OUTER HOUSE, COURT OF SESSION

[2022] CSOH 32

P773/21

OPINION OF LADY WISE

In the petition of

X & Y

Petitioner

against

THE PRINCIPAL REPORTER

First Respondent

and

KB

Second Respondent

for Judicial Review of the decision by the children's hearing to include the names and address of the petitioners in a compulsory supervision order made on 7 September 2021

Petitioner: Inglis; SKO Family Law for JK Cameron, Glasgow
First Respondent: Brabender, QC; Anderson Strathern LLP
Second Respondent: Moynihan QC; Balfour + Manson LLP

8 April 2022

Introduction

[1] This case raises the issue of the extent, if any, to which those who wish to become foster carers of a child with a view to future adoption, are entitled to make representations at a children's hearing. The petitioners, X & Y, are now foster carers and prospective adopters

of a child IB, who is 5 years old. IB has been the subject of compulsory supervision orders (CSOs) since April 2018 having suffered an extremely serious sexual assault when she was just 1 year old. The second respondent, KB, is IB's mother. She failed to take the child to hospital promptly after IB was assaulted by K who was then KB's partner. Having spent over 2 years with foster carers a plan for IB to be adopted was made. She was matched with X & Y and on 7 September 2021 the children's hearing decided that IB should be placed with them and that indirect contact should take place between IB and her mother. It is that decision of the children's hearing which is challenged, but only insofar as the hearing refused to make an order withholding the names and address of the petitioners from the second respondent.

[2] It is not in dispute that the petitioners were not in attendance at the relevant children's hearing. They had not yet met IB. Since the decision under challenge was made, the petitioners have lodged an adoption petition in Kilmarnock Sheriff Court. In accordance with rule 10 of the Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 No 284 the petitioners applied for a serial number to be granted to the adoption application. At the time of the substantive hearing in this petition IB was living with the petitioners and the adoption petition was progressing. Two particular aspects of the decision-making by the hearing on 7 September 2021 are challenged. First, it is said that the failure by the chair of the hearing to make arrangements for the attendance of the petitioners at the hearing for the purposes of consideration of the request that their names and address not be disclosed was in contravention of the procedural aspects of Article 8 of the European Convention on Human Rights (ECHR) and the Children's Hearings (Scotland) Act 2011 (the 2011 Act) and so unfair and unlawful. Secondly, it is contended that the absence of written reasons within the record of proceedings in relation to

the decision refusing to make a measure of non-disclosure within the child's CSO amounted to a procedural irregularity. Declarator that the decision was unlawful insofar as the names and address of the petitioners were included is sought, together with interdict restraining the first respondent from divulging to any person the name and address of the petitioners pending the outcome of the adoption proceedings.

The relevant legislation and procedural rules

[3] The primary legislation governing the decisions of the children's hearing is the Children's Hearings (Scotland) Act 2011. Insofar as relevant to this petition it includes the following provisions:

> "**25 Welfare of the child**
> (1) This section applies where by virtue of this Act a children's hearing, pre-hearing panel or court is coming to a decision about a matter relating to a child.
> (2) The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.
>
> **28 Children's hearing: pre-condition for making certain orders and warrants**
> (1) Subsection (2) applies where a children's hearing is ~
> (a) Considering whether to make a compulsory supervision order
> (b) Considering whether to vary or continue a compulsory supervision order
> (c) ……
> (2) The children's hearing may make, vary or continue the order or interim variation or grant the warrant, only if the children's hearing considers that it would be better for the child if the order, interim variation or warrant were in force than not.
>
> **78 Rights of certain persons to attend children's hearing**
> (1) The following persons have a right to attend a children's hearing —
> (a) the child …
> (b) a person representing the child,
> (c) a relevant person in relation to the child …
> (d) a person representing a relevant person in relation to the child …
> (e) the Principal Reporter,
> (f) if a safeguarder is appointed under this Act in relation to the child, the safeguarder, …

(2) No other person may attend a children's hearing unless—
(a) the person's attendance at the hearing is considered by the chairing member of the children's hearing to be necessary for the proper consideration of the matter before the children's hearing,
(b) the person is otherwise granted permission to attend by the chairing member of the children's hearing, or
(c) the person is authorised or required to attend by virtue of rules under section 177 …

(4) The chairing member must take all reasonable steps to ensure that the number of persons present at a children's hearing at the same time is kept to a minimum.

83 Meaning of 'compulsory supervision order'

(1) In this Act, '*compulsory supervision order*', in relation to a child, means an order—
(a) including any of the measures mentioned in subsection (2),
(b) specifying a local authority which is to be responsible for giving effect to the measures included in the order (the 'implementation authority'), and
(c) having effect for the relevant period.

(2) The measures are—
(a) a requirement that the child reside at a specified place,
…
(c) a prohibition on the disclosure (whether directly or indirectly) of a place specified under paragraph (a), …

138 Powers of children's hearing on review

(1) This section applies where a children's hearing is carrying out a review of a compulsory supervision order in relation to a child.

(2) …

(4) The children's hearing may vary or continue a compulsory supervision order only if the children's hearing is satisfied that it is necessary to do so for the protection, guidance treatment or control of the child.

178 Children's hearing: disclosure of information

(1) A children's hearing need not disclose to any 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."

[4] The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013/194 (SSI) ("the 2013 Rules") include the following provisions:

"**84.- Non-disclosure requests**

(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.

88.- Notifying decision of a children's hearing to the child, relevant person and appointed safeguarder

(1) Where by virtue of the Act or any other enactment a children's hearing has been held in relation to a child the Reporter must give to the persons mentioned in paragraph (2) the information mentioned in paragraph (3) within 5 days of the children's hearing.

(2) Those persons are –
- (a) the child:
- (b) each relevant person;
- (c) any appointed safeguarded

(3) That information is –
- (a) the decision of the children's hearing
- (b) the reasons for that decision;
- (c) a copy of any compulsory supervision order, interim compulsory supervision order, medical examination order made, or warrant to secure attendance granted
- (d) a notice of any right to appeal the children's hearing decision ….

89.- Information to be given to the implementation authority and others

(1) Where Rule 88 applies within 5 days of the children's hearing the Reporter must give to the persons mentioned in paragraph (2) the information mentioned in rule 88(3)(a) to (c).

(2) Those persons are –
- (a) the chief social work officer of the implementation authority….
- (b) any person who under the compulsory supervision order…..is responsible for providing any service, support, or accommodation in respect of the child.

(3) Where by virtue of any compulsory supervision order…the person with whom the child is required to reside is a person other than the implementation authority or a relevant person paragraph (4) applies.

