



SHERIFF APPEAL COURT

**[2026] SAC (Crim) 8
SAC/2025/200/AP**

Sheriff Principal A Y Anwar KC
Sheriff Principal C Dowdalls KC
Appeal Sheriff W A Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in

appeal against refusal to vary a non-harassment order made in terms of section 234aza(6) of
the Criminal Procedure (Scotland) Act 1995

by

MH

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

**Appellant: Allison; Lee Doyle, Solicitors, Glasgow
Respondent: E. Campbell, (sol adv), AD; the Crown Agent**

2 April 2026

Introduction

[1] In this appeal, the court is invited to consider the interplay between sections 234A and 234AZA of the Criminal Procedure (Scotland) Act 1995 and section 11 of the Children (Scotland) Act 1995 and to consider the approach to be taken by the criminal courts when imposing or varying Non-Harassment Orders (“NHOs”) prohibiting contact with a child.

[2] This is an opinion of the court to which all members have contributed.

Legislation

[3] The following legislative provisions are relevant to this appeal:

Criminal Procedure (Scotland) Act 1995

“234A Non-harassment orders

- (1) This section applies where a person is—
 - (a) convicted of an offence involving misconduct towards another person ('the victim'),
 - (b) acquitted of such an offence by reason of the special defence set out in section 51A, or
 - (c) found by a court to be unfit for trial under section 53F in respect of such an offence and the court determines that the person has done the act or made the omission constituting the offence.

- (1A) The prosecutor may apply to the court to make (instead of or in addition to dealing with the person in any other way) a non-harassment order against the person.

- (1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.

- (2) On an application under subsection (1A) above the court may, if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from harassment (or further harassment), make a non-harassment order.

- ...

- (2C) The court must give the person against whom the order is sought an opportunity to make representations in response to the application.

- ...

- (6) The person against whom a non-harassment order is made, or the prosecutor at whose instance the order is made, may apply to the court which made the order for its revocation or variation and, in relation to any such application the court concerned may, if it is satisfied on a balance of probabilities that it is appropriate to do so, revoke the order or vary it in such manner as it thinks fit, but not so as to increase the period for which the order is to run.

(7) For the purposes of this section—
'harassment' and *'conduct'* are to be construed in accordance with section 8 of the Protection from Harassment Act 1997 (c.40),
'misconduct' includes conduct that causes alarm or distress.”

“234AZA Non-harassment orders: domestic abuse cases

- (1) Section 234A applies subject to this section if an offence referred to in subsection (1) of that section is one listed in subsection (2)(c).
- (2) For the purposes of this section—
 - (a) *'victim'* has the same meaning as it has in section 234A,
 - (b) *'child'* has the same meaning as given by section 5(11) of the Domestic Abuse (Scotland) Act 2018,
 - (c) the list is—
 - (i) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
 - (ii) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
- (3) A non-harassment order in the person's case may include provision for the order to apply in favour of any of the following, in addition to the victim—
 - (a) in any circumstances, a child usually residing with the person or a child usually residing with the victim (or a child usually residing with both the person and the victim),
 - (b) where the offence is one under section 1(1) of the Domestic Abuse (Scotland) Act 2018, and is aggravated as described in section 5(1)(a) of that Act, a child to whom the aggravation relates, if the court is satisfied that it is appropriate for the child to be protected by the order.
- (4) The court must—
 - (a) without an application by the prosecutor, consider the question of whether to make a non-harassment order in the person's case,
 - (b) after hearing the prosecutor as well as the person, make such an order unless of a negative conclusion on the question,
 - (c) if of a negative conclusion on the question, explain the basis for this.
- (5) Here, a negative conclusion on the question is the conclusion by the court that there is no need for—
 - (a) the victim, or
 - (b) the children (if any) in mind by virtue of subsection (3), to be protected by such an order.

...

- (7) For the avoidance of doubt, nothing in this section affects the ability to make a non-harassment order in the case instead of or in addition to dealing with the person in any other way.”

Children (Scotland) Act 1995

“11.— Court orders relating to parental responsibilities etc

- (1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to—
- (a) parental responsibilities;
 - (b) parental rights;
 - (c) guardianship; or
 - (d) subject to section 14(1) and (2) of this Act, the administration of a child's property.
- (2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders—
- (a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;
 - (b) an order—
 - (i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and
 - (ii) giving that person such rights;
 - (c) an order regulating the arrangements as to—
 - (i) with whom; or
 - (ii) if with different persons alternately or periodically, with whom during what periods, a child under the age of sixteen years is to live (any such order being known as a *‘residence order’*);
 - (d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a *‘contact order’*)
- ...
- (3) The relevant circumstances mentioned in subsection (1) above are—
- (a) that application for an order under that subsection is made by a person who—
 - (i) not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest;
 - (ii) has parental responsibilities or parental rights in relation to the child.
- ...

- (7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—
- (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
 - (b) taking account of the child's age and maturity, shall so far as practicable—
 - (i) give him an opportunity to indicate whether he wishes to express his views;
 - (ii) if he does so wish, give him an opportunity to express them; and
 - (iii) have regard to such views as he may express.
- (7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.
- (7B) Those matters are—
- (a) the need to protect the child from—
 - (i) any abuse; or
 - (ii) the risk of any abuse,
 which affects, or might affect, the child;
 - (b) the effect such abuse, or the risk of such abuse, might have on the child;
 - (c) the ability of a person—
 - (i) who has carried out abuse which affects or might affect the child; or
 - (ii) who might carry out such abuse,
 to care for, or otherwise meet the needs of, the child; and
 - (d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.
- (7C) In subsection (7B) above—
- 'abuse'* includes—
- (a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
 - (b) abuse of a person other than the child; and
 - (c) domestic abuse;
- ...
- (10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above."

Human Rights Act 1998, Schedule 1, Part 1

Article 8

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (“UNCRC Act 2024”)

“6 Acts of public authorities to be compatible with the UNCRC requirements

- (1) It is unlawful (subject to subsection (4)) for a public authority to act, or fail to act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements.
- (2) In subsection (1), a ‘*relevant function*’ means a function that—
 - (a) it is within the legislative competence of the Scottish Parliament to confer on the authority, and
 - (b) is conferred by—
 - (i) an Act of the Scottish Parliament,
 - (ii) a Scottish statutory instrument originally made wholly under a relevant enabling power,
 - (iii) a provision in a Scottish statutory instrument originally made partly under a relevant enabling power, provided that the provision itself was either—
 - (A) originally made under the relevant enabling power, or
 - (B) inserted into the instrument by an Act of the Scottish Parliament or subordinate legislation made under a relevant enabling power, or
 - (iv) a rule of law not created by an enactment.

