FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 72
P1229/17

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition of

ABC

Petitioner

against

(FIRST) PRINCIPAL REPORTER; (THIRD) THE LORD ADVOCATE

Respondents

and

(FIRST) EAST LOTHIAN COUNCIL; (SECOND) XL; (THIRD) YL

Interested Parties

for judicial review of certain decisions of a children's hearing

Petitioner: Brabender QC, McAlpine; Clan Childlaw Limited
First Respondent: Moynihan QC, D Scullion (sol adv); Anderson Strathern LLP
Third Respondent: L Dunlop QC, Charteris; Scottish Government Legal Directorate
First Interested Party: Cartwright; Allan McDougall McQueen LLP
Second Interested Party: Aitken; Lisa Rae & Co
Third Interested Party: Gilchrist; BCKM Solicitors

27 November 2018

[1] On 7 September 2017 a children's hearing continued a compulsory supervision order (CSO) in respect of a child DEF, who was then just under 7 years old. Two of the measures included in the order were directions regulating contact between DEF and, amongst others, the petitioner, who is designed as ABC. ABC is an older sibling of DEF. At that time he was 13 years of age. The first direction restricted direct contact between DEF and ABC to a minimum of once per fortnight for a minimum of two hours. The second direction restricted indirect contact between DEF and the petitioner by prohibiting telephone contact between them. The reporter arranged a further children's hearing to take place on 5 December 2017 to review the CSO and the directions concerning contact. On that date, amongst other things, the hearing varied the directions by allowing supervised telephone contact in addition to the direct contact previously permitted.

[2] In this petition ABC contends that the contact decisions constituted an unlawful interference with his right to respect for family life in terms of article 8 of the European Convention on Human Rights (ECHR). The petition was resisted by the principal reporter (the first respondent) and the Lord Advocate (the third respondent). Three interested parties have taken part in the proceedings, namely East Lothian Council as the implementation authority in terms of the CSO (the first interested party) and the siblings' father and mother (respectively the second and third interested parties).

[3] The dispute concerns certain provisions of the Children's Hearings (Scotland) Act 2011 (the 2011 Act), and in particular section 81 which deals with the determination of a claim that a person should be deemed a "relevant person" for the purposes of a children's hearing. A relevant person can attend and participate fully in respect of all decisions made by a children's hearing. In terms of section 200 of the Act certain persons are automatically entitled to this status, in general those with parental responsibilities in relation to the child

concerned. Other persons can claim deemed relevant person status at the hands of a panel at a children's hearing, or a pre-hearing panel, on the basis that the individual has (or has recently had) "a significant involvement in the upbringing of the child" – section 81(3). If the application is granted this places that person under significant obligations in relation to the proceedings before the children's hearing and entitles full participation in the process, including rights of appeal.

[4] It is clear that siblings have no automatic entitlement to relevant person status. A sibling can only achieve such if the test in section 81(3) is satisfied. The petition proceeds upon the basis that ABC cannot meet the test, a view which has not been challenged by any of the other parties. The contention is that deprivation of relevant person status means that ABC cannot participate fully in decisions taken concerning DEF, most particularly those concerning contact between him and DEF, thus his procedural rights as guaranteed by article 8 have been violated and the aforesaid decisions are unlawful.

[5] Particular reliance is placed upon the decision of the UK Supreme Court in *Principal Reporter* v *K* 2011 SC (UKSC) 91. The case concerned the then relevant legislation, namely the Children (Scotland) Act 1995, and in particular whether deprivation of relevant person status from the unmarried father of the child concerned was compatible with various convention rights. At the time section 93(2)(b) of the 1995 Act provided that relevant person status in relation to a child meant, in effect, any parent or person enjoying parental responsibilities or rights in respect of the child concerned, or any person who ordinarily (other than by reason of his employment) had charge of or control over the child. *K* did not fall into either category. At paragraph 69 of the judgment it was stated that the potential for violation of his article 8 procedural rights could be cured if the relevant provision was read

as granting relevant person status to anyone "who appears to have established family life with the child with which the decision of a children's hearing may interfere".

