



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 19
XA92/18

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

XY

Appellant

against a decision of the sheriff on 22 June 2018

Appellant: Scott QC; Balfour & Manson LLP (for Gleeson McCafferty, Glenrothes)
Respondents: Moynihan QC, D Scullion (sol adv); Anderson Strathern
Lord Advocate: Dunlop QC, Charteris; Scottish Government Legal Department
Parents: Coutts; Drummond Miller LLP
Safeguarder for the sisters: Mrs Janet Mathieson, Solicitor; Anderson Macarthur, Stornoway

27 March 2019

[1] XY is an adult brother of three younger sisters who are the subject of compulsory supervision orders and are now in foster care. While he has contact with them, there have been ongoing issues in respect of its nature and extent. Along with the children's parents he is strongly in favour of family reunification.

[2] In August 2017 a pre-hearing children's panel declined an application that XY be deemed a "relevant person" in terms of section 81(3) of the Children's Hearings (Scotland) Act 2011. This decision was overturned on an appeal to the sheriff. One of XY's sisters appealed to the Sheriff Appeal Court, which restored the original decision. In June 2018 a further application by XY to be granted relevant person status was refused by a pre-hearing panel. The sheriff heard an appeal against that decision. Arguments were presented based on the legislation's alleged incompatibility with articles 6 and 8 of ECHR. Although those submissions were not before the Sheriff Appeal Court, the sheriff considered himself bound by its decision. As a result he simply refused the appeal.

[3] The sheriff has prepared a stated case setting out various questions for the opinion of the Court of Session. The case was sisted for a period pending the outcome of other appeals. The sist having been recalled, the court heard submissions on behalf of XY in support of the appeal, and on behalf of the Locality Reporter and, separately, the Lord Advocate in opposition.

[4] Senior counsel for the appellant indicated that she was asking the court to consider only questions 6 and 8 in the stated case. They are in the following terms:

"6 Are the provisions of the Children's Hearings (Scotland) Act 2011 with respect to who is treated as a 'relevant person' not within the competence of the Scottish Parliament and accordingly 'not law' in terms of section 29(2)(d) of the Scotland Act 1998 on the ground that they are incompatible with Convention rights (this being a devolution issue in terms of section 98 and schedule 6 to that Act)?

8 Should the decision as to whether the applicant is to be treated as a relevant person be returned to the children's hearing for a fresh determination on the basis of an interpretation of the Children's Hearings (Scotland) Act 2011 that is compatible with articles 6 and 8 of the European Convention on Human Rights?"

[5] In a note of argument for the appellant it was stated that the appeal is based on a single proposition, namely that:

“The test of ‘significant involvement in upbringing’ adopted by the Children’s Hearings (Scotland) Act 2011 for involvement in procedure relating to children under that Act is too narrow to satisfy the procedural requirements of articles 8 and 6 of ECHR.”

It was explained that the complaint concerns what was described as a “structural defect” in the legislation. The restriction of deemed relevant person status to those who complied with the statutory test is too narrow. It is too restrictive in respect of other family members’ articles 6 and 8 procedural rights given the potential for interference with their private and family life. Reference was made to various cases, including *W v UK* (1987) 10 EHRR 29; *McMichael v UK* (1995) 20 EHRR 205; *S v Miller* 2001 SC 977; *Knox v S* 2010 SC 531; and *Principal Reporter v K* 2011 SC (UKSC) 91.

[6] At the outset of her submissions counsel for the Lord Advocate helpfully focused the appellant’s position along the following lines: a family non-parent member who possesses article 8 rights in respect of a referred child, but who has not been significantly involved in his or her upbringing, cannot obtain the maximum level of participation in the children’s hearings concerning that child; this amounting to an incompatibility with their article 8 rights, and therefore to a structural defect in the legislation. It was submitted that this proposition is not vouched by any authority; on the contrary the jurisprudence both domestically and in Strasbourg contradicts it. It wrongly assumes that all persons whose article 8 rights might be interfered with are entitled to the same level of protection as parents and others who fall within the terms of the deemed relevant person status test. No separate issue arises under article 6.

[7] We do not consider it necessary to rehearse the detailed submissions of the parties. The key issues raised in this appeal have been addressed and decided in two recent decisions of this court, namely *ABC v Principal Reporter* 2018 SLT 1281 and *DM v Locality*

Reporter 2018 SLT 1308. While those opinions should be referred to for their full terms, the following summary may be sufficient to address and deal with the single proposition presented on behalf of the appellant:

- (i) Where decisions are taken which affect the article 8 rights of a relative other than a parent, generally this will not require the same level of involvement in the whole process as that of a parent. (*ABC* paragraph 13)
- (ii) The intention of the UK Supreme Court in *Principal Reporter v K* was to extend relevant person status to unmarried fathers and a limited class of others who had a significant involvement in the upbringing of the child, much as subsequently enacted in section 81(3). (*ABC* paragraph 17)
- (iii) In respect of other family members, exactly what is required to comply with the procedural protections afforded by article 8 will vary depending upon the particular circumstances; however the system is sufficiently flexible to allow their legitimate interests to be taken into account. (*ABC* paragraph 20, *DM* paragraphs 13 and 16)

[8] The decision in *ABC* was that neither the Convention nor case law required that the petitioner be afforded relevant person status or the opportunity to apply for such. There had been no violation of article 8 rights. Senior counsel for the appellant sought to distinguish the present case from both *ABC* and *DM*, but presented no basis for doing so. Failing that, and while recognising that this court cannot revisit or overturn its earlier decisions, the submission was that they were wrongly decided, in essence because any remedies based upon discretion rather than formal right are illusory and theoretical.

[9] For the reasons explained in the opinions in *ABC* and *DM*, we are satisfied that there is no merit in the appeal. (For completeness we confirm that no separate issue arises under

article 6.) The two questions mentioned earlier will be answered in the negative and the appeal refused.

Postscript

[10] It is clear from the recent procedural history of the children's hearings in respect of the appellant's sisters that he is being given opportunities to have a say in decisions in which he has a legitimate interest. No doubt this explains why the submission in support of the appeal was made at a high level of abstraction and without reference to any specific grievances, or even the particular circumstances of the appellant. It was submitted that this rendered the proceedings hypothetical and incompetent, or at least misconceived. The court sees force in this, but given that there is no merit in the primary proposition, it is not necessary to decide the point.

[11] The court was given an insight into the particular circumstances of the children and the workings of the children's hearing system in the course of a brief oral submission from their safeguarder. She is concerned as to their privacy rights if their brother is made a relevant person, which would give him full access to personal and confidential information concerning his sisters. She sees no need for multiple relevant persons all pursuing the same objectives. The parents of the referred children and the appellant are fully engaged as relevant persons and share his desire for family reunification, failing which adequate contact arrangements. The safeguarder is troubled by the number of people, including lawyers, attending the hearings. They are held frequently (there have been 18 hearings in the past 18 months), and are lengthy and disputatious. The children find them stressful and intimidating, and so sometimes leave or do not attend. It was stressed that their best

interests should be paramount, however “the needs of the children are being lost in the system.” The court shares all these concerns.