OUTER HOUSE, COURT OF SESSION

[2018] CSOH 81

P1229/17

OPINION OF LADY WISE

In the Petition of

ABC

Petitioner

against

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

Respondents

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

Interested Parties

for

Judicial Review of certain decisions of the Children's Hearing

Petitioner: Brabender QC, McAlpine; Clan Childlaw Ltd
First Respondent: R Dunlop QC, Innes; Anderson Strathern LLP
Third Respondent: L Dunlop QC, Irvine; SGLD
First Interested Party: Cartwright; Allan McDougall
Second Interested Party: Aitken; Lisa Rae & Co Court Solicitors
Third Interested Party: Gilchrist; BCKM

31 July 2018

Introduction

[1] This case involves a challenge to two decisions of a Children's Hearing on the basis that the petitioner, ABC, who is the full sibling of DEF, the child about whom decisions were

taken at those hearings, was not able to participate or at least fully participate in them, notwithstanding his established family life with his sibling. The petitioner, whose identity has been protected through anonymisation, including, unusually, in the petition itself, was born in October 2003. The first respondent is the Principal Reporter whose office, The Scottish Children's Reporter Administration ("SCRA") provides administration and a number of other duties in respect of the Children's Hearing. The third respondent is the Lord Advocate. The first interested party is East Lothian Council, the implementation authority in terms of a compulsory supervision order ("CSO") in respect of ABC's sibling DEF. The second interested party is the father of both ABC and DEF. The third interested party is the mother of both ABC and DEF. For convenience I will use the masculine personal pronoun "he" when referring to both ABC and DEF, although Counsel took care to preserve anonymity to the extent of not referring to the gender of either of them.

[2] DEF was born in October 2010 and is accordingly seven years younger than his full sibling ABC. The two children lived together with their parents (and their other siblings) until 14 June 2016 when they were both accommodated with foster carers in terms of measures included in CSOs made by the Children's Hearing in respect of each of them. They were accommodated with different foster carers. ABC was returned to the care of his parents on 26 July 2017. He challenges decisions made by the Children's Hearing on 7 September 2017 and 5 December 2017 which made certain provisions in relation to the restriction of his contact with DEF. The challenges he makes require consideration of the relevant provisions of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") and their compatibility or otherwise with the procedural requirements of article 8 of the European Convention on Human Rights ("ECHR").

The relevant legislation

[3] The current legislation in this jurisdiction providing a statutory scheme for the operation of the Children's Hearing system is the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). Subordinate legislation provides the relevant procedural rules, currently the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013/194 ("the 2013 Rules") made under and in terms of section 177 of the 2011 Act. The provisions of the 2011 Act and relative rules with which this case is primarily concerned relate to those that make provision for the definition of "relevant person", that is someone who can attend and participate fully in the Children's Hearing. In the predecessor legislation, Part 2 of the Children (Scotland) Act 1995, the term "relevant person" was also used. However the definition under the 2011 Act is different. In addition, there is a new mechanism for determination of whether to deem a person a relevant person for the purposes of participation in the Children's Hearing. The provisions of the 2011 Act germane to this petition are in the following terms:

> "**79** **Referral of certain matters for pre-hearing determination**(1) [Subsections (2) to (5) apply] where a children's hearing is to be held in relation to a child by virtue of section 69(2) or Part 9 to 11 or 13.
>
> (1A) Subsection (5A) applies (in addition to subsections (2) to (5)) where the children's hearing is—
>
> (a) a subsequent children's hearing under Part 11, or
>
> (b) held for the purposes of reviewing a compulsory supervision order.
>
> (2) The Principal Reporter—
>
> (a) must refer the matter of whether a particular individual should be deemed to be a relevant person in relation to the child for determination by three members of the Children's Panel selected by the National Convener (a 'pre-hearing panel') if requested to do so by—
>
> (i) the individual in question,
>
> (ii) the child, or
>
> (iii) a relevant person in relation to the child,

(b) may refer that matter for determination by a pre-hearing panel on the Principal Reporter's own initiative,

(c) may refer a matter of a type mentioned in subsection (3) for determination by a pre-hearing panel—

(i) on the Principal Reporter's own initiative, or

(ii) following a request to the Principal Reporter from the child, a relevant person in relation to the child, or if a safeguarder has been appointed for the child, the safeguarder.

(3) Those matters are—

(a) whether the child should be excused from attending the children's hearing,

(b) whether a relevant person in relation to the child should be excused from attending the children's hearing,

(c) whether it is likely that the children's hearing will consider making a compulsory supervision order including a secure accommodation authorisation in relation to the child,

(d) a matter specified in rules under section 177(2)(a).

(4) For the purposes of subsection (3)(a), the pre-hearing panel may excuse the child from attending the children's hearing only if—

(a) the pre-hearing panel is satisfied that any of paragraphs (a) to (c) of section 73(3) applies, or

(b) the child may be excused under rules under section 177.

(5) For the purposes of subsection (3)(b), the pre-hearing panel may excuse a relevant person in relation to the child from attending the children's hearing only if—

(a) the pre-hearing panel is satisfied that section 74(3)(a) or (b) applies, or

(b) the relevant person may be excused under rules under section 177.

