZL's family agree with, they must understand that it is not their interests that the court is considering – the court is focussed on [ZL] and his best interests."

This statement by the sheriff is clearly consistent with the statements of the Grand Chamber in *Strand Lobben* v *Norway* at paras 207 and 208.

[40] At para 11(2) in *J* v *M* the court gave the following guidance, which was cited by the appellants:

> "2) Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child (sometimes referred to as 'exceptional circumstances'). Reference can be made to *M* v *K* (para 25). This approach is reflective of the general background of it almost always being conducive to the welfare of a child that parental contact is maintained. In *NJDB* v *JEG* (para 14) Lord Reed explained that there must be 'a reasonable basis' for a decision to refuse such an application."

The present case involved a reduction in contact, not a complete refusal of the application. Nevertheless we consider that there was a reasonable basis for the sheriff's decision to reduce the contact enjoyed by both parents and siblings to twice yearly. His decision followed recommendations made to the court by Dr Katherine Edward, a chartered clinical psychologist who had prepared two reports by herself and a third one in conjunction with a colleague, Dr Lucie MacKinlay, in relation to the questions of residence and contact for ZL. Dr Edward's conclusions with regard to contact were set out by the sheriff at paragraphs [213], [214], [216] and [220] of his judgment. Her recommendation was to reduce to biannual contact. This was supported by David Fenwick, a social worker who was the petitioner's Team Leader in Children's Services (paras [151] and [152] of the sheriff's

judgment. Another senior social worker from the respondent's children's services team, Rogan Higginbottom, supported reduction in contact (para [179] of the sheriff's judgment). We are satisfied that there was a body of evidence to support the sheriff's decision to reduce parental and sibling contact as substantially as he did.

[41] However, that is not the end of the matter. At paras [399]-[400] of his judgment, the sheriff went on to indicate that the duration of contact sessions might be extended and that supervised contact in relation to ZL's siblings might be removed in due course and that the frequency of sibling contact might be increased. In our view these indications reflect the care which the sheriff gave to the question of contact.

[42] Accordingly we consider that the Article 8 rights of the respondents and of the minuters have not been infringed in this case.

[43] In the light of our decisions in relation to the first and second grounds of appeal, we understand that the third ground is not to be insisted upon.

[44] We shall refuse the appeals and adhere to the sheriff's interlocutor of 28 March 2022.

Expenses

[45] We sanction the appeals as suitable for the employment of junior counsel and in accordance with the submissions of all parties we shall make no order for the expenses of the appeals.