(4) The Reporter must give the information mentioned in rule 88(3)(a)-(c) –
- (a) where a social work officer from the implementation authority or relevant local authority for the child, as the case may be, attended the children's hearing resulting in the order in question, and it is reasonably practicable to do so, to that social worker immediately following the children's hearing;
- (b) in any other case, to the chief social work officer of the implementation authority…….no later than the end of the working day following the conclusion of the children's hearing."

[5] The rules relevant to the adoption application made by the petitioners subsequent to the decision under challenge are contained in Act of Sederunt (Sheriff Court Rules

Amendment) (Adoption and Children (Scotland) Act 2007) 2009 No 284. Rule 10 thereof provides:

> "10 (1) When any person who proposes to apply under rule 8 wishes to prevent his identity being disclosed to any person whose consent to the order is required, he may before presenting the petition apply by letter to the sheriff clerk for a serial number to be assigned to him for all purposes connected with the petition.
> (2) On receipt of an application under paragraph (1), the sheriff clerk must—
> (a) assign a serial number to the applicant; and
> (b) enter a note of the number opposite the name of the applicant in a register of serial numbers.
> (3) The contents of the register of serial numbers and the names of the persons to whom each number relates shall be treated as confidential by the sheriff clerk and are to not be disclosed to any person other than the sheriff …"

Submissions for the petitioners

[6] Mr Inglis contended first that the petitioners' ECHR rights had been engaged in the decision under challenge. Under reference to the case of *Paradiso* v *Italy* (2017) 65 EHRR 2 (at paragraph 163) it was said that the desire to adopt engaged the petitioners' private life in terms of Article 8 ECHR. The petitioners enjoyed family life as a co-habiting married couple but it was their plan to adopt IB that engaged their private life. It had been recognised in *R (on the application of Countryside Alliance)* v *Attorney General* [2008] AC 719 at 774 (paragraph 116) that a person's personal and psychological space was inviolable and that as the home is protected a sub-division of that protected category is a person's address. In *Alkaya* v *Turkey* – 42811-06 (judgment 9 October 2012, unreported) it had been confirmed that the choice of one's place of residence was an essentially private matter and that a person's home address constituted personal data or information which fell within the scope of private life and as such was eligible for the protection granted to the latter. Positive obligations can flow from the right to respect for one's private life, although the choice of

means calculated to secure compliance with such obligations falls within States' margin of appreciation - *Stubbings* v *United Kingdom* (1997) 23 EHRR 213, paragraphs 60-61.

[7] The core challenges mounted by the petitioners were first that they ought to have been heard by the children's hearing and secondly they should have received a cogent explanation of the decision that was contrary to their interests. On the first of these, it was accepted that petitioners were not relevant persons within the meaning of the 2011 Act but the effect of section 78 of the Act was that if attendance was necessary for the proper consideration of the matter before the hearing then the petitioners had a right to be there. Although the legislation conferred a discretion on the chairing member, in the particular circumstances of this case the chair had been under an obligation to invite the petitioners' attendance because the non-disclosure or otherwise of their names and address was the only controversial decision for the hearing and was one that would interfere with the petitioners' Article 8 rights. Accordingly the discretion effectively had to be exercised in favour of inviting them to attend. Had they been invited to attend, they would have made submissions about their desire for anonymity in the form of a prohibition of their names and address being included in the decision such that the second respondent would have that information. They anticipate that the intended adoption petition will involve the petitioners and the second respondent being engaged in "contentious and emotive litigation" and would be anxious if KB knew how to contact them directly. The child was also entitled to enjoy home life with the petitioners in the absence of any possibility that her mother could make unauthorised and unwarranted contact with her.

[8] The exclusion of the petitioners from the process by which decisions were made that affected them was a breach of the procedural aspects of Article 8 ECHR - *Lazoriva* v *Ukraine* (6878/14) [2018] ECHR 328, at paragraphs 67-70. All the petitioners sought was a

narrower and short term form of involvement in the process to assert their Article 8 rights and be heard on the issue of non-disclosure of their details. As no one at the hearing had raised the issue of the petitioners' Article 8 rights, their absence had deprived the hearing of considering the detail of those rights. As no one had been representing the interests of the petitioners at the children's hearing the panel chair ought to have considered whether their interests made it necessary for them to be present and that was not done.

[9] On the absence of reasons reference was made to *English* v *Emery Reimbold & Strick* Ltd [2002] 1 WLR 2409. There, the Court of Appeal had reiterated (at paragraph 12) that Article 6 ECHR requires that a judgment contains reasons that are sufficient to demonstrate that the essential issues raised by the parties have been addressed by the court and how those issues have been resolved. In the context of children's hearings, the statement of reasons attached to a decision must make clear that the hearing has applied the Act's provisions and a brief explanation for the decision must be given - *Locality Reporter Manager* v *AM* [2017] SAC (Civ) 36. Further, in *JM* v *Taylor* 2015 SC 71 at paragraph 21, an Extra Division accepted that the reasons given by a children's hearing should be a clear and intelligible statement of the material considerations to which the hearing had regard. That statement should be "proper and adequate". Failure to notify proper and adequate reasons would amount to a procedural irregularity. In essence, Mr Inglis' point was that because the petitioners had not been present they were given no reasons at the time and in the absence of written reasons they had none on which to rely.

[10] Counsel acknowledged that some of those who had attended the children's hearing had produced affidavits. However, he contended that those gave no clear account of what had been said in relation to the matter under challenge. For example, Ms Lauchlan the reporter stated that there was lengthy discussion at the hearing about the matter of

non-disclosure and that the panel members each said that they felt there was no evidence from the mother's previous behaviour that she posed any risk to the child or her new placement. Ms Lauchlan had advised the panel that from the reporter's view significant harm was the test but there was also a discussion about a wider test and the panel members did not feel that they could justify a non-disclosure order on any basis. The affidavit of Ms Currie, the second respondent's solicitor stated (at paragraph 9) that the panel chair had said that in his view the threshold to withhold a child's address from a parent was high. In contrast, the affidavit of Ms McAvoy, a social worker employed by the implementation authority states (at paragraph 4) that she had raised with the panel members that the local authority was seeking to have the petitioners' names and address withheld from the natural mother. She narrates that the chairperson indicated that there had never been any evidence that the natural mother had jeopardised the placement and he did not feel that the threshold test of significant risk of harm in order to justify the panel attaching non-disclosure to the petitioners' address going forward had been met. There was in her affidavit no reference to a wider test. On that basis Mr Inglis submitted that there were confused and inconsistent accounts from those present and because the decision was to affect the petitioners' Article 8 rights they ought to have been present or at least received clear reasons.

