



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 73
XA52/18

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in an appeal under section 164(1) of the Children's Hearings (Scotland) Act 2011

by

DM

Appellant

against

LOCALITY REPORTER

First Respondent

and

THE LORD ADVOCATE

Second Respondent

Appellant: Aitken; Drummond Miller LLP
First Respondent: Moynihan QC; Anderson Strathern
Second Respondent: L Dunlop QC; Scottish Government Legal Directorate

27 November 2018

[1] This is an appeal by way of stated case from a decision of a sheriff. He refused an appeal against a decision of a children's hearing that DM (the appellant), then a boy

aged 12 years (now 13 years), was not to be deemed a “relevant person” in terms of section 81(3) of the Children’s Hearings (Scotland) Act 2011 in respect of his then four months old half-sister. The children’s hearing accepted that, along with his older brother, the appellant had been living with his mother and his half-sister, and that the brothers helped their mother with feeding and changing the baby. However this was not “a significant involvement in the upbringing of the child”, thus the statutory test for deemed relevant person status was not met.

The sheriff’s decision

[2] In the appeal to the sheriff it was contended that a broader approach to the statutory test should have been taken to ensure that the appellant obtained the procedural protections afforded to a relevant person. As it was, the decision was incompatible with the appellant’s article 8 rights. This submission was rejected by the sheriff. The appellant had not had a significant involvement in his half-sister’s upbringing. The decision of the children’s hearing was intelligible, rational and justified. It had been argued that only relevant person status could safeguard the appellant’s interest in maintaining contact with his half-sister, but this was misconceived. Relevant person status is a wholly different thing from the rights conferred by article 8. Parliament had deliberately restricted the scope of those entitled to participate as relevant persons. In any event the children’s hearing will always seek to safeguard and promote the welfare of the appellant’s half-sister, including giving consideration to contact between her and her half-siblings. It was open to the appellant to raise court proceedings seeking a contact order under section 11 of the Children (Scotland) Act 1995. The participation of the mother, and potentially the father, afforded sufficient procedural protection in respect of any article 8 rights of the appellant (and his brother).

The focus of the decision in *Principal Reporter v K* 2011 SC (UKSC) 91 was on adults, not siblings of the removed child. In any event, it would be unduly burdensome to impose the obligations flowing from relevant person status on a 12 year old child (who himself is the subject of child protection proceedings). In his stated case the sheriff asks this court to adjudicate upon whether he erred in law in the above determination.

The appellant's submissions

[3] On behalf of the appellant Mr Aitken presented a clear and focused submission. Unless afforded the procedural protections arising from deemed relevant person status the appellant will be unable to contest the contact direction made by the children's hearing which prevents him from spending time with his half-sister. His desire for contact is at the core of his appeal. Unless he is a relevant person he has no right to notification of hearings; no right to attend and make representations at hearings; no right to legal aid or legal representation; no right to seek a review of decisions; and no right of appeal to the sheriff against adverse decisions. All of this is vested in relevant persons alone. It was accepted that this status, with all its obligations (which are subject to criminal sanctions), was considerably more than the appellant requires in order to safeguard his interest in contact, but the legislation allows for no "halfway house". If one is a relevant person one is inside the hearing system, if not, one is outside. It is "an all or nothing system". The statutory scheme was designed to keep the number of those with the right to participate as a relevant person to a minimum. Any request to attend a hearing and make representations could with impunity be refused. The appellant did not have the right to be told of decisions, even if they directly affect him. The children's hearing can refuse contact, even if the sheriff has ordered it (as is illustrated by the history of the present case).

[4] Counsel accepted the adverse implications for the operation of the children's hearing system if siblings and other family members were entitled to be treated as relevant persons. Ideally there should be an opportunity for someone such as the appellant to participate in a more limited manner if and in so far as his interests were directly involved. However, only the Scottish Parliament can devise a scheme which is compatible with ECHR. A "better version" of section 126 of the 2011 Act would be a solution. Any proposed route under section 78 is "problematic".

[5] The submission was that the sheriff erred in law by not appreciating that section 81(3) is sufficiently flexible to allow the appellant to be given deemed relevant person status. Were it otherwise the current legislation would be incompatible with ECHR. The court was told that there are similar cases "in the pipeline", for example on behalf of grandparents and kinship carers. Support for the appellant could be gained from *Principal Reporter v K*, given that the appellant had an established family life with his half-sister (see paragraphs 40/41 of the judgment of the UK Supreme Court). This triggers article 8 procedural obligations in the decision-making process. It was no answer to say that a contact order could be made in the children's hearing proceedings concerning the appellant himself; that would breach his half-sister's rights. The involvement of their mother was not sufficient to guarantee the appellant's interests.