...

- (4) But subsection (1) does not make unlawful doing or failing to do something if the authority was required or entitled to act in that way by words that—
 - (a) are not contained in an enactment of a kind mentioned in subsection (2)(b), or

- (b) are contained in such an enactment having been inserted into it by an enactment of a kind that is not mentioned in subsection (2)(b).
- (5) In this section, 'public authority' –
 - (a) includes, in particular –
 - (i) the Scottish Ministers,
 - (ii) a court or tribunal,
 - (iii) any person certain of whose functions are functions of a public nature (but see subsection (8))."

Background

[4] The appellant is the biological father of AH but not of ZH. On 24 July 2024, the appellant raised proceedings at Edinburgh Sheriff Court ("the family proceedings") seeking: (i) parental rights and responsibilities with respect to the child ZH in terms of section 11(2)(b) of the Children (Scotland) Act 1995; and (ii) an order for contact with ZH and AH in terms of section 11(2)(d) of the Children (Scotland) Act 1995.

[5] On 3 September 2024, the appellant was convicted of the following charges at Glasgow Sheriff Court:

"(01) Between 1 November 2022 and 19 March 2024 both dates inclusive at [address] and elsewhere, you [MH] did engage in a course of behaviour which was abusive of your partner or ex-partner [BH], care of the Police Service of Scotland, in that you did repeatedly shout, swear, repeatedly call her names, invite her son [ZH] to call her names, make abusive comments, attempt to manipulate her emotionally, point at her, place in a state of fear and alarm, spit on her, state that she was not to seek employment, kick a box at her, threaten to remove her children from her care, attempt to punch her on the head, whereby you struck a door damaging same, strike a door with your elbow seize her by her throat and restrict her breathing; CONTRARY to the Domestic Abuse (Scotland) Act 2018 section 1

(02) Between 21 March 2024 and 23 March 2024 (both dates inclusive) at [address] you [MH], having given an undertaking under section 25(2)(a) of the Criminal Justice (Scotland) Act 2016 and being subject to the condition inter alia does not approach or contact nor attempt to approach or contact the witness [BH] in any way did fail without reasonable excuse to comply with said condition in that you did communicate with the said [BH] your former partner and did repeatedly send her video messages through a mobile phone app; CONTRARY to the Criminal Justice (Scotland) Act 2016 Schedule 1 paragraph 1(1)(c) and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual

Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner.”

[6] The appellant was sentenced on 15 October 2024 to a community payback order with a requirement of supervision for 18 months and a requirement to engage with programmes designed to address his offending behaviour. A restricted movement requirement was also imposed requiring the appellant to remain within his home between the hours of 7.00pm and 7.00am for a period of 12 months.

[7] The Crown moved the court to make a NHO prohibiting the appellant from contacting or approaching the complainer, BH, and the children, ZH and AH or attempting to do so. The appellant opposed the Crown’s motion, but only in insofar as the NHO affected his ability to approach or contact the children.

[8] The summary sheriff (“sheriff”) had presided over the trial. She had regard to the nature of the charges and the terms of a Pre-Sentence Report prepared by the English Probation Service. She noted that the author of the report had assessed the appellant as posing “a medium risk of serious harm towards children on the basis of emotional and psychological harm from witnessing domestic abuse”. She considered the submissions and the terms of a victim impact statement from the complainer. On 15 October 2024, the sheriff made a NHO for a period of 5 years prohibiting the appellant from approaching, contacting or communicating with the complainer, ZH and AH in any way except, in relation to AH, if contact was otherwise ordered by the sheriff court or by the children’s hearings system.

[9] The sheriff explained that she did not make the same exception with respect to ZH because ZH: (i) was not the appellant’s biological son; (ii) had been referred to in the libel of the complaint; (iii) had witnessed (and to some extent had been exposed to) the

appellant's abuse of the complainer; and (iv) had additional support needs. At the time she made her decision, the sheriff was aware that the family proceedings had been raised.

[10] In the family proceedings, a child welfare reporter was appointed on 9 September 2024 to obtain ZH's views on contact. The report was issued on 11 November 2024. The child welfare reporter took the decision not to meet with ZH explaining that unless the NHO was amended or appealed there could not be contact between the appellant and ZH, there would thus be little benefit in her being introduced to ZH but that she would meet with him if the NHO was successfully appealed or varied. She reported that, but for the terms of the NHO, she would have recommended that the appellant have supervised contact with ZH at a contact centre.

[11] A child welfare hearing took place on 6 December 2024. We were advised by the appellant's counsel that an oral motion was made at that hearing for supervised contact. The interlocutor of that date makes no reference to such a motion having been made.

[12] The appellant sought to appeal against his conviction and sentence, including the imposition of the NHO. Leave to appeal was refused.

[13] On 14 February 2025, in the family proceedings, a case management hearing took place. On joint motion, the record was closed and a 2-day proof assigned for 20 and 21 October 2025.

[14] The appellant then made an application to vary the NHO under section 234A(6) of the Criminal Procedure (Scotland) Act 1995. That application called on 26 March 2025 before the same sentencing sheriff. The sheriff was advised that a child welfare report had been obtained in the family proceedings. The appellant submitted that the child welfare report was positive in its terms in relation to the appellant and ZH and that there were no negative reports from social work.

[15] The appellant invited the sheriff to vary the NHO and create an exception for ZH in the same terms as the exception applied for AH. The Crown adopted a neutral position and made no submissions. The sheriff refused the application.

The sheriff's report

[16] The sheriff noted that there had been no change of circumstances since the order was made on 15 October 2024. She considered that the tests of appropriateness and necessity within section 234AZA continued to be met having regard to the nature of the offences committed by the appellant.

[17] In response to a submission made by the appellant regarding competency, she noted that a proof had been assigned in the family proceedings from which she inferred that the court considered the appellant's crave for contact with ZH to be competent, notwithstanding the terms of the NHO.