The Lord Ordinary's decision

[6] In her decision in respect of ABC's petition the Lord Ordinary reached the view that the test for deemed relevant person status in section 81(3) "is a narrower test than that carefully crafted by the UK Supreme Court in *Principal Reporter* v *K*" ([2018] CSOH 81, paragraph 55). ABC would have been entitled to relevant person status under the previous legislation as read down by the Supreme Court, but the inclusion of the word "upbringing" in the new statutory test removed this entitlement. Her Ladyship continued:

> "[57] I acknowledge the concerns expressed on behalf of the principal reporter that there are good reasons for restricting the number of participants in the children's hearing. However, just as that argument was insufficient to overcome the difficulties with the previous legislation, so I regard it as insufficient to resolve the difficulty with the test in section 81(3). This case is not about imposing rights and obligations on siblings generally. It concerns the inability of an individual who, by concession, has established family life with his sibling to participate fully in decisions that directly affect him. In this context, I would add that I am satisfied that the decisions of the children's hearing in the present case undoubtedly interfered with that established family life. The *de facto* position in family life is that sibling contact is unlimited. Far from conferring any right of contact on these siblings, the decisions of the children's hearing altered that, first by imposing a CSO accommodating DEF away from the family unit and then by limiting the nature and frequency of any contact that was permitted. No issue was taken with the merits of those decisions but on the face of it they represent an interference with the established family life between ABC and DEF. That ABC would be involved in any reintegration of DEF with the core family unit is self-evident given that he was returned to live in that family unit in late July 2017. This places ABC squarely in the category of someone who has an interest not just in maintaining contact but in decisions about whether DEF will be reintegrated into the core family unit.
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> [58] For these reasons, I consider that those representing ABC were correct in identifying that he could not bring himself within the test for deemed relevant person in section 81(3) and so could not insist that the principal reporter refer that matter to a pre-hearing panel. It follows that ABC did not fail to exhaust any statutory remedies in the way contended for on behalf of the principal reporter. ... It

> is not so much that the principal reporter breached ABC's article 8 ECHR rights; rather the difficulty ABC faced arose from the way in which section 81(3) is framed."

[7] The Lord Ordinary asked herself how ABC's situation could be resolved. She noted that in the circumstances of an individual such as ABC, who does not profess to have been involved in the upbringing of a child, but who has nonetheless established family life/significant involvement with that child with which the decisions of the children's hearing may interfere, the legislation is not drafted in a way that permits him to be deemed a relevant person in order that he might participate fully and have a right of appeal against those decisions. This created "a danger of incompatibility." Her Ladyship continued at paragraph 59:

> "I have concluded that the section 81(3) test, even if purposively construed, is not quite sufficient as it stands to allow those such as ABC to claim a right so to participate. ABC's particular position is that he has attained legal capacity and his parents cannot, therefore, formally represent his interests. Accordingly, his claim to participate in the hearing is not one that can be subsumed within his parents' right to complain on his behalf. In so concluding, however, I acknowledge that there may be many cases where the parents' involvement as relevant persons is sufficient to protect the interests of some or all of their children."

The Lord Ordinary decided that the difficulty could be resolved by reading down section 81(3) so that after "upbringing of the child" it includes the words "or persons whose established family life with the child may be interfered with by the hearing and whose rights require the procedural protection of being a relevant person. This had the benefit of including as deemed relevant persons only those whose rights required the procedural protection of full participation rather than any lesser right.

> "Standing the need to restrict participation only to those who fulfil the test, those additional words, while arguably otiose, may serve to clarify the difference between those whose procedural protection may be provided adequately through those already involved as relevant persons and those who require that procedural protection in their own right." (paragraph 60)

The reading down did not "go against the grain" of the legislation because, in the Lord Ordinary's view, reading sections 200 and 81(3) together, the provisions were clearly designed to allow full participation by all those with the requisite article 8 rights who fell short only on a point of drafting rather than one of principle.

[8] The Lord Ordinary observed that, as a result of her decision, ABC would now be in a position to invoke the provisions of sections 79-81 of the 2011 Act and seek deemed relevant person status. It would be for a pre-hearing panel to apply the test as read down if an application was made. It was not for the court to conclude that ABC should have been a deemed relevant person at the time of the hearings in September and December 2017, just that he should have been able to apply to participate as such using the appropriate statutory route. Accordingly the Lord Ordinary could not be satisfied that the decisions were unlawful. By interlocutor dated 7 August 2018 it was found and declared that section 81(3) of the Children's Hearings (Scotland) Act 2011 should be read so as to include the words mentioned earlier, and it was ordered that all provisions relative to section 81(3), including in particular rules 22 and 24 of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 be construed consistently with section 81(3) as read down. The Lord Ordinary refused all the orders sought by the petitioner, which included declarator that the said decisions to the extent of directions made regulating direct and indirect contact between the DEF and the petitioner were unlawful: declarator that various provisions in the 2011 Act were incompatible with article 8 of ECHR; and an order for damages in terms of section 8 of the Human Rights Act 1998.