[11] On the issue of whether any procedural irregularity made a difference to the outcome Mr Inglis referred to the decision in *C* v *Miller* 2003 SLT 1379 where the scope of irregularity in this context was discussed. The Extra Division there approved a passage in Sheriff Kearney's textbook *Children's Hearings in the Sheriff Court (2nd Edition)* suggesting that any defect or irregularity in this context would require to be material in the sense of causing real prejudice to the person affected by it. In essence, the court confirmed (at page 1395) that before any irregularity in the conduct of the case could found a successful appeal, it

would be necessary for it to be shown that the occurrence concerned was damaging to the justice of the proceedings. Mr Inglis submitted that in the present case that test was met. A separate irrationality challenge was presented. It was submitted that, had the panel exercised the power under section 78(2)(a) of the Act and invited the petitioners to attend, they would have known that the intention was for a serial number adoption and the current situation could have been avoided. The decision made was irrational because it abrogated the rights of the petitioners under rule 10 of the 2009 adoption rules which gave them an absolute right to confidentiality in the adoption process. Under reference to *BC* v *Chief Constable, Police Scotland* 2021 SC 265 it was submitted that the question as to whether there was a reasonable expectation of privacy must take account of the whole context. In the present case because the relevant statutory instrument on adoption provides for the protection of confidentiality of the details of the petitioners the threshold for reasonable expectation was met. There was no authority for the proposition that a mother who has no contact with her child where the children's hearing has decided that child should be adopted is entitled to the information in question.

[12] While initially the petitioners sought to pursue a separate illegality challenge, in essence this was really part of the procedural irregularity challenge. It was said that it was unclear what test the children's hearing had applied to the issue of non-disclosure. Because the affidavits were not consistent and there was nothing in the written reasons one could not be sure but it appeared on the face of it that a test of significant harm to the child may have been used. That approach ignored that all decisions of the children's hearing were subject to the welfare test in section 25 of the 2011 Act. Unless a specific threshold is mentioned for a decision being made only the welfare test applied. Under reference to the sheriff court decision in *CA* v *Children's Reporter* 2020 Fam LR 50 and the annotations to the

2011 Act, section 178, it was submitted that the significant harm test in section 178 applied only to "material evidence" in the sense of documents. There was a long history of the higher test of significant harm being required for a refusal to disclose documents, following the case of *D (Minors) (Adoption Reports: Confidentiality*) [1996] AC 593 at 615. The application of the test was restricted to material adverse to a respondent such as KB that she would normally be entitled to see. In any event, non-disclosure of information is an exception to the general rule and could only be ordered applying the test of the best interests of the child being the paramount consideration. Mr Inglis contended that in going down the route of disclosure of the petitioners' information, the children's hearing did not appear to have considered IB's interests but only those of the second respondent. Against a background of very serious abuse and an unknown impact on IB all explanations about her background would have to be given to her carefully and sensitively. While the indirect contact ordered by the hearing was said to be reciprocal Mr Inglis advised that that did not quite accord with the petitioners' position, notwithstanding that no challenge to that part of the decision was taken.

Submissions for the first respondent

[13] Ms Brabender submitted that in general terms the 2011 Act and relative rules have been acknowledged as providing a child focused mechanism for decisions in the best interests of those children and to protect the interests of all involved. In the case of *ABC* v *Principal Reporter* [2020] SC (UKSC) 47 the UK Supreme Court had confirmed that the relevant procedure was sufficiently flexible to protect all those with an interest. It was noteworthy that the parents of a child came first in terms of the interests that had to be protected in decision-making by the children's hearing, followed by others who may have

had care of a child. Those who enjoyed family life with a child such as siblings, but had not been involved significantly in their care or upbringing had no automatic entitlement to attend a children's hearing, in contrast with the child's parents who enjoyed the full panoply of rights of attendance and the provision of information. In the present case there were three issues for determination. First was the question of whether the petitioners had a legitimate expectation of privacy in terms of their names and address being withheld from the second respondent. Secondly, whether the issue for determination by the children's hearing could not be determined without the attendance and participation of the petitioners and thirdly whether the absence of written reasons by the children's hearing on that issue was a failure of such seriousness as to damage the proceedings. In all three issues context was of the upmost importance and the factual circumstances that pertained at the date of hearing and the nature of the various interests held were all relevant. In essence what the petitioners sought to do was ask the court to go beyond the supervisory jurisdiction by challenging the merits of the decision.

[14] The context in which the decision challenged was made was that the children's hearing was reviewing the compulsory supervision order ("CSO") in respect of IB and so the order made on 7 September 2021 was a continued CSO in terms of section 138 of the 2011 Act. In terms of section 138(4) the children's hearing can continue or vary a CSO only if it is satisfied that it is necessary to do so for the protection, guidance, treatment or control of the child. The effect of the order made on 7 September 2021 to place IB with the petitioners as foster carers through a requirement in her CSO that she be so placed is part of the context. The test that the children's hearing required to apply in deciding to vary the CSO was one of necessity. The welfare test in section 25 of the Act applies to all decisions relating to children in this context. It is the paramount consideration but not the only one.

Accordingly, in determining whether it was necessary for the protection, guidance, treatment or control of IB that the CSO be varied on 7 September 2021 the paramount consideration was the welfare of the child. It was also uncontentious that the children's hearing could only make any decision or measure if it was better for the child to make it than for such a decision or measure not to be made in terms of section 28 of the Act. It was apparent from the terms of the decision of 7 September 2021 that the children's hearing imposed two measures in the continued CSO. These were (1) that the child IB shall reside with the petitioners and (2) that contact between her and the second respondent was to be indirect, twice per year, reciprocal and could include photographs. What it did not include was narration of the refusal of the implementation authority's wish for non-disclosure of the petitioners' names and address or the reasons for refusal to impose such a measure. Nothing in the making of a CSO or a continued CSO removes the second respondent's parental responsibilities and rights. She continues to be the only person with the parental responsibility and right to have IB living with her and to regulate the child's residence, but both her responsibility and right in that respect are restricted by the CSO. As a generality, knowing where one's child is living falls within the parental responsibility and right in relation to residence. A specific measure of non-disclosure of the address where the child resides would be a further restriction on the operation of the second respondent's parental responsibilities and rights. The legislation contains exceptions to the general rule that a parent such as the second respondent has the full panoply of rights when before the children's hearing. For example section 178 of the Act gives the children's hearing the power not to disclose information if there is a risk of significant harm to the child and that test is also found in rules 84 to 87 of The Children's Hearings (Scotland) Act 2011 (Rules of Procedure etc) Rules 2013 ("the 2013 Rules"). Similarly, section 182 of the 2011 Act imposes

restrictions on the publication of the address of any child subject to a CSO and breaching that provision amounts to an offence.