(5A) The Principal Reporter—

(a) must refer the matter of whether an individual deemed to be a relevant person by virtue of section 81 should continue to be deemed to be a relevant person in relation to the child for determination by a pre-hearing panel if requested to do so by—

(i) the individual so deemed,

(ii) the child, or

(iii) a relevant person in relation to the child,

(b) may refer that matter for determination by a pre-hearing panel on the Principal Reporter's own initiative.**]**

(6) A member of the Children's Panel selected for a pre-hearing panel may (but need not) be a member of the children's hearing.

80 Determination of matter referred under section 79

(1) This section applies where the Principal Reporter refers a matter to a pre-hearing panel under [section 79(2) or (5A)**]**.

(2) The Principal Reporter must arrange a meeting of the pre-hearing panel for a date before the date fixed for the children's hearing.

(3) If it is not practicable for the Principal Reporter to comply with subsection (2), the children's hearing must determine the matter referred at the beginning of the children's hearing.

81 Determination of claim that person be deemed a relevant person

(1) This section applies where a matter mentioned in section 79(2)(a) (a 'relevant person claim') is referred to a meeting of a pre-hearing panel.

(2) Where the relevant person claim is referred along with any other matter, the pre-hearing panel must **[**unless that other matter is a matter mentioned in section 79(5A)(a)**]** determine the relevant person claim before determining the other matter.

(3) The pre-hearing panel must deem the individual to be a relevant person if it considers that the individual has (or has recently had) a significant involvement in the upbringing of the child.

(4) Where the pre-hearing panel deems the individual to be a relevant person, the individual is to be treated as a relevant person for the purposes of Parts 7 to 15, 17 and 18 in so far as they relate to—

(a) the children's hearing,
(b) any subsequent children's hearing under Part 11,
(c) any pre-hearing panel held in connection with a children's hearing mentioned in paragraph (a), (b) or (e),
(d) any compulsory supervision order, interim compulsory supervision order, medical examination order, or warrant to secure attendance made by—

(i) a hearing mentioned in paragraph (a) or (b),
(ii) the sheriff in any court proceedings falling within paragraph (f),

(e) any children's hearing held for the purposes of reviewing a compulsory supervision order falling within paragraph (d),
(f) any court proceedings held in connection with a hearing mentioned in paragraph (a), (b) or (e),
(g) any court proceedings held in connection with an order or warrant falling within paragraph (d),
(h) the implementation of an order or warrant falling within paragraph (d).

(7) Where, by virtue of section 80(3), the children's hearing is to determine the relevant person claim, references in subsections (2) to (4) (other than paragraph (c) of subsection (4)) to the pre-hearing panel are to be read as references to the children's hearing.

…

126 Review of contact direction

(1) This section applies where, in relation to a child –
(a) a children's hearing –
(i) makes a compulsory supervision order,
(ii) makes an interim compulsory supervision order, an interim variation of a compulsory supervision order or a medical examination order which is to have effect for more than 5 working days, or
(iii) continues or varies a compulsory supervision order under section 138, and
(b) the order contains (or is varied so as to contain) a measure of the type mentioned in section 83(2)(g) or 87(2)(e) ('a contact direction').

(2) The Principal Reporter must arrange a children's hearing for the purposes of reviewing the contact direction –
(a) if an order mentioned in subsection (3) is in force, or
(b) if requested to do so by an individual who claims that the conditions specified for the purposes of this paragraph in an order made by the Scottish Ministers are satisfied in relation to the individual.

(3) The orders are –
(a) a contact order regulating contact between an individual (other than a relevant person in relation to the child) and the child, or
(b) a permanence order which specifies arrangements for contact between such an individual and the child.

…

200 Meaning of 'relevant person'

(1) In this Act, 'relevant person', in relation to a child, means—

(a) a parent or guardian having parental responsibilities or parental rights in relation to the child under Part 1 of the 1995 Act,
(b) a person in whom parental responsibilities or parental rights are vested by virtue of section 11(2)(b) of the 1995 Act,
(c) a person having parental responsibilities or parental rights by virtue of section 11(12) of the 1995 Act,
(d) a parent having parental responsibility for the child under Part 1 of the Children Act 1989 (c.41) ('the 1989 Act'),
(e) a person having parental responsibility for the child by virtue of—

(i) section 12(2) of the 1989 Act,
(ii) section 14C of the 1989 Act, or
(iii) section 25(3) of the Adoption and Children Act 2002 (c.38),

(f) a person in whom parental responsibilities or parental rights are vested by virtue of a permanence order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007 (asp 4)),
(g) any other person specified by order made by the Scottish Ministers.

(2) For the purposes of subsection (1)(a), a parent does not have parental responsibilities or rights merely by virtue of an order under section 11(2)(d) or (e) of the 1995 Act.