The appeal against the Lord Ordinary's decision

[9] The petitioner has reclaimed (appealed) against that decision on the following

grounds. Having found that the appellant, with an established family life, was unable to fully participate in the decision-making process in relation to the hearings in September and December 2017 and that those decisions directly affected him and interfered with, or at least potentially interfered with his established family life, the Lord Ordinary erred in law by finding that the decisions were nonetheless lawful. The Lord Ordinary should have held that section 81(3) of the 2011 Act is not compatible with article 8. In any event the mechanism in the Act as read down does not provide an effective route to full participation in the decision-making process. The reading down is internally inconsistent in that those with an established family life with a child which may be interfered with by the hearing must necessarily be given the procedural protection of being a relevant person. Furthermore the Lord Ordinary failed to provide sufficient reasoning for concluding that the decisions complained of were lawful notwithstanding her finding it necessary to read down the relevant legislation in order to make it convention compliant.

[10] The principal reporter lodged a cross appeal. It was accepted that the decision was incorrect, but not for the reasons given on behalf of the petitioner. The Lord Ordinary erred in concluding that there was an incompatibility between the provisions of the 2011 Act and the article 8 rights of the petitioner requiring a "read down" of section 81(3) and associated provisions. Every individual with an established family life with the child concerned did not require to participate "fully" in the hearings; merely be afforded a proper opportunity to take part in the decision-making process. This is a flexible requirement which can in some instances be met by informal representation of wider family members through the participation of the child and parents. The petitioner's article 8 rights were adequately protected at the hearing at which the issue of contact was reviewed in that the petitioner was present and legally represented. Failing that it is contended that if compliance with article 8

requires that the petitioner has the rights (and responsibilities) attaching to a relevant person, the Lord Ordinary erred by finding that the test in section 81(3) is narrower than the test drafted by the UK Supreme Court in *Principal Reporter* v *K*, and further erred in concluding that the provision could not be interpreted purposively to accommodate the petitioner.

[11] In his answers to the appeal the Lord Advocate notes that in the petition the petitioner sought declarator that the decisions were unlawful only in respect of the contact directions. By way of cross appeal the Lord Advocate submits that the Lord Ordinary erred in proceeding on the basis that the decision in *Principal Reporter* v *K* requires that all those who can fulfil a factual test of having established family life with the referred child with which the decisions of the children's hearing may interfere must be accorded maximal procedural status. Furthermore the *de facto* disruption of family life represented by the making of a CSO in relation to DEF did not of itself constitute an interference with the rights under article 8 enjoyed by ABC. The substantive interest of ABC under article 8 goes no further than a reasonable opportunity to maintain his relationship with DEF. The Lord Ordinary was in error in holding that the necessary degree of participation could only be secured by a right of formal participation and a right of appeal. Having regard to the procedures adopted at the September and December hearings, his rights were sufficiently protected.

Discussion

[12] In *Haase* v *Germany* [2005] 40 EHRR 19 at paragraph 82 the European Court of Human Rights observed that:

> "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 article 8 of the convention." (emphasis added)

Echoing this, in *Principle Reporter* v *K* at paragraph 41 the UK Supreme Court said:

> "Parents must be enabled to play a proper part in the decision-making process before the authorities interfere in their family life with their children. This has been established time and time again in the Strasbourg jurisprudence ..."

At paragraph 43 reference was made to "Strasbourg's pre-occupation with ensuring that there are sufficient procedural safeguards where fundamental rights are in issue." The court's focus was on parents and their role in the proceedings involving their child.

[13] In the normal run of things it is parents who make the decisions which are being taken over by the state. That is the interference with "fundamental rights" which triggers the need for relevant person status for parents. In the normal run of things, siblings fall into a different category. Unless special circumstances justify it, such as that he played a parental role, it will not usually be necessary, or even appropriate, for a sibling to be involved in all decisions concerning the removed child. Where decisions are taken which affect the article 8 rights of a relative other than a parent, generally this will not require the same level of involvement in the whole process as that of a parent if it is to be justifiable as necessary in a democratic society – see, in the context of a claim by an uncle, *Boyle* v *UK* (1995) 19 EHRR 179 at paragraph 54 of the Commission's report.