[18] The sheriff did not accept that the NHO prevented the child welfare reporter from obtaining ZH's views on the question of contact with the appellant. She noted that a Form F9 had been issued to ZH in the family proceedings to allow him an opportunity to express his views. The sheriff considered the child welfare reporter to have erred in refusing to meet ZH. She noted that the child welfare reporter could be instructed by the court in the family proceedings to take ZH's views, if considered appropriate. The sheriff presiding over the proof would require to have regard to the existence of the appellant's conviction and the terms of the NHO as relevant factors when assessing ZH's overall welfare and determining whether a contact order would be in his best interests.

Grounds of appeal

[19] Three grounds of appeal were advanced, namely that:

- (i) the sheriff's refusal to vary the NHO amounted to an unlawful interference with the appellant's right to family life in terms of Article 8 of the ECHR;
- (ii) the sheriff had failed to address whether the test in section 234AZA(3) of the Criminal Procedure (Scotland) Act 1995 continued to be met; and
- (iii) the sheriff had erred in taking account of an irrelevant matter, namely whether contact was in ZH's best interests, rather than focussing on whether the NHO remained appropriate to protect the child.

[20] The appellant invited the court to grant the appeal, quash the sheriff's decision of 26 March 2025 and grant the application varying the NHO to the extent of limiting the prohibition on contact between the appellant and ZH to the extent that contact was otherwise ordered by the sheriff court or by the children's hearings system. We invited submission on the relevance, if any, of the UNCRC Act 2024 upon the matters raised in the appeal. In particular, in the event that we granted the disposal sought, we wished to be addressed on whether, if the UNCRC Act 2024 applied to the application to vary the NHO, the court required to have regard to ZH's views, and if so, how those views were to be obtained in practical terms.

Submissions for the appellant

[21] The purpose of the proposed variation was to permit contact with ZH only within the confines that a sheriff or a children's hearing allowed it, having determined that contact was in ZH's best interests. It was submitted that the application to vary was based on:

- (i) the terms of the child welfare report and the child welfare reporter's comment therein

that she did not meet ZH to ascertain his views due to the terms of the NHO; and (ii) the refusal of the sheriff to grant interim contact on 6 December 2024. As we have already noted, however, the interlocutor of that date does not record such a motion as having been made and refused.

[22] In relation to the first ground of appeal, the appellant and ZH previously lived together as part of a family unit. The appellant played the role of stepfather to ZH whilst he was in a relationship with the complainer. The appellant is also the father of ZH's brother, AH, who lives in the same household as ZH. The appellant and ZH have an established family life together. Even if that is not accepted, an aspiration to maintain and develop a relationship with a child with whom a person has a connection is capable of falling within the scope of Article 8 (*Lazoriva v Ukraine* (6878/14) [2018] ECHR 328). The sheriff's refusal to vary the NHO amounted to an interference with the appellant's right to a private family life under Article 8 of the ECHR.

[23] Sections 3 and 6 of the Human Rights Act 1998 require that sections 234A and 234AZA of the Criminal Procedure (Scotland) Act 1995 are read in a manner that is compliant with the ECHR. As a NHO interferes with family and/or private life, the court must be satisfied that such an order is both necessary and proportionate to a legitimate aim. It was conceded that no submissions as to the Article 8 implications of a NHO were made either at the sentencing diet, or during the hearing on the application to vary the NHO. However, the sheriff had erred in law in failing to have regard to Article 8. It was not sufficient for the sheriff to simply assert in her report to this court that she had considered Article 8; her reasoning must bear out a proper application of the necessary principles (*West Lothian Council v MB* [2017] UKSC 15; 2017 SC (UKSC) 67 [29]). Her reasoning failed to engage with the effect of her decision on the appellant's Article 8 rights or to demonstrate a

proper balancing exercise assessing the proportionality of different options available to her (*In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911).

Had she approached matters in that way, she would have been bound to conclude that the granting of the application was the only proportionate decision.

[24] In the written submissions lodged on behalf of the appellant, it was argued that the appellant's crave for contact in the family proceedings was susceptible to an argument that it was incompetent. During the course of oral submissions, however, it was argued that if the NHO was not varied, then the appellant's crave for contact with ZH in the family proceedings, while technically competent, may be viewed as inappropriate, as its terms would be contrary to the terms of the NHO: *P v P* 2000 SLT 781. The effect of the sheriff's decision had been to circumscribe the exercise of jurisdiction by the sheriff in the family proceedings.

[25] In relation to the second ground of appeal, section 234AZA(3) to (5) did not contain a two-stage test. A party seeking variation of a NHO did not require to produce new or additional information before arguing the merits of varying the order. If there was such a two-stage test, then it was possible that a party who had a legitimate argument that Article 8 had not been properly applied at the time of the granting of the NHO would be precluded from seeking to vary the NHO in order to rectify that error. The sheriff had failed to consider whether the test in section 234AZA(3) to (5) continued to be met.

[26] The sheriff had erred in having regard to irrelevant matters. Her request to see the report from the child welfare reporter reflected a failure by her to retain focus on the statutory test set out in section 234AZA(3) to (5). That report was of no relevance to the test to be applied by the court. By having regard to the terms of the report, the sheriff had

diverted herself from the statutory test in section 234AZA(3) to (5) to focus instead on whether contact was in ZH's welfare interests.

[27] It was submitted that section 6(1) of the UNCRC Act 2024 was not engaged.

Although section 6(1) of the UNCRC Act 2024 makes it unlawful for the court as a public authority, to act in a way which is incompatible with the UNCRC requirements, that was only the case where a relevant function was engaged. The term "relevant function" was defined in section 6(2) of the Act. Functions conferred by pre-devolution Acts of the UK Parliament were not subject to the duty in section 6(1). This included the Criminal Procedure (Scotland) Act 1995. As such, the sheriff had no duty to obtain the views of the child in accordance with Articles 3 and 12 of the UNCRC because she was not exercising a relevant function when applying the test for a NHO in terms of section 234A and 234ZA of the Criminal Procedure (Scotland) Act 1995.

[28] The appellant invited the court to quash the sheriff's decision and to grant the variation of the NHO. Counsel also invited the court to provide some general guidance as to how sheriffs dealing with applications for NHOs in respect of children should approach matters, including by providing guidance on what information the court should have or seek from parties, the interrelationship between civil and criminal jurisdictions and the role and effect of Article 8 considerations.