The submissions for the reporter

[6] For the reporter, Mr Moynihan QC contested the suggestion that the legislation has a binary approach. There are a number of practical and effective options short of deemed relevant person status available to someone in the position of the appellant. The relevant person legislation is therefore compatible with ECHR. Counsel focused upon section 78 of

the 2011 Act which allows the chair of a children's hearing to permit the attendance of someone with an interest in an issue before the panel. It is reflective of the common law rules of natural justice and fairness. It was acknowledged that there had been a breach of natural justice when the children's hearing made a contact direction removing the appellant's ability to spend time with his half-sister, in that the appellant had been given no notification of the hearing and no opportunity to make representations on the subject. He was told of a review hearing set for August, but it had not taken place. (There was no clear explanation as to why the hearing had been adjourned until a later date.)

[7] To impose relevant person obligations upon the appellant would be unattractive and disproportionate. He would require to be given sensitive and confidential information on matters of no direct relevance to him. Any failure to comply with his obligations would amount to a criminal offence. It is important that children's hearings remain focused on the welfare of the removed child. This would be difficult to achieve in the face of a multiplicity of relevant persons all seeking rights of legal representation, reviews, appeals, etc. There would be unproductive hearings and a proliferation of disputes. It was right and beneficial that relevant person status should be restricted to those whose interests were integral to all decisions. Others could apply under section 78 if and when it was required. The social work department has statutory and ECHR obligations towards looked after children (*Haase v Germany* (2005) 40 EHRR 19 and (2008) 46 EHRR SE 20) including the preservation of family bonds. Full participation in all matters will not be required for every issue. In many instances the social work department can fill any gaps, or written representations on behalf of the interested party will suffice. Where appropriate the reporter can be notified of a desire for someone such as the appellant to attend and then facilitate any necessary arrangements.

[8] Paragraph 41 of *Principal Reporter v K* did not set out an absolute rule. The UK Supreme Court did not envisage or intend that there would be a large increase in the number of relevant persons. Not everyone with an established family life with the child concerned need enjoy the same procedural protections. It is always a question of fairness having regard to all the particular circumstances of the case. Reference was made to *Boyle v UK* (1995) 19 EHRR 179 at paragraph 54 of the Commission's report. The current relevant person system is proportionate and justifiable. It promotes the aim of keeping hearings focused on the welfare of the child at the centre of the proceedings. Though designed to allow contact directions to be reviewed, section 126 and the associated regulations present "an issue of interpretation". If this was the only available avenue for the appellant, one could read the provisions down to solve the problems, but such is not necessary given the flexibility in the system. The appeal should be refused.

The Lord Advocate's submissions

[9] On behalf of the Lord Advocate Ms Dunlop QC accepted that a sibling living with a removed child can have an established and protected family life under article 8. It was not conceded that removal of a sibling (or half-sibling) is an interference with article 8 rights; however a denial of contact may be such, in that it might interfere with maintenance of the relationship of, in this case, half-brother and half-sister. It was accepted that the appellant should have some form of involvement in the children's hearing process in order to seek a reasonable opportunity to safeguard that family relationship.

[10] Turning to *Principal Reporter v K*, Ms Dunlop submitted that the *ratio* did not require maximum procedural protection for all who had enjoyed an established family life with the now looked after child. The *ratio* of the decision was to be found in paragraph 48 of the

judgment. The discussion in *K* concerned the parent/child relationship, and in particular unmarried fathers and a few others who had a guiding or shaping role in the life of the child. It was clear that *K* was someone who should have the same participation rights as relevant persons. The only way to achieve this was by reading down the statutory provisions. However we now have sections 78 and 126 of the 2011 Act, and procedural rule 60 (SSI 2013/194). There is nothing in the Strasbourg jurisprudence which requires the appellant to have relevant person status.

[11] While it was accepted that there are some “infelicities” in section 126 and the associated regulations (SSI 2013/193), nonetheless appropriate procedural rights can be afforded to the appellant within the present framework. Reference was made to the submissions made on behalf of the reporter. This was a better route given the problems which would flow from conferring relevant person status on the appellant and others in a similar position. For example, the appellant would become entitled to sensitive information about his half-sister, while similar material concerning himself is withheld from him in respect of his own children’s hearings. There would be an inevitable increase in the complexity of proceedings. Under domestic law, parents and those in a parental role are regarded as distinct and have specific rights which are denied to other family members such as siblings. Most siblings do not play a parental role – if they do, they can qualify under section 81(3). In the whole circumstances the sheriff did not err in law.