[14] The Lord Ordinary's decision was based on the view that:

> "the clear *ratio* of the relevant part of *Principal Reporter* v *K* was that all those who could fulfil a factual test of having 'established family life with which the decisions of the children's hearing may interfere' must be able to participate fully in those hearings." (paragraph 49)

No doubt this can be inferred if one considers the "read down" words in isolation, but they must be interpreted in the context of the circumstances under consideration and the full

terms of the judgment. If this is done it becomes clear that the true *ratio* of the decision is more limited in respect of those entitled to the fullest level of participation in the children's hearing process.

[15] Understandably the judgment delivered in *K* was primarily concerned with unmarried fathers. The concern was interference with their family life with a removed child – see for example paragraphs 38-44. In paragraph 60 the question was posed: "If it be right that the present position violates the article 8 rights of some unmarried fathers – and indeed of some other people – and their children, how can it be cured?" Having regard to the tenor of the court's observations both before and after this question, we do not interpret "some other people" as including everyone whose established family life with the removed child might be interfered with by the decisions of the children's hearing. For example, it was not intended to cover all the child's siblings. The question was followed by a consideration of the categories of persons entitled to relevant person status in terms of the 1995 Act. They covered most parents; persons in whom parental responsibilities or parental rights were vested; and people with charge of or control over the child concerned. On any view it would be a major innovation upon this list to include any sibling who had lived with the child before his or her removal. The court's primary intention was to add a person such as *K*, the child's unmarried father, to the list, and thus avoid convention incompatibility. It had been suggested that the court should add "or appears to be a parent who has a *de facto* family tie with the child" to the statutory definition. The view was expressed that this came close to addressing the problem, however (paragraph 68):

> "Persons other than parents may have article 8 procedural rights which require to be protected. This is not as dramatic an extension as it may seem. It is not every aspect of family life which attracts its procedural protection."

[16] The discussion thereafter confirms the relatively limited expansion envisaged. It would not require to address questions of "informal contact with the wider family" which "in most cases" would be adequately protected by the participation of those entitled to do so. (The use of "wider family" in this context can be contrasted with the term "core family unit" in paragraph 38.) The expansion would address the problem of a child's ultimate reintegration in the family depending upon "a grandparent or other family member". That relative would then need to be involved in the decision-making process, however it is difficult to place a young sibling in this group. The court's consideration of this topic concluded as follows:

> "69. The potential for violation could therefore be cured 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'. This goes very much with, rather than against, the grain of the legislation. The aim of the hearing is to enlist the family in trying to find solutions to the problems facing the child. This is simply widening the range of such people who have an established relationship with the child and thus something important to contribute to the hearing. Mostly, these will be unmarried fathers, but occasionally it might include others. It will, of course, involve the reporter initially and then the children's hearing in making a judgment. But section 93(2)(b)(c) already does this. The discussion during the course of the hearing before this court as to whether a father who shared care with the mother might already be covered by this paragraph was ample demonstration of this. The case law on whether unmarried fathers had established family life with their children is sufficiently clear and constant for reporters to develop a checklist or rules of thumb to guide them. At the very least, it is likely that all unmarried fathers who were living with the mother when the child was born; or who were registered as the child's father; or who are having contact with the child whether by court order or arrangements with the mother will have established family life with the child. In a borderline case, it would be safer to include him and let others argue than to leave him out."

[17] Apart from the opening sentence, the above passage is of a piece with the preceding paragraphs. Only "occasionally" would the widened entitlement to claim deemed relevant person status go beyond unmarried fathers. It would require "a judgment" to be made by the children's hearing, essentially to identify those playing, as counsel for the Lord Advocate

put it, a "bringing-up role." By contrast, it can be noted that if persons such as ABC were covered, a large number of people would be able to claim the rights (and responsibilities) of relevant person status, with little or no judgment being required of the children's hearing. A proliferation of relevant persons would have obvious adverse consequences for the whole system. It can be noted that, unlike the provisions in the 2011 Act, the court was not even opening up relevant person status to all unmarried fathers regardless of their particular circumstances. Our interpretation of the judgment in *Principal Reporter* v *K* is that, however open-ended the read down insertion might appear if looked at in isolation, the intention was to limit it to unmarried fathers and to a limited class of others with a significant involvement in the upbringing of the child whose voice should be heard in respect of all decisions concerning the removed child – in other words, much as subsequently enacted in section 81(3) of the 2011 Act. All of this is consistent with the Strasbourg jurisprudence, some of which was mentioned earlier.