Submissions for the Crown

[29] The Crown also considered the appeal to raise a matter of general importance, namely, the interplay between the civil court's jurisdiction to make a contact order in family proceedings and the test of appropriateness and necessity in terms of section 234AZA in criminal proceedings.

[30] The advocate depute accepted that a NHO which prohibits contact between an offender and a child for whom he has parental responsibilities and rights will invoke consideration of the parties' Article 8 ECHR rights. When considering whether it is appropriate and necessary to grant a NHO to protect a child, the criminal court is required to consider any determination made by the civil courts in relation to any section 11 application drawn to its attention. It may be the case that a court exercising its civil jurisdiction is able to identify and arrange protective measures regulating contact between an offender and a child such that the criminal court may be able to reach a negative conclusion on the question in section 234AZA(5) (being whether it is appropriate to include provision for the order to apply to a child). Ultimately, however, the decision as to whether to make, vary or revoke, a NHO is a matter for the criminal court. If the legislative framework set out within the Criminal Procedure (Scotland) Act 1995 is properly applied then a NHO will not fall foul of the test of proportionality and there shall be no unlawful breach of any parties' Article 8 rights.

[31] In the circumstances of the present appeal, the sheriff did not err. The sheriff had explained her reasons for the imposition and the duration of the NHO. In reaching her decision she had the benefit of presiding over the trial and assessing the evidence and she had a Pre-Sentence report. She also had a victim impact statement and the benefit of submissions. She explained by reference to this material why a NHO had been necessary and appropriate for ZH's protection. She explained why the terms of the NHO differed as between ZH and AH. She had correctly explained that the very existence of the NHO had not restricted the child welfare reporter in carrying out her role and did not prevent the sheriff dealing with the family proceedings from reaching a determination of the appellant's crave for contact. The advocate depute drew an analogy from the civil courts' approach to

compulsory supervision orders and section 11 orders (*JC & MH v RJ* [2022] SC ELG 21).

There had been no change in circumstances such that would enable the sheriff to conclude that she should vary the terms of the NHO. The tests of appropriateness and necessity had still been met. A NHO should not be varied on speculative grounds. It remained open to the appellant to seek a variation of the NHO should the civil court grant his crave for a contact order.

[32] The sheriff could not be criticised for having regard to the terms of the child welfare report. Those acting for the appellant had sought to rely upon it and had referred to it in their submissions.

[33] The sheriff advised parties that she would reconsider matters if an order for contact between the appellant and ZH was granted in the family proceedings. It is reasonable to infer that the sheriff considered the application premature. She had been correct to do so.

[34] In exercising judicial oversight of criminal proceedings, passing sentence and imposing orders, the court is carrying out a “relevant function” in terms of section 6(1) of the UNCRC Act 2024. The appellant’s submission involved too narrow a definition of the term “relevant function” and was at odds with the wider interpretation in *Procurator Fiscal, Dundee v JH and LL* [2025] HCJAC 2. There is a distinction to be drawn between the acts which the court is required to carry out by the Criminal Procedure (Scotland) Act 1995 and the discretionary powers that it may exercise upon being satisfied of the relevant legal tests. When considering whether to grant, vary, or revoke a NHO, the criminal court requires to act compatibly with the UNCRC. The criminal court must ensure that the right of the child to have his or her best interests taken as a primary consideration is fully respected. The criminal court must also ensure that a child who is capable of forming his or her own views is able to express those views freely and that those views are given due weight in accordance

with his or her age and maturity. Where this is done, when applying the legislative framework set out within the Criminal Procedure (Scotland) Act 1995 in relation to NHOs, the court will have acted compatibility with the UNCRC.

[35] The advocate depute accepted that the Crown had a duty, when considering whether to make a motion for a NHO under section 234A which would affect a child victim, to act in a way which is UNCRC compliant. Thus, the Crown would give a child victim an opportunity to express their views on such an order where they were capable of providing a view, and provide that information to the court. The advocate depute similarly accepted that the Crown had a duty to place that information before the court if the Crown seeks a variation of a NHO. However, where section 234AZA is engaged, the court must consider the imposition of a NHO without an application from the Crown. In doing so, the court must act in a manner which is UNCRC compliant and will require to ingather the relevant information, including, where possible, the views of the child. As a result of a Joint Protocol between the Police Service of Scotland and the Crown, and the engagement of the Crown's Victim Information and Advice Service, the Crown should have relevant information which it can provide to the court when it requires to consider a NHO under section 234AZA and if the Crown is aware of a child's views, those can be provided to the court. However, a NHO can apply to a child who would not have any involvement with the Crown in the course of a prosecution. In those cases, it would not be appropriate for the Crown to approach a child and seek his or her views. The court of first instance may adjourn proceedings under section 201(1) of the Criminal Procedure (Scotland) Act 1995 to enable inquiries to be made. The nature of those enquiries, where the Crown has no prior engagement with the child, would be a matter for the court and may depend upon the circumstances of the individual case and relevant child.

Decision

General principles

(i) The differing functions of the criminal and civil courts

[36] Before dealing with the merits of this appeal, it is helpful to address a number of general matters which arose during the course of submissions.

[37] It is important to bear in mind that when considering whether to make a NHO, the criminal court is performing a different function, on the basis of different information, to that of a civil court dealing with an application for orders under section 11 of the Children (Scotland) Act 1995 (“section 11 orders”).

[38] Section 234AZA of the Criminal Procedure (Scotland) Act 1995 applies to those convicted of an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018 or an offence that is aggravated in terms of section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. It extends the category of persons in whose favour a NHO may be made to a child usually residing with the offender, a child usually residing with the victim, or a child usually residing with both the person and the victim (section 234AZA(3)(a)). Where the offence is one under section 1(1) of the Domestic Abuse (Scotland) Act 2018 and is aggravated as described in section 5(1)(a) of that Act, the category is extended to a child to whom the aggravation relates (section 234AZA(3)(b)). The court requires to be satisfied, on a balance of probabilities that “it is appropriate for the child to be protected by the order” (sections 234A(2) and 234AZA(3)). The only issues to which the court requires to have regard which are specified in section 234AZA are: the appropriateness of the order and the need for protection from the offender’s conduct. Whether a NHO should be imposed under section 234AZA is not a matter of discretion.