[15] It was for the local authority as the implementation authority in respect of IB's CSO to decide which route to take in terms of her permanence plan. There were two routes through which IB could have been moved lawfully to the petitioners. The first was to vary the CSO and place IB with the petitioners as foster carers who would then present an adoption application. The second route would have been for the local authority to apply to the court for a permanence order with authority to adopt. In that context an interim order could have been sought placing the child with the petitioners. It was the local authority that made the choice to proceed down the variation of the CSO route. This was important because the adoption process on which Mr Inglis had relied was not part of a single chronological process in the circumstances of this case but a separate application.

[16] The final part of the context and background could be found in the affidavits of those who had been present at the hearing. What these illustrated were that the petitioners' position in relation to non-disclosure of their names and address was put forward on their behalf to the hearing, this was clear from the affidavit of the social worker Ms McAvoy. Further, the affidavit of Ms Lauchlan, the reporter, made clear that the panel found itself unable to justify non-disclosure on any basis. It was also noteworthy that the affidavit of Ms Currie, the second respondent's solicitor, confirmed (at paragraph 9) that the social worker had provided information to the children's hearing that she did not think that the petitioners would withdraw from the prospective adoption if their address was disclosed. It was clear also from that affidavit that there had been a detailed discussion about the issue.

[17] On the question of whether the petitioners had a legitimate expectation of privacy on 7 September 2021 Ms Brabender submitted that at best what was engaged was their right to

private life but that their family life as a couple was not engaged. This was clear from the decision in *Paradiso* v *Italy* (2017) 65 EHHR 2. In *Alkaya* v *Turkey* - 42811-06 (judgment 9 October 2012, unreported) (reported only in French) it was reiterated that the issue is that a fair balance has to be struck between the right to the protection of private life and the right to freedom of expression. The case was demonstrative of the usual balancing exercise of Article 8 rights of various parties. Accordingly if the petitioners' private life was engaged it had to be balanced against the second respondent's rights and all those individuals' rights and interests were subject to the principle of the paramountcy of the welfare of the child. Further, in the case of *Lazoriva* v *Ukraine* (6878/14) [2018] ECHR 328, which had involved an aunt, it was held that private life but not family life had been engaged. At its highest the children's hearing in the present case would have been engaged in a balancing exercise between the private life of the petitioners and the pre-existing family life of the second respondent. There was no question of Article 8 ECHR providing individuals with the right to privacy of their address in every respect. By implicitly accepting the procedural route chosen by the local authority to having the child IB placed with them the petitioners must be assumed to know that the default position was that their address and identity would not be kept confidential. The statutory scheme provides for non-disclosure only if the children's hearing makes a decision to that affect and it was not bound so to do.

[18] So far as the provisions of the adoption rules were concerned these were permissive and entitled any party to apply for anonymity. However on 7 September 2021 there was no adoption application and IB had not even met the petitioners. Accordingly, the ability to seek anonymity was something that was only likely to become available to the petitioners in the future. The Lord President had made clear in *MH* v *Mental Health Tribunal for Scotland* 2019 SC 432 (at paragraph 7) that confidentiality in one process or in one part of

a process did not guarantee confidentiality in all judicial or acquis judicial proceedings. It followed that the petitioners had no guarantee of anonymity at the time of the decision-making on 7 September 2021.

[19] Turning to the issue of whether the petitioners' attendance at the children's hearing was necessary for the proper consideration of the matter before it, it was clear from section 78(2)(a) of the 2011 Act that the presumption that numbers at the children's hearing should be limited to the persons listed in section 78(1) was subject only to the listed exceptions. In considering whether it had been a reasonable exercise of the discretion of the chairing member of the children's hearing not to regard the petitioners' attendance as necessary, the context was that they had never met the child and could not offer relevant information about her welfare. If the petitioners' argument that their attendance was necessary was correct, then the relevant prospective carers involved in any varied CSO in terms of section 83(2)(c) would have to attend the hearing. It was clear from the affidavits referred to that the children's hearing had adequate information to consider the issue of whether a non-disclosure measure was appropriate. Further, the transition of the child to being in the care of the petitioners was being put in place and the petitioners had made no attempt to ask to appear and address the children's hearing. Against that background it could not be said that the panel chair had acted unreasonably in not deferring the hearing and inviting the petitioners to attend.

[20] It was clear from the decision in *ABC* v *Principal Reporter* [2021] SC (UKSC) 47 that not every interest requires attendance at and participation in the children's hearing. The procedural aspects of Article 8 required only that the decision-making process be fair and the required degree of involvement with that process depended on the relationship and role that a party seeking to participate had in the child's life (paragraphs 27 and 30 of *ABC*).

A process of matching the child with the petitioners with a view to prospective placement was not sufficient to give them an absolute right to involvement. It did not offend against the principle of a fair process that parties whose interests may be affected can have representations made for them, particularly where different interests may be allied - *ABC* v *Principal Reporter* at paragraph 39. In the present case the interests of the petitioners were allied with those of the implementation authority, which was working with them. The petitioners' stated preference for privacy was made very clear to the children's hearing through the implementation authority but as a matter of law no one could have given them a guarantee that their preference would be accepted. It could not be said that the information provided by the social work department was anything other than directly relevant to the decision on non-disclosure. Unsurprisingly, no argument was made by the local authority in respect of the petitioners' Article 8 rights, as the necessary focus was on the child.

[21] The absence of written reasons for the refusal to make a non-disclosure measure could only be reviewed where the procedural irregularity would damage the justice of the proceedings. As the petitioners had not been entitled either to the provision of or the withholding of information by the children's hearing it could not be said that the absence of written reasons had damaged these proceedings. The 2013 Rules were important in this context. Rule 88 thereof provides that the reporter must give information about the decision made and its reasons to the child, each relevant person and any appointed safeguarder within 5 days of the hearing taking place. An important purpose of that rule is to ensure that those who have a right to appeal decisions of the hearing receive sufficient information about the outcome. A copy of the decision and reasons are also provided to the chief social work officer of the implementation authority and to any person who under the CSO is

responsible for providing any service, support or accommodation in respect of the child in terms of rule 89. In the particular circumstances of this case, however, rule 89(3) and (4) apply as the continued CSO on 7 September 2021 required the child to reside with a person other than the implementation authority. In those circumstances the reporter must give the relevant information to the social worker who attended the hearing and only to the chief social worker of the implementation authority where there was no such attendance. In the present case the petitioners had the right to have the decision and its reasons conveyed to them by the implementation authority in order to have IB lawfully transferred to their care. As they were not participants at the children's hearing and had no right of appeal, the primary purpose of being informed of the decision by the social work officer was in respect of the accommodation of the child rather than to convey the issue of disclosure or non-disclosure of their address.