[18] The submission for the petitioner in support of the Lord Ordinary's approach was heavily dependent upon the proposition that in respect of participation in the decision-making process, the children's hearings system operates on an "all or nothing basis". If one is a relevant person, one is involved in all decisions: if one is not a relevant person, one is, in effect, excluded from anything that can be described as fair or proper participation in the decisions being made. That said, counsel recognised that ABC had an involvement in the September and December hearings, but this was insufficient because he had no entitlement to notification of them; no right to attend or receive papers; no right to appeal; and no right to ask a reporter to convene a hearing to review a decision. Only a relevant person enjoyed such rights. In *K*, at paragraph 48, the UK Supreme Court said that a parent (or other person) whose family life with the child is at risk in the proceedings "must be afforded a

proper opportunity to take part in the decision-making process". It was suggested that this means that ABC must be allowed relevant person status. Anything less would not give him a proper opportunity to participate in decisions affecting him. The flaw in the submission is that it wrongly assumes that the UK Supreme Court had in mind a sufficiently broad extension of the category of persons entitled to relevant person status as to include siblings in the position of ABC. As already discussed, the focus was on a narrower group of potential deemed relevant person claimants.

[19] There remains a legitimate and important question as to the position of someone such as ABC whose direct interest in contact with his sibling is the subject of determination by a children's hearing. A panel considering such an issue, and the other professional persons involved, should be mindful of a sibling's interest in the matter and the need to take it into account. Depending on the specific circumstances this might trigger the need for active measures. As mentioned in *K* at paragraph 68, usually this will not be necessary, but there may be circumstances where fairness requires that the sibling has an opportunity to provide written information in advance. Only exceptionally would his or her attendance at the inquiry be required. In most cases the presence of others, including parents, the reporter, and social workers, will give the panel enough information to reach an appropriate decision.

[20] A similar issue is discussed in our contemporaneous opinion in *DM* v *Locality Reporter and another*. Suffice to say that section 78 of the 2011 Act, and the relevant regulations, require to be operated by reporters and the chair of children's hearings in a manner which is consistent with the rules of natural justice. So far as the convention is concerned, article 8 contains no explicit procedural requirements. It is sufficient if "the decision-making process involved in measures of interference (is) fair and such as to afford

due respect to the interests safeguarded by article 8": *SJP and ES* v *Sweden* 28 August 2018, Application no. 8610/11 at paragraph 92. The approach of the Strasbourg court in *Lazoriva* v *Ukraine* 17 April 2018, Application no. 6878/14 demonstrates the fact specific nature of the inquiry in respect of wider family members. In that case there would have been no violation if the Ukrainian authorities and courts had, rather than ignore it, given "meaningful consideration" to an aunt's offer to provide tutelage for her nephew before his adoption was approved, see paragraphs 63/67. The clear picture is that not all family members enjoy the same level of protection as a parent of a removed child. Exactly what is required will vary depending upon the particular circumstances of the case. It is wholly understandable that parents, and those in an equivalent position, stand at the apex of procedural protections; but equally understandable that to extend this to all relatives whose established family life with the removed child is likely to be affected by decisions would be not only unnecessary and disproportionate, but also unjustifiably damaging to the efficient operation of the system, and thus to the interests and welfare of the child at the heart of the process. With regard to those with an interest in contact decisions, there is more than enough flexibility in the current system, if sensibly operated, to allow them to be taken into account in a fair and procedurally satisfactory manner.

[21] If there was a legal flaw in respect of the September hearing, it was cured by what happened in December. This is so even if one leaves aside the presence of ABC's parents at the September hearing, one of whom was legally represented, and whose position in respect of contact and family reintegration coincided with that of the petitioner. It was suggested that this factor should be left out of account given that ABC had legal capacity to appear or be represented on his own behalf, but this overlooks the essentially informal child-centred nature of the children's hearings system.

Decision

[22] Neither the convention nor case law required that the petitioner be afforded relevant person status, nor the opportunity to apply for such, in relation to the children's hearings concerning his sibling DEF. There has been no violation of his article 8 procedural rights in respect of the decisions taken in September and December 2017. There is no need to read down the provisions of section 81(3) of the 2011 Act and related provisions in the manner narrated by the Lord Ordinary. Her interlocutor to that effect will be recalled, but the court adheres to her refusal of the orders sought in the petition.