Rather, it is a question of judgment. That is clear from the language of section 234AZA(4).

The court must consider the question of whether to make a NHO and, if of a negative conclusion, must explain the basis for that. The correct approach to be taken by the court was set out in *GRPW v HM Advocate* [2021] HCJAC 47; 2022 JC 73. Delivering the opinion of the court, Lord Matthews explained (at para [23]):

“... when considering the position of a child under sec 234AZA of the 1995 Act there is a two-stage test. There is first the issue of appropriateness under sec 234AZA(3) and second the statutory question referred to in subsecs (4) and (5). Counsel for the appellant pointed out that the purpose of the statutory provision was protection and, in relation to appropriateness one might pose the question, ‘Is there a spectre of protection being required?’ If that were the case, then one moved on to the statutory question. We agree with counsel and the Advocate-depute that there is indeed a two-stage process in so far as children are concerned. However, in our opinion, the appropriateness ‘test’ is nothing more than a threshold. It is not for us to re-write the words of the statute but one approach which commends itself to us is to consider whether the child is within the orbit of the offending and affected or likely to be affected by it. When the child falls within section 234AZA(3)(b), it is difficult to conceive of any circumstances in which an order will not be appropriate ... when such a child has witnessed, overheard or been a victim of domestic violence, it will only be rarely that the court should not have that child ‘in mind’ for the purposes of addressing the question posed in section 234AZA(4). Thereafter, issues such as the nature of the offence, the persistence of offending, the offender’s record, steps taken to address any issues the offender might have etc, will come into play when the statutory question is being considered, although there might well be some overlap between the two stages”.

[39] When applying that two-stage test, the court will consider the evidence at trial, or, in the case of a guilty plea, the circumstances of the offence as narrated by the Crown. It will also consider any plea in mitigation offered on behalf of the offender and will have before it the offender’s previous convictions, if any. If the court has obtained a criminal justice social work report, it will have information regarding the level of risk posed by the offender, his attitude towards the offence, whether there are programmes available to assist in the offender’s rehabilitation, and his willingness to address his offending behaviour. The court may also have available to it any victim impact statements and the views of the complainer

and any child involved, if provided by the Crown. What the criminal court will rarely have, however, is any information on whether any measures might be put in place to adequately protect the child while allowing the child to maintain some degree of contact with the offender. If such information becomes available, in terms of section 234A(6), an offender may apply to the court to revoke or vary the terms of the NHO. There is no statutory bar on the number of applications that may be made.

[40] The position is different in the civil court. In terms of section 11(7) of the Children (Scotland) Act 1995, when considering whether or not to make any orders, such as a contact order, a residence order or an order granting or removing parental rights and responsibilities, the court must have regard to the welfare of the child concerned as its paramount consideration, shall not make any order unless it considers that it would be better for the child that the order be made than that no order is made at all, and taking account of the child's age and maturity, have regard to any view the child wishes to express. The court is required to have regard to the matters set out in section 11(7B) which include the need to protect the child from abuse or the risk of any abuse which might affect him. Protection from abuse is thus one of a number of matters, albeit, a very important matter, to which the court requires to have regard.

[41] Comprehensive procedural rules exist to assist the court in its task, both in relation to making enquiries and in relation to obtaining the child's views on the orders sought. The sheriff may order the service of a Form F9 upon the child, allowing the child an opportunity to express a view on the orders sought by parties (Rule 33.19 - 33.19C of the Ordinary Cause Rules), or may meet with the child to obtain those views. In appropriate cases, the court can seek assistance from trusted third parties, such as a relative or the child's teacher, or from children's advocacy groups, where available, to enable the child to express their views. The

sheriff may appoint a child welfare reporter to seek the views of a child and to undertake such enquiries as specified by the court (Rule 33.21 OCR). They may appoint a local authority to investigate and report to the court on the circumstances of the child and on proposed arrangements for the care and upbringing of the child (Rule 33.21A OCR). Where appropriate, a curator ad litem may be appointed to represent the child's interest in the proceedings. The child themselves may instruct a solicitor to represent them in the proceedings. The court may convene a child welfare hearing to discuss arrangements for the child's care. The court is aided by the parties' pleadings and productions and ultimately, if necessary, will determine whether to grant or refuse the orders sought having considered evidence led at proof. The court is therefore well placed to consider whether, if contact is to take place, what, if any, measures might be put in place to protect a child from the risk of abuse and the form any contact should take, including whether it should be limited to supervised, video, telephone or letterbox contact. The information available to the civil court is wide ranging and can be obtained from independent sources following investigations allowing the court to make a more holistic assessment of the child's circumstances and welfare.

[42] For these reasons, a decision by a civil court to grant section 11 orders, made subsequent to the imposition of a NHO, may, in appropriate circumstances, allow a criminal court to satisfy itself on a balance of probabilities that it is appropriate to vary a NHO in terms of section 234A(6).

(ii) *Article 8 rights*

[43] Whether Article 8 rights are engaged is a question of fact dependent upon the real existence of close personal ties and may encompass *de facto* family ties including those, such

as in the present case, between a step-child and step-parent (*Vinškovský v Czech Republic*, application 59252/19). As explained by Lord Hope in *Principal Reporter v K* [2010] UKSC 56; 2011 SC (UKSC) 91 at para [40], “any court order which regulates or restricts the ‘mutual enjoyment of each other’s company’ which ‘constitutes a fundamental element of family life’ will amount to an interference”. Accordingly, when making a NHO (or imposing special conditions of bail – *Porch v Dunn* [2015] HCJAC 111; 2016 JC 101), the court requires to assess whether the interference with family life is necessary and proportionate in the pursuance of a legitimate aim, namely the protection of the victim or child named in the order.

[44] An assessment of the proportionality of the interference with Article 8 rights caused by the making of a NHO, brings the interplay between the criminal and civil courts into sharp focus. As explained by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, when examining the proportionality of a measure which may restrict rights protected by the ECHR, the court is required to address four questions:

“(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.” (per Lord Reed at para [74], see also Lord Sumption at para [20]).