The response for the appellant

[12] In a brief response Mr Aitken observed that section 78 does not give the appellant any legal rights. There would be no entitlement to legal aid, nor to legal representation.

Decisions will be taken at the hearing, and if they are adverse the only potential remedy would be by way of judicial review.

Discussion

[13] The submissions for the respondents are to be preferred. The contention for the appellant that his legitimate interests, including his article 8 rights, can only be protected by the conferment of deemed relevant person status is unfounded. It is true that the section 126 route has been closed off by what may well have been a drafting mistake (see the postscript to this opinion), however there remains more than sufficient flexibility in the system to accommodate those whose interests are directly affected by contact decisions made by a children's hearing. If a statutory basis is required for what would otherwise be covered by common law considerations, section 78 affords the chair of a children's hearing a broad discretion to permit the attendance at a hearing of any person if such is "necessary for the proper consideration of the matter before the children's hearing" (section 78(2)(a)). (It is implicit that such a person can be given an opportunity to express views or provide information.) There may be no need for this if the position of a person such as DM is already sufficiently clear, for example from written information supplied by him or on his behalf, or if others are able to protect his interests. However if in doubt it will usually be better to permit participation in the matter which is of concern to a person making an application under section 78. The opportunity for contributions from all or on behalf of all with a direct interest in a particular issue will improve the quality of the decision-making, and thus promote the welfare of the child at the centre of the proceedings.

[14] No doubt the need to be mindful of these matters will place onerous burdens on all those involved in preparing for and conducting children's hearings, but this is part and

parcel of the requirement for such hearings to comply with the rules of natural justice and articles 6 and 8 of ECHR. Rule 22 of the Children's Hearings Rules 2013/194 provides for mandatory notification of children's hearings to certain people, but this does not mean that other persons with a direct interest in the decisions to be considered can with impunity be ignored. The same applies to rule 81. It is one of the disadvantages of the proliferation of such detailed procedural rules (often, and in a wide variety of contexts, now placed in primary legislation) that it can be assumed that if they are complied with, all is well.

[15] In summary, it is axiomatic that if a decision-maker is considering making or altering an order such as a contact direction, the substantive and procedural interests of affected siblings, and anyone else directly involved must be kept in mind; and that, where it is appropriate and necessary, such a person has the opportunity to make representations on the matter. It should be emphasised that this will not necessarily require their presence at the hearing. Furthermore, as recognised by the UK Supreme Court in *Principal Reporter v K* at paragraph 68, the involvement of others who have a right to attend will usually provide sufficient protection, thus anything more will be the exception rather than the norm. What is required is that, in advance of and at the hearing, careful thought is given to the interests and issues involved and a reasonable decision taken. Our common law rules were echoed in *Haase v Germany* (2005) 40 EHRR 19, when the European Court of Human Rights observed (paragraph 94):

“Whilst article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by article 8.”

[16] Reference is made to the observations on this issue in our contemporaneous opinion in *ABC v Principal Reporter and others*, especially in paragraphs 19 and 20 where additional

Strasbourg jurisprudence is mentioned. It is stressed that exactly what is required to ensure fairness will depend on the circumstances of the particular case. While parents stand at the apex of procedural protections, neither the common law nor the convention requires that all those whose family life with the removed child may be interfered with be given all the rights (and responsibilities) of relevant person status. Reference is also made to the observations in that opinion as to the proper approach to the decision of the UK Supreme Court in *Principal Reporter v K* 2011 SC (UKSC) 91.

Decision

[17] In the stated case the sheriff asks “Did I err in law when I determined that the decision of the children’s hearing not to deem the appellant to be a relevant person to the child was justified?” We answer this question in the negative and therefore refuse the appeal. In terms of section 164(6) we shall remit the case to the sheriff for disposal.

Postscript

[18] Section 126 of the 2011 Act is headed “Review of contact direction”, and it seems plain that the intention was to address the interests of persons directly affected by such decisions. While the terms of the section and of the associated rules are not entirely easy to follow, in large measure the potential benefits of this provision have been removed by provisions which, in certain circumstances, restrict the scope of persons who can make an application thereunder to those who can satisfy the test for deemed relevant person status – see section 126(2)(b) of the Act and paragraph 2 of the Children’s Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 SSI 2013/193. The court does not understand why this restriction was imposed. Without it there

would be a specific remedy for someone in the appellant's position. The authorities may wish to review not only this part of the statutory and regulatory framework, but also consider any other improvements which can be made in light of the court's more general comments as to the need to ensure that those directly affected by decisions taken by a children's hearing have their interests properly taken into account.