[22] Senior counsel submitted that any procedural irregularity in this case could not be said to damage the process because the reasons were given orally by the children's hearing and all those with a right of appeal against the decision knew what the decision was and the reasons for it. The local authority social worker imparted the decision and reasons to the petitioners. It was apparent from the raising of the petition that the petitioners had been given full information about the decisions made and the measure refused. In the context of the petitioners' role on 7 September 2021 which was only to have a plan for the child's physical care being transferred to them put by the implementation authority to the children's hearing, it was appropriate that it would be the implementation authority that would convey the decision and its reasons to them.

[23] In response to submissions about the test for a non-disclosure measure and whether it had been applied or not by the children's hearing, Ms Brabender submitted that the issue

was not properly part of the supervisory jurisdiction and so not before the court. In any event, the welfare principle in section 25 of the 2011 Act was as indicated an overarching requirement and not a standalone test. To the extent that the sheriff in *CA* v *Children's Reporter* 2020 Fam LR 50 had expressed a view to the contrary (at paragraph 27) she was wrong. It was not a question of a competition between the different tests in the Act. As it happened in that case the sheriff had been dealing with a section 138 review decision which included the necessity test. The position underlying the whole of the petitioners' argument was that the place of a proposed adoption should be kept secret. There was nothing in the statutory scheme to support that and every case had to be treated on its merits. The decision made by the children's hearing to vary the CSO could only be made after consideration of a number of tests and interests. It had to be better than not for the child that it be varied, it had to be necessary for the control, guidance or treatment of the child and it could only be made against a backdrop of her welfare being the paramount consideration. Critically, the second respondent as a relevant person had been entitled to all information, including the address of the petitioners unless that was restricted. Section 178 provided an example of how it could be restricted but no more than that. There would have to be compelling evidence to deviate from the usual norm of disclosure. All of the orders sought by the petitioners should be refused. The effect of an interdict would be to impose a section 83(2)(c) measure something that this court is not empowered to do. There was simply no apprehended legal wrong in the names of the petitioners appearing in the CSO.

Submissions for the second respondent

[24] Mr Moynihan adopted Ms Brabender's submissions and adjusted his own written submission to the extent that he now accepted that Article 8 was engaged, albeit in respect

only of private life and not family life. He drew parallels in this context with the case of *Lazoriva* v *Ukraine* (6878/14) [2018] ECHR 328. In that case, an application was made by the aunt of a Ukrainian orphan who wanted to assume his guardianship. She was resident in Russia. On those facts the court had decided that the aunt did not enjoy family life with the orphan but that her private life was engaged. In that case the adoption had been pursued without giving any consideration at all to the interests of the aunt and so on a test of sufficient involvement her rights had been breached.

[25] It was important not to belittle the interest of KB the child's mother in this case. It is a basic parental instinct to want to know where one's child is and that she is safe. The second respondent's affidavit supported that this was her aim. She had accepted now that there is no likelihood of her looking after the child again. The importance of her interest as the natural mother has to be balanced against any other convention rights. The principle of open justice had been a domestic principle before the Human Rights Act 1998 and our existing approach should normally meet the requirements of the convention - *A* v *SSHD* 2014 SC (UKSC) 151 at paragraph 57. Exceptions to the principle of open justice include the rules on anonymity in the reporting of children's cases and for complainers in sexual offenders cases. Where an issue of anonymity arises it will be based on a balance of competing interests. In some instances Parliament has intervened in the area. The example of rule 10 in the adoption rules gives prospective adopters an option to claim anonymity which will be granted if so claimed. It is contingent upon an election and represents a legislative judgment that adoption is sufficiently important that it must not be jeopardised by a lack of anonymity if sought. In contrast, the children's hearing decisions deal with a vast multitude of circumstances. What the Scottish Parliament has done in that context is framed a number of different provisions such as section 83 and section 178 of the 2011 Act

which give the means by which those involved can be afforded anonymity. None represents an absolute rule; it is always a balance. Accordingly, there is simply no right to unqualified anonymity of those participating in the children's hearing.

[26] Insofar as Mr Inglis had referred to section 178 of the 2011 Act being restricted to withholding "adverse evidence" to a party such as the second respondent, that was incorrect as the provision referred to any information. It was obvious that sections 178 and section 83 must be read together for practical reasons. If someone wanted to withhold their name and address the children's hearing would have to be satisfied in terms of both section 178 and section 83 otherwise the standard to be applied would be inconsistent and this could yield absurd results. It was interesting that Professor Norrie in his text on The Law Relating to *Parent and Child* (3rd Edition) notes (at paragraph 11-05) the view that non-disclosure of a child's residence will normally be considered appropriate when contact between the child and another person is likely to be harmful to the child and when it is believed that there is a risk that the other person will attempt to make contact. This was consistent with the default position that non-disclosure of information in this context was for the protection of the child. If non-disclosure was being sought for the benefit of a third party that would have to be developed and meet the various requirements of the legislation. It could not be said that the petitioners had no right or interest to put their position before the children's hearing. Section 78 of the 2011 Act gave the panel chair a discretion to invite them to the hearing. In this case however no one asked that the petitioners be heard or that the non-disclosure measure should be made in their interests as opposed to the child's interest. Critically, no one contended that the proposed adoption would be jeopardised if the petitioners were not anonymised. Had the petitioners wanted to address the children's hearing on any issue they could have contacted the reporter and asked to be heard. For the

petitioners' argument to succeed they would have to show that their absence negated proper consideration of the issue of non-disclosure of their address. That did not fit with the scheme of the legislation.

[27] Mr Moynihan submitted also that there were several points arising from the UK Supreme Court decision in *ABC* v *Principal Reporter* [2021] SC (UKSC) 47 which were relevant to this case. First was what he termed the default setting, namely that the focus at the children's hearing was on the welfare of the child unless other interests were flagged up - paragraph 13 of *ABC*. Secondly, it could not be said that the ratio of *ABC* was a narrow one. The decision was applicable to all those who do not fall within the definition of relevant person and so have no automatic right of participation in the children's hearing. It was clear from paragraph 21 that *ABC* had argued that as a sibling with Article 8 rights he should have certain accompanying procedural rights. These included being informed of the hearing, being provided with papers, having a right to attend and be legally represented, to make representations and to appeal or review the children's hearing's decision. ABC's argument failed on the basis that, if operated sensibly, the 2011 Act affords siblings and others a sufficient opportunity to take part without being given the status of a relevant person. The court acknowledged (at paragraph 52) that the case had identified a gap in what procedural rights were to be afforded to those who had an interest but were not relevant persons. The court had specifically referred (at paragraph 39) to participation through others on a collective basis. In the present case, the local authority had responsibility for the child as the implementation authority under the CSO. It was the local authority who as a relevant public authority was in a position to identify any Article 8 rights of the petitioners that had to be protected and put those, through the social worker, to the children's hearing. What mattered, as was clear from paragraph 53 of *ABC*, was that all

those involved in the process required to be aware of the relevant interests and inform all those interested about the proceedings. The children's hearing was entitled to work on the basis that the social worker had ascertained what the petitioners wished and was able to represent those interests.