NHOs often impose an absolute prohibition on any approach to, or contact with, the person named in the order. That is because, on the basis of the information placed before it, the court has concluded that such an order is appropriate and necessary to protect those named in the order. Where the NHO is imposed to protect a child, the limited material placed before the sheriff in criminal proceedings does not lend itself to nuanced decision-making on

whether less intrusive measures such as video, telephone, supervised or letterbox contact should be considered, nor how such contact would be managed. However, in order to be satisfied that a measure is proportionate, the court does not require to consider and discount all hypothetical alternatives (*Bank Mellat*, Lord Reed at para [75]). Thus, if the existence of civil proceedings in which the offender is seeking section 11 orders (or indeed proceedings before a children's hearing) is brought to the attention of the sentencing sheriff, in their assessment of proportionality, the sentencing sheriff should consider whether, on the facts of the case, it is appropriate to make a NHO which prohibits the offender from approaching or contacting a child, except insofar as authorised to do so by the civil court or a children's hearing. The sentencing sheriff may nevertheless conclude that an absolute prohibition is both appropriate and necessary to protect the child and can be justified on the facts before them.

(iii) *The need for the civil courts to be fully apprised of the circumstances giving rise to the NHO*

[45] In civil proceedings in which a crave for a section 11 order is sought, the court is usually apprised of the existence of a NHO by the parties' averments. It is unusual however, for the court to have before it a copy of the complaint setting out the terms of the conviction which led to the imposition of the NHO or a copy of any criminal justice social work report. The former can be instructive, particularly where the charge involved is a lengthy omnibus charge under section 1 of the Domestic Abuse (Scotland) Act 2018 libelling a course of abusive behaviour and any aggravation by reason of involving a child. The latter can be instructive in relation to the offender's insight, attitude to the offence and the assessment of the risk posed by the offender, at the time of conviction. Where the offender has requested a stated case in pursuit of an appeal, the stated case will contain a summary of

the evidence led at trial and the sentencing sheriff's reasons for making a NHO. The information contained in a stated case is thus also likely to be of considerable assistance to the civil court.

[46] Sheriffs have wide ranging powers to secure the expeditious resolution of disputes by ascertaining from parties the matters in dispute and any information relative to that dispute and may make such order as they think fits at a Child Welfare Hearing (OCR 33.22A(4)). They have similar powers to make enquiries at an Initial Case Management Hearing (OCR 33.36J) and a Full Case Management Hearing (OCR 33.36P). At each such hearing, the parties have a duty to provide the sheriff with sufficient information to enable the sheriff to conduct the hearing. The sheriff has wide ranging powers to appoint a child welfare reporter to undertake enquiries and report to the court.

[47] In order to ensure that the civil court is able to make a fully informed decision on whether section 11 orders should be granted, and to allow the civil court to be better appraised of the material which led to the NHO being made, the sheriff dealing with an action in which section 11 orders are sought should consider requiring a party against whom any NHO has been made to make a copy of the complaint (as amended, if appropriate), criminal justice social work report, schedule of previous convictions and any stated case available to the civil court.

(iv) Are craves for section 11 proceedings competent where a NHO exists?

[48] While counsel for the appellant ultimately retracted his submission that craves seeking section 11 orders are incompetent if they contradict the terms of a NHO, it is appropriate that we note that we are not persuaded any competency issue arises. A NHO precludes a person with parental rights and responsibilities from acting in any way which

would be incompatible with that order insofar as it relates to a child (section 3(4) of the Children (Scotland) Act 1995). However, neither the Children (Scotland) Act 1995 nor the Criminal Procedure (Scotland) Act 1995 contain any provisions which oust or limit the jurisdiction of the sheriff to make section 11 orders in such circumstances. Counsel for the appellant was unable to refer us to any authority which supported his submission. A section 11 order will be incapable of being implemented if incompatible with the terms of a NHO, however, that does not render the granting of a crave seeking such an order incompetent. We are fortified in our view by the court's approach in similar situations. An analogy may be drawn with the approach to determining applications for section 11 orders in circumstances where compulsory measures of supervision have been made in terms of section 70 of the Children (Scotland) Act 1995. The section 11 order has no immediate practical effect as the measures under section 70 preclude its exercise (*P v P* 2000 SLT 781). *JC & MH v RJ* [2022] SC ELG 21 is a more recent example of the court making a section 11 order whilst a compulsory supervision order was in force.

The appeal

[49] Turning to the circumstances of this appeal, the sheriff convicted the appellant following a trial which lasted 4 days. While leave to appeal the conviction was refused, the stated case was made available to us for the purposes of this appeal. It narrates that the appellant and the complainer had been in a relationship for around 21 months. The period of the libel extended to 17 of those months. The parties' child, AH was 10 months at the date of the trial. ZH is not the appellant's biological child and the appellant did not have parental rights and responsibilities in relation to him. ZH is a 7 year old boy with autism and global developmental delay who was assessed as having an intellectual capacity of less

than 2 years. The course of conduct for which the appellant was convicted included emotionally manipulative behaviour, calling the complainer derogatory names and instructing and encouraging ZH to participate in the name-calling, shouting and swearing at her, prohibiting her from seeking employment, threatening to remove the children from her care, kicking items at her, spitting at her, attempting to punch her on her head, striking a door and seizing the complainer by the throat and restricting her breathing. Both children were present during the assaults upon the complainer. The sheriff assessed the appellant's behaviour as being designed to degrade and humiliate the complainer, to control her, restrict her freedom and to punish her. The complainer suffered fear, alarm, distress and injury.

[50] The sheriff was made aware that the appellant had raised proceedings seeking section 11 orders in relation to ZH. She was also aware that in terms of the HM Prison and Probation Service Pre-Sentence Report, the appellant exhibited denial, minimisation and a lack of insight into the harm caused by his behaviour. He was assessed as presenting a risk of serious harm towards intimate partners and emotional or psychological harm to children. She had regard to the victim impact statement and submissions from both Crown and defence. She determined, notwithstanding the existing family proceedings, that in terms of section 234AZA the terms of the NHO were both appropriate and necessary to protect AH and ZH.

[51] We deal with the first and second grounds of appeal together as they raise similar issues. It was submitted that the sheriff erred in law; her refusal of the application to vary the NHO was contrary to the appellant's Article 8 rights. She had failed to properly assess whether the test in section 234AZA(3) continued to be met, namely that the NHO continued to be appropriate and necessary for the protection of ZH.