[28] Unlike the position in *Lazoriva* v *Ukraine* (6878/14) [2018] ECHR 328 there had been no failure in this case to give material consideration to an acknowledged interest. A further issue about the children's hearing procedure is that the hearing comprises three members and these often change. It would have simply been undesirable, impracticable and inappropriate for the hearing on 7 September 2021 to have been adjourned or deferred in order that the petitioners could appear. Where the necessary focus is on a child's welfare adjournments should be discouraged.

[29] Mr Moynihan accepted that giving a written statement of reasons was normally a procedural requirement but a failure to do so would only render a decision unlawful if there was material prejudice to an affected party. The decision here on non-disclosure of the petitioners' address could only have been an issue from the child's perspective so far as the children's hearing was concerned. Any written decision by the hearing would not have covered the point that the petitioners now seek to make. It was not disputed that reasons must be sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed and how those issues have been resolved - *English* v *Emery Reimbold & Strick* Ltd [2002] 1 WLR 2409 at paragraph 12. A consideration of the affidavits of those who were witnesses to the decision illustrates that they were all agreed that the issue before the hearing was the withholding of the petitioners' names and address from a welfare perspective. The petitioners now say that they would have raised the issue of their intention to seek serial number protection in the proposed future adoption proceedings

and would have asked the children's hearing to confer anonymity in terms of sections 83 and 178 of the 2011 Act. However none of that was submitted before the children's hearing and so any a statement of reasons would not have covered those matters. It was clear from the affidavit of Ms Currie that the important considerations put before the children's hearing on the issue of non-disclosure were: (1) all prior placement addresses of the child had been disclosed to the second respondent; (2) no reason was advanced to show any necessity to withhold disclosure of the proposed placement with the petitioners; (3) the social work department's position was that the placement was not in jeopardy if a non-disclosure order was not made; and, (4) disclosure provided reassurance to the second respondent that the child was safe. The irregularity in not providing written reasons in this case could not amount to the sort of damage to the justice of the proceedings described in *C* v *Miller* 2003 SLT 1379. The context was one where reasons had been given orally and were available to the petitioners through their social worker. Further as they were not relevant persons and had no right of appeal the purpose of notification to the petitioners differed markedly to notification of written reasons to a relevant person. The question was what difference it would have made had reasons for the decision in question being notified in writing rather than orally at the hearing. The answer was none.

[30] In these circumstances it could be seen that all of those who were necessary for the proper disposal of the anonymity matter were in attendance at the children's hearing in terms of section 78 of the 2011 Act. In keeping with the decision in *ABC* v *Principal Reporter*, the children's hearing was under no obligation to invite the petitioners, particularly if their interest could otherwise be represented. It could not be said that their attendance was necessary. The children's hearing could not have been expected to engage in speculative consideration of matters not raised. The whole angle of the petitioners' private life was not

before the children's hearing and on that basis it could not be said to be unlawful for them not to attend or to expect reasons about that issue.

Analysis and decision

[31] The decision of 7 September 2021 can only be understood against the backdrop of the statutory framework within which the children's hearing operates. At all material times IB was looked after by the local authority in terms of a compulsory supervision order. In terms of section 83(1)(b) of the 2011 Act they had the responsibility, as implementation authority, to give effect to all measures of the CSO. The decision that IB live with the petitioners is a measure imposed by the children's hearing pursuant to a variation of the CSO and in terms of section 83(2) of the Act. It is important to acknowledge that a decision to place a child such as IB with named carers does not remove the responsibility on the implementation authority in terms of the legislation. Further, that measure did not remove any of the parental responsibilities and rights held by her mother KB. Those parental responsibilities and rights continued to be suspended to the extent that her child would not be living with her and in relation to contact with her child being indirect, albeit reciprocal. However, in the absence of any specific provision to the contrary, a parent whose child is subject to a CSO will have information about their child including the address at which that child is resident. There are no doubt circumstances in which it may be necessary specifically to prohibit disclosure to a parent or a third party of the address at which a child is residing. The default position, though, is that a parent will know the location of a child not living with them. Any measure that prohibits disclosure to a parent of their child's address requires to be specifically imposed by a measure in terms of section 83(2)(c).

[32] Indisputably, the petitioners had no formal place in the children's hearing system as at 7 September 2021. It is not suggested that they could fall within the definition of relevant person as that term is defined in section 200 of the Act. Section 78(1) of the Act lists those who have a right to attend a children's hearing. The child, who is at the centre of the proceedings is the first person so entitled. Parents and others who have had a significant involvement in the child's upbringing will qualify as relevant persons. Representatives of a child or a relevant person are also permitted to attend. The reporter and any safeguarder will also be in attendance. In keeping with the statutory duty imposed on the chairing member of a children's hearing to take all reasonable steps to keep the number of persons present to a minimum (section 78(4)) the situations in which those with no entitlement to attend may be present are closely circumscribed. The petitioners could have expected to have attended the hearing only if - (1) their attendance was considered by the chairing member to be necessary for the proper consideration of the matter before the hearing or (2) they had otherwise been granted permission to attend - section 78(2)(a) and (b). There is no suggestion that the petitioners sought permission to attend the hearing and so only the first category, that of the chairing member considering it necessary, would have been relevant. The first issue for determination is whether it can be concluded that the absence of the petitioners from the hearing in circumstances where one of the issues for discussion was disclosure or not of their names and address to the second respondent can be regarded as unlawful or procedurally improper and so unfair. In terms of Convention rights, it was not disputed ultimately that the petitioners' Article 8 rights to private life were engaged in this case to the extent that their desire to adopt IB was sufficient for that - *Paradiso* v *Italy* (2017) 65 EHRR 2 (at paragraph 163). However, engagement of those Article 8 rights affords those

such as the petitioners only with a qualified right that must be balanced against competing interests.