[52] For the reasons we have set out above, we accept that as a step-parent who had resided with ZH for 21 months, the appellant's Article 8 rights, and those of ZH were engaged.

[53] We are mindful that we are considering the sheriff's refusal of the application to vary and not the sheriff's decision to make a NHO. Leave to appeal against conviction and sentence, including the making of the NHO was refused. The question before this court is simply whether in refusing the application to vary, the sheriff erred.

[54] In that regard, we reject the submission made on behalf of the appellant that it is not necessary for an offender who seeks to invite the court to exercise its powers under section 234A(6) to revoke or vary a NHO, to present the court with new or additional information which was not before the court when the order was made, or to advise the court of a change in circumstances (*GRPW v HM Advocate*, para [27]). Were that not so, such an offender could effectively seek a review of the sentencing sheriff's decision to make a NHO without appeal. An application to vary is not "a second bite at the cherry".

[55] It is important then to understand what information was placed before the sheriff in support of the application to vary. The sheriff was advised that a child welfare reporter had been appointed by the sheriff in the family proceedings. The child welfare reporter had reported as follows:

"I took the decision not to meet with [ZH]. The reason for this was the current terms of the non-harassment order. Given it has terms which unless appealed or amended there cannot be contact with the [appellant] and ZH. Therefore there seemed little benefit to ZH by him being introduced to me at this stage. If however, there was an appeal or amendment, I would have met with him."

[56] The sheriff was made aware that the report was otherwise in favourable terms. The sheriff was correct to conclude that the child welfare reporter's decision not to meet with ZH or obtain his views did not amount to a change of circumstances or relevant new

information which might merit an application to vary. As we have explained above, a NHO does not prevent a party from seeking and being granted a section 11 order.

Notwithstanding the submission to the contrary, there was no record in the interlocutors post-dating the child welfare report of any motion for interim contact having been made, considered and refused. There was no suggestion that the sheriff in the family proceedings had concluded, having regard to the wide-ranging information before him and having carried out a more holistic assessment of ZH's welfare, that but for the NHO, contact was in ZH's best interests. The sheriff dealing with the family proceedings could have re-directed the reporter to complete her court appointed remit had the sheriff considered that necessary. No motion to that effect was made on behalf of the appellant in the family proceedings. In any event, having regard to ZH's autism, global developmental delay and level of intellectual functioning, it is at least questionable whether he would have been capable of forming and articulating his views.

[57] There being no basis upon which the sheriff could properly consider whether it was appropriate to vary the NHO, it was not necessary for her to address whether on a balance of probabilities, it was appropriate to grant the application.

[58] Nonetheless the sheriff did consider the application and in doing so, she carefully reassessed the circumstances. She had a clear understanding of the detailed facts of the case and had the benefit of having heard the witnesses, including the complainer and the appellant give evidence. Whilst no submission on the appellant's Article 8 rights were advanced at first instance, it is clear that the sheriff undertook the proper balancing exercise, having regard to the serious nature of the offence, the appellant's use of ZH in the commission of the offence, the complainer's views, the vulnerability and additional support needs of the children and the appellant's lack of remorse or insight. She had been made

aware of the family proceedings and of the appellant's opposition to a NHO insofar as it sought to protect the children at the time the NHO had been imposed. She was correct to conclude that the NHO did not prevent the sheriff in the family proceedings determining whether a contact order would be in ZH's best interests. She was also correct to conclude that the application to vary was premature: in the event that a section 11 order was granted in the family proceedings (following proof or *ad interim*), a variation could be sought.

[59] Accordingly, grounds of appeal one and two are refused.

[60] Ground of appeal three can be dealt with in short compass. It was submitted that the sheriff had erred by having regard to an irrelevant matter, namely, she had asked to see the terms of the child welfare report which indicated that "she was, herself, wading into the question of welfare-appropriateness of contact" and was effectively seeking to usurp the role of the sheriff in the family proceedings. This ground of appeal is without merit. The appellant had sought to rely upon the terms of the child welfare report. That was the very basis of the application. The sheriff was entitled in those circumstances to appraise herself of the content of the report. Counsel for the appellant was unable to point us to any passage in the sheriff's report that supported the proposition that, by doing so, she had sought to usurp the role of the sheriff in the family proceedings by considering the broader question of ZH's welfare. Counsel's submission is entirely unfounded.

[61] The sheriff took a nuanced and considered approach to the terms of the NHO in relation to each child. She explained why she approached matters differently in relation to each child. In relation to ZH in particular, she took account of the appellant's instructions to ZH to participate in his behaviour towards the complainer and of ZH's particular vulnerabilities. This case falls squarely into the category of cases envisaged by the court in

GRPW v HM Advocate (at para [24]); where there is more than one child, the issue of the appropriateness and the answer to the statutory question may not be the same for both.

[62] Ground of appeal three is refused. Accordingly, we shall refuse the appeal.

UNCRC

[63] In those circumstances, the question of whether, having regard to the UNCRC Act 2024, this court required to obtain ZH's views in the event that it varied the NHO does not arise. However, as we heard submissions, we shall address this issue briefly.

Navigating the labyrinthine provisions of the UNCRC Act 2024, and in particular those of section 6 of that Act, is not without its difficulties.

[64] The UNCRC Act 2024 came into force on 16 July 2024. It incorporated into Scots law, the rights and obligations contained in the UN Convention on the Rights of the Child. Part 1 of the schedule to the UNCRC Act 2024 includes all 42 Articles of the UN Convention. These Articles contain a number of requirements which relate to the manner in which children (those under 18: Article 1) ought to be treated in both the civil and criminal justice systems. A child who is capable of forming their own views shall have the right to express those views freely and they are to be given due weight in accordance with the child's age and maturity (Article 12.1). The child is to be given the opportunity to be heard in judicial proceedings affecting them either directly or through a representative in a manner consistent with procedural rules (Article 12.2). Section 6(1) of the UNCRC Act 2024 provides that it is unlawful for a public authority to act, or fail to act, in connection with a relevant function in a way which is incompatible with UNCRC requirements. A court or tribunal is a "public authority" (section 6(5) of UNCRC Act 2024).

[65] Counsel for the appellant submitted that a court making or varying a NHO in terms of section 234AZA is not exercising a “relevant function” within the meaning of section 6(2) of the UNCRC Act 2024. Section 234AZA was inserted by an Act of the Scottish Parliament (the Domestic Abuse (Scotland) Act 2018), into the Criminal Procedure (Scotland) Act 1995, an Act of the UK Parliament. Section 42(2) of the UNCRC Act 2024 provides that when a function arises from words inserted into an Act of the UK Parliament, the function is to be treated as if conferred by the Act which was modified.

[66] Whilst we acknowledge that it may have been the original policy intention of the Scottish Parliament that the UNCRC Act 2024 would apply more broadly to judicial decisions, the language used in section 6(1) was a consequence of the decision of the Supreme Court in *UNCRC (Incorporation) (Scotland) Bill* [2021] UKSC 42; 2022 SC (UKSC) 1. The correct approach to the interpretation of the UNCRC Act 2024 and the reasons behind the inclusion of the words “relevant function” were explained by the Lord Justice General (Carloway) in *Procurator Fiscal, Dundee v JH and LL* [2025] HCJAC 2 at paras [42] to [47]. In that case, the court was concerned with whether, in deciding to prosecute a child, the Lord Advocate was carrying out a “relevant function” in terms of section 6(2) of the UNCRC Act 2024. At para [46], the Lord Justice General explained that section 6(2):

“ . . . is intended to confine its reach to, putting matters broadly, devolved areas acts or omissions. Seen in that light, there is little question that it applies to the Lord Advocate when deciding whether or not to prosecute a child and to the conduct of the prosecution, other than where the latter is, for example, dictated by the terms of the 1995 Act (see section 6(4)). As already noted there is no such dictation in the present context.”

[67] Section 6(4) of the UNCRC Act 2024 provides as follows:

“(4) But subsection (1) does not make unlawful doing or failing to do something if the authority was required or entitled to act in that way by words that—
 (a) are not contained in an enactment of a kind mentioned in subsection (2)(b), or

- (b) are contained in such an enactment having been inserted into it by an enactment of a kind that is not mentioned in subsection (2)(b)."

[68] The advocate depute drew a distinction between acts which the court is required to carry out under the terms of the 1995 Act and the discretionary powers it may exercise upon being satisfied of the relevant legal tests. She submitted that when deciding whether or not to make or vary a NHO under section 234AZA, the court was exercising a discretionary power, the exercise of which was a "relevant function" and engaged the UNCRC Act 2024. We are unable to agree. NHOs are a creation of the 1995 Act, being an Act of the UK Parliament. The approach of the courts is "dictated" by the terms of that Act. Section 234AZA(4) provides that the court *must* consider the question of whether to make a NHO in cases where there is a conviction under section 1(1) of the 2018 Act, and in cases to which the aggravation in section 1(1)(a) of the 2016 Act applies, unless it concludes that there is no need for the victim or any child (as specified in section 234AZA(3)) to be protected from harassment or further harassment. As we have explained at para [38], whether a NHO should be imposed under section 234AZA is a question of judgment. When making a NHO under section 234AZA or when considering an application to revoke or vary the same, the court is neither exercising a discretion nor carrying out a relevant function in terms of the UNCRC Act 2024.

[69] The position remains as set out in *GRPW v HM Advocate*, in which the court also considered whether the views of children required to be sought prior to the imposition of a NHO. The court noted that the 1995 Act "does not require that the views of those who might be protected by an order should be sought and we do not ourselves think it is necessary in any event". The court referred to the comments of this court in *Findlay v*

Corrins [2020] SAC (Crim) 1; 2020 SC (SAC) 7, in which Appeal Sheriff Braid (as he then was) explained that section 234AZA:

“... makes no reference whatsoever to a victim’s views being sought. Indeed, where the only criterion for making an order is that of necessity, we can see why that is so. The court does not require to carry out some sort of balancing exercise, weighing necessity on the one hand, and the free will of a victim to be exposed to the risk of harm on the other. Necessity trumps the views of the victim. That said, we acknowledge that in considering necessity, the views of the victim may be relevant. If, for example, a victim were to say that (s)he had been assaulted only once, it was out of character, (s)he did not fear the accused and that there were other protective factors in place, the court may well feel able to conclude that there was no necessity for such a person to have the protection of an order. However, that is different from saying that where the court had concluded on the basis of other factors (such as previous analogous offending) that there was a need for an order (or rather, as the section puts it, where the court was not able to conclude that there was no need for one), nonetheless an order should not be made simply because the victim did not want one. That is not what the section says, and is to conflate the questions of appropriateness (the criterion for making an order in a non-domestic abuse case) with necessity.”

[70] We too acknowledge that in considering the question of necessity, the child’s views may be relevant and the court may have regard to the expressed views of the child but is not required to do so. We also accept that the child’s Article 8 rights are engaged and that the court must consider the issue of proportionality. Parties should be in a position to address the court on these matters and furnish the court with appropriate information.

[71] The Crown accepted that it had a duty when making a motion under section 234A for a NHO or making a motion to vary a NHO under section 234A or 234AZA to act in a way which was UNCRC compliant and would therefore give a child victim, who is capable of expressing a view, an opportunity to express a view and provide those views to the court when the motion or application is made. The Crown also explained that the Police Service of Scotland and the Crown had agreed the terms of a Joint Protocol outlining the procedures and practices that will be followed by both organisations in the investigation, reporting and prosecution of allegations of domestic abuse. As a result of that Joint Protocol and the

engagement of the Crown and Procurator Fiscal Service Victim Information and Advice Service with victims of domestic abuse, child victims and witnesses, the Crown should have some relevant information on the child's views it can provide to the court when a NHO falls to be considered under section 234AZA, without a motion by the Crown. In practical terms then, the court can expect to be furnished with information on the child's views by the Crown in most cases. We accept that the definition of a "qualifying child" in terms of section 234AZA(3) is expansive and may include children who have not had involvement with the Crown in the course of a prosecution. In such cases, the court can explore with the Crown and with those instructed to provide a criminal justice social work report, how best the child's views might be obtained, if considered appropriate and necessary. In the present case, had we required to consider varying the NHO, having regard to ZH's vulnerabilities, his age and maturity, we would not have considered it appropriate to seek his views before doing so.