[33] I reject the proposition that mere engagement of an Article 8 right bestows on those such as the petitioners an automatic right to attend and participate in the children's hearing. In the course of argument reliance was placed on the decision in *Lazarovia* v *Ukraine* (6878/14) [2018] ECHR 328. There the biological aunt of a child was precluded from any involvement in the decision making process about her nephew. The applicant's sister had been unable to look after a previous child who had then been placed permanently with the applicant. As a relative who had met the child and sought to become his carer and legal tutor her Article 8 right of private life was engaged and in the particular circumstances of that case had been breached. Nothing in the decision supports a contention that a particular procedure (such as physical presence at a hearing) must be followed to ensure participation in proceedings of anyone with Article 8 rights. The need to balance competing interests and the margin of appreciation enjoyed by each State is emphasised (at paragraph 62). More importantly, the decision making process must be considered as a whole to see whether any involvement in it provides a sufficient protection of any interests claimed (paragraph 63).

[34] Domestic authority is consistent with the approach in *Lazarovia*. It was made clear by the UK Supreme Court in the case of *ABC* v *Principal Reporter* [2020] SC (UKSC) 47 that not every Article 8 interest carries with it full rights of participation in the children's hearing system. That is why the context of this decision being one taken within the statutory scheme is so important. The petitioners' role in the child's life was a prospective one and not one that existed at the time decisions were being made about who should attend the hearing. Standing the central role of the implementation authority in placing the child pursuant to the measure being sought, it was both legitimate and appropriate in principle

for any views of the petitioners in respect of disclosure of their address to be conveyed to the children's hearing through the implementation authority as represented by the social worker at the children's hearing. Had the petitioners wished to frame an argument restricted to their own rights, as opposed to the interests of the child, section 78(2)(b) was available as a vehicle for them to request that they attend. While the chairing member would still have had a discretion to refuse their attendance, it would have been a route by which they might have flagged up that an issue of **their** rights, as opposed to the child's interests, was to be articulated. No such application was made. The petitioners contend that as the non-disclosure or otherwise of their names and address was the only controversial decision for the hearing and one that would interfere with their rights the chairing member should have understood that it was necessary for them to attend. However, the central purpose of the hearing was to consider the continuation and variation of the CSO and in particular to consider moving IB to live with the petitioners and regulate the question of contact between her and her mother. The decision of the hearing is produced at number 7/2 of process. It records the decisions on those matters with detailed reasons. It narrates that there was full discussion in relation to the recommendation of the local authority plan. The decision and reasons contains a summary of the welfare considerations behind the decision to move the child to live with the petitioners. It records also that there was considerable discussion around contact between IB and the second respondent. The decision was that there would be a benefit to the child in maintaining indirect contact with her mother. Accordingly, the implementation authority's proposal that the petitioners' name and address be withheld from the issued decision and so from IB was not the only matter that the chairing member required to consider in terms of the necessity or otherwise of the petitioners' attendance. Nonetheless, the issue of whether to

impose a measure of non-disclosure in terms of section 83(2)(c) of the 2011 Act was one about which there was no consensus and on which the hearing had to decide. The core issue on this first challenge is whether or not, in the particular circumstances of this case, it was sufficient for the petitioners' position on non-disclosure to be put by the social worker or whether the test of necessity for their attendance was met such that the panel chair could not lawfully exercise discretion other than to have them present.

[35] This leads to the issue of the basis for departure from the default position of disclosure and what was said about it at the hearing. Ms McAvoy the social worker representing to the hearing that a measure of non-disclosure should be made has sworn on affidavit for these proceedings (number 6/4 of process). At the time of the hearing she was a social worker of some 12 years' experience. She explains at paragraph 4 of her affidavit that she made various recommendations to the panel members of the hearing in relation to changing the child's residence and approving the plan for the child to be adopted.
Ms McAvoy states in terms that she raised with the panel members that the implementation authority was seeking to have the petitioners' names and address withheld from the natural mother KB. During the discussion about that issue that took place the panel chair had indicated that there was no evidence that KB had jeopardised IB's current placement and that there did not appear to be any significant risk of harm to the child to justify a measure of non-disclosure. It is clear that the contrary position was put by the social worker namely that the second respondent's future responses could not be predicted. This illustrates that, quite properly, the social worker framed her request for non-disclosure of the petitioners' names and address primarily as a child centred issue. Mention was made of the child's right to private and family life. There was some discussion about the appropriate test to be met before non-disclosure could be ordered. The broad narrative of what occurred is

confirmed by the affidavits of the reporter and the mother's solicitor. The decision not to make a prohibition on disclosure of the petitioners' names and address was made and reasons given orally by the panel chair. The affidavits illustrate that the welfare of the child was paramount in this decision-making process. That was consistent with the overarching obligation on the hearing in terms of section 25 of the 2011 Act.

[36] There does seem to have been to some discussion about whether the test of significant harm was relevant to disclosure of this kind of information. I reject the contention made on behalf of the petitioners that section 178 should be restricted to documentary material containing evidence adverse to a party such as the second respondent. It seems clear to me that names and addresses of those with whom a child is to live constitute information that can be withheld if its disclosure would be likely to cause significant harm to the child. In this respect there is a clear relationship between sections 83(2)(c) and section 178. The imposition of a measure of non-disclosure in this case would have amounted to a variation of the existing CSO. That could only be done if the measure was necessary for the protection, guidance, treatment or control of the child - section 138(4). As a generality it would be difficult to satisfy the necessity test unless there was some risk to the child absent the imposition of the measure. Such an approach is consistent with the default position being that information about where and with whom the child is placed is not withheld. To that extent I disagree with the decision of the sheriff in *CA* v *Children's Reporter* 2020 Fam LR 50. The sheriff in that case was dealing with a situation where the prospective adopters were relevant persons and so were able to appeal decisions of the children's hearing. She appeared to accept the submission that "no test at all" was specified in relation to section 83(2)(c). While Professor Norrie's textbook The Law

Relating to *Parent and Child* (3rd Edition) was prayed in aid in support of that submission, what the learned author states (at paragraph 11-05) is:

> "The statute gives no indication as to when it would be appropriate for the children's hearing to exercise the power to prohibit disclosure of the child's place of residence, and there is nothing to prevent them from doing so for the benefit of someone other than the child, such as foster carers, kinship carers or prospective adopters with whom the child has been placed. The prohibition will, however, normally be considered appropriate when contact between the child and another person is likely to be harmful to the child and when it is believed that there is a risk that the other person will attempt to make contact."

I accept that the *circumstances* in which a children's hearing may prohibit disclosure of the child's place of residence are not limited by statute and that it would be competent for those such as the petitioners to ask the hearing (whether in person or through the implementation authority) to impose such a measure for their benefit. However, where the children's hearing is asked to make a non-disclosure order in the context of varying the CSO measures it will require to have several statutory provisions in mind. These include whether the proposed variation is necessary for the protection or guidance of the child (section 138(4)), whether granting or refusing to prohibit the disclosure of information will risk significant harm to the child (section 178) and whether it would be better for the child that the measure be imposed than not (section 28) with all of that being considered against the overarching consideration of the child's welfare being paramount (section 25). Once that is understood, it cannot be regarded as wrong to consider an issue of non-disclosure with reference to concepts of harm and risk, consistent with the suggestion made by Professor Norrie.

[37] It seems to me that what the children's hearing was asked to do in this case was consider a prohibition on disclosure of the child's residence, and so the identity of the petitioners, taking into account all relevant considerations. No suggestion was made to the hearing that the petitioners wished non-disclosure for their own benefit and so the

discussion centred only on whether it would be harmful to IB were the names and address to be disclosed. It was implicit in the discussion that it would be harmful to the child and her placement if the mother tried to disrupt that by seeking her out contrary to the provision that there be only indirect contact. The considerations that the hearing required to take into account included all of the known information about KB, the fact that she had not disrupted any previous placement or tried to contact the child and balance that against the speculative risk that she might behave differently in future as advanced by the social worker. In these circumstances there is nothing reviewable about the discussion that appears to have taken place at the hearing in relation to the applicable test. The petitioners' position was conveyed clearly to the hearing by the social worker. The difficulty with the petitioners' first challenge is its suggestion that the chairing member ought to have considered it necessary to hear from them about their Article 8 rights when none of the information before the children's hearing indicated that those rights were at issue. I conclude that there is nothing in the material to support the suggestion that it was irregular, unlawful or wrong for the chairing member not to defer consideration of the matter of non-disclosure of the address to a separate reconvened hearing. As Mr Moynihan pointed out, there would have been practical difficulties in such an approach.

[38] Turning to the failure to provide written reasons for the decision, it seems to me that the failure to record the decision and reasons on the non-disclosure measure was a procedural irregularity. The critical issue, however is whether the procedural irregularity has been "damaging to the justice of the proceedings" - *C* v *Miller* 2003 SLT 1379 at 1395. There is a relationship between this issue and the whole question of the petitioners' lack of any formal role in the children's hearing proceedings. Their position in so far as relevant was represented through the social worker as the implementation authority was an

interested party in the proceedings. The issues in terms of this challenge are whether (1) intelligible reasons given for the hearing's decision on non-disclosure were given and (2) the failure to produce reasons in writing materially prejudiced the petitioners such that the justice of the proceedings has been compromised.

[39] On the first issue, the four affidavits produced illustrate that the issue of non-disclosure raised by the implementation authority was addressed by the children's hearing and that reasons for their refusal to vary the CSO by imposing a measure of non-disclosure were given. The matter is summarised by the reporter in her affidavit in the following way:

> "When the three panel members were giving their decision to vary the CSO, each stated that they were not including the non-disclosure order and gave reasons for this. The oral reasons they gave were not extensive reasons as they had already had that discussion during the hearing, but each reiterated that they did not think there was anything to suggest that the mother would behave in any way that was detrimental to the child, based on her previous behaviour. Those oral reasons were given in the presence of [the social worker]."

[40] I have already emphasised that the task in which the children's hearing was engaged on 7 September 2021 was primarily to make important decisions about moving the child IB to the home of a couple who had been matched as possible adopters for her but whom she had not yet met. All those involved were aware that this was a major step and was intended to lead in future to adoption of the child by the petitioners. Future indirect contact between IB and her mother was another focal point. Against that background and standing the need to justify non-disclosure as a departure from the default position, the oral reasons given appear to have dealt with the sole issue raised which was the notion of any harm or detriment to the child if the second respondent came to know of her new address.

[41] Turning to the question of whether the failure to provide those reasons in writing was material such that the justice of the proceedings was compromised, I conclude that it

would have made no difference were the decisions to have been given in writing. As counsel for the second respondent pointed out, the petitioners were not parties to the proceedings and had no right to appeal the decision. Their only recourse would be to raise the present petition which is what they did on being informed of the hearings decision and reasons through the social worker who was present. The critical point in balancing the various interests was that this was not a case where those who had put themselves forward to care for the child had indicated that they were only willing to do so if their anonymity could be guaranteed in terms of non-disclosure of their names and address. That question was specifically asked and answered in the course of the hearing. In the absence of written reasons the petitioners were left in the same situation as they would have been had written reasons been given. The justice of the proceedings was not compromised. In these circumstances the second challenge also fails.

[42] Finally, I deal with the suggestion that a perceived conflict exists between the 2009 Adoption Rules and the decision under challenge. While the petitioners are able to secure anonymity in the adoption proceedings, neither they, nor anyone else involved in the children's hearing has an absolute right to anonymity there. The reasons for that are not difficult to understand. The 2011 Act operates where there will invariably be at least one individual with parental rights and responsibilities for a child, the operation of which is suspended by the intervention of the state. It is important that while those proceedings are ongoing, interference with the parent's rights is kept to a minimum, something that is reinforced by section 28. As indicated, the default position is that a parent who has not had their parental responsibilities and rights removed by lawful process will know where and with whom their child lives. Any concern about that information being publicly available is met by section 182 of the 2011 Act which prohibits the publication of any information about

a child subject to the children's hearing including her home address or school attended. For the reasons outlined earlier, there is no barrier to those such as the petitioners requesting anonymity in the children's hearing procedure, but it cannot be automatic because the statutory scheme applies to a wide spectrum of cases. For example, a child may be subject to a CSO but still living with a parent. She may be living apart from her parent(s) but enjoying regular direct contact with them. Or she may, as in the present case, be living apart from her parent but be subject to a measure of reciprocal indirect contact with her. When the children's hearing is involved, any request for anonymity is necessarily considered on a case by case basis and against a backdrop of a parent or parents retaining some or most of their parental responsibilities and rights. The court adoption process seeks to deprive parents of those responsibilities and rights in a way that renders it an entirely different type of litigation with longer term consequences than those imposed by the children's hearing. There is simply no basis for an assertion that the rules applicable to one tribunal ought to be the same as those applicable in separate court proceedings. The presumption will always be in favour of open justice unless the particular rules or circumstances necessitate anonymity - *MH* v *Mental Health Tribunal for Scotland* 2019 SC 432 (Lord President Carloway at paragraph 27).

Disposal

[43] For the reasons given above I will repel the petitioners' pleas in law and dismiss the petition. I will reserve meantime all questions of expenses.