The specific definition of relevant person for the purposes of section 21 reviews of contact is contained in The Children's Hearings (Scotland) Act 2011 (Review of contact directions and definition of relevant person) Order 2013 (2013 no 193), article 2 of which is in the following terms:

"**2. – Review of contact directions**

(1) The condition set out in paragraph (2) is specified for the purposes of section 126(2)(b) of the Children's Hearings (Scotland) Act 2011 (review of contact direction).
(2) The condition is that the individual, who is not a relevant person in relation to the child, has or recently has had a significant involvement in the upbringing of the child.
(3) In this article 'relevant person' includes a person who is to be treated as the child's relevant person by virtue of a decision under section 81(3), 160(4)(b) or 164 of the Children's Hearings (Scotland) Act 2011."

The condition is identical to that in (Rule 81(3)(a) of SSI 2013/194) the test in section 81(3) of the 2011 Act.

[4] The pertinent parts of the 2013 Rules in relation to notification of Children's Hearings are in the following terms:

"**Notification of children's hearings – general**

22.(1) Where a children's hearing is to be held in relation to a child by virtue of section 69(2) (determination under section 66: referral to children's hearing) or Parts 9 to 11 (children's hearing; proceedings before sheriff; subsequent children's hearings) or 13 (review of compulsory supervision order) of the Act the Reporter must notify the persons mentioned in paragraph (2) of the date, time and place of the children's hearing, as soon as practicable and no later than 7 days before the intended date of the children's hearing.

(2) Those persons are—

(a) the child;
(b) each relevant person;
(c) any individual other than a relevant person who appears to the Reporter to have or recently have had significant involvement in the upbringing of the child;
(d) any appointed safeguarder;
(e) the chief social work officer of the relevant local authority for the child;
(f) the National Convener.

Other information to be given with notification of a children's hearing to the child and each relevant person

23. The Reporter must when issuing the notice under rule 22(1) to the child and each relevant person also give to the child and each relevant person—

(a) information on the availability to the child and relevant person of legal advice;
(b) confirmation of the child's duty to attend the children's hearing under section 73 (child's duty to attend children's hearing) of the Act;
(c) confirmation of the relevant person's duty to attend the children's hearing under section 74 (relevant person's duty to attend children's hearing) of the Act;
(d) confirmation of the right of the child and each relevant person to request a pre-hearing panel or children's hearing to determine whether—

(i) a particular individual should be deemed to be a relevant person;
(ii) the child or relevant person should be excused from all or part of the children's hearing;
(iii) it is likely that the children's hearing will consider making a compulsory supervision order including a secure accommodation authorisation in relation to the child;

(e) information on the means by which the child may express views to the children's hearing;
(f) confirmation of the right of the child and each relevant person to give any report or other document for the consideration of the children's hearing or pre-hearing panel.

Other information to be given with notification of a children's hearing to certain other persons

24.(1) Where rule 22 applies, when issuing the notification required under that rule the Reporter must also give to any individual other than a relevant person who appears to the Reporter to have or recently have had significant involvement in the upbringing of the child the information mentioned in paragraph (2).

(2) That information is confirmation of the right of the individual to require a pre-hearing panel or a children's hearing to determine whether the individual should be deemed to be a relevant person."

"**81.**(1) …

(2) Where this rule applies and a children's hearing is to be held in relation to a child the Reporter must notify the persons mentioned in paragraph (3) that a children's hearing is to be held in relation to a child, on the date to be specified in the notification, and, when issuing that notification, also give those persons the information mentioned in paragraphs (4) and (5).

(3) Those persons are –
(a) any individual other than a relevant person who appears to the Reporter to have or recently have had significant involvement in the upbringing of the child;
(b) any individual who has a contact order regulating contact between the individual and the child;
(c) any individual who has a permanence order which specifies arrangements for contact between the individual and the child."

Undisputed facts

[5] There was no suggestion at the hearing before me that the matters raised by the petitioner could not be determined by reference to the undisputed facts and legal argument. As already indicated, the petitioner lived in family with his parents, the second and third interested parties, and the child DEF until June 2016. They have been part of the same family

unit for their whole lives other than where there has been state intervention in the form of care proceedings initiated by the Reporter to the Children's Panel. It was not ultimately disputed that the petitioner has established family life with DEF in terms of article 8 ECHR although this was not conceded by the third respondent prior to the commencement of the hearing before me. After the petitioner and DEF were accommodated by the local authority they continued to have contact. One of the issues before the Children's Hearing in the second half of 2017 was the nature and extent of that contact.

[6] Turning to the two specific decisions of the Children's Hearing under challenge, the first of these was a decision of 7 September 2017. On that date the Children's Hearing continued a compulsory supervision order ("CSO") in respect of the child DEF. Two of the measures included in the CSO were continued directions regulating contact between DEF and, amongst others, the petitioner. Those directions were continued from a previous CSO made on 25 April 2017 when both children had been accommodated but with different foster carers. The first relevant direction specified that contact between DEF and ABC would be for a minimum of once per fortnight for a minimum of two hours. The second direction restricted indirect contact between DEF and the petitioner by prohibiting telephone contact between them (and between DEF and his parents). It is not in dispute that ABC was not notified of the Children's Hearing held on 7 September 2017. He was not invited to attend that hearing or provided with any papers that were to be considered on that date. He was not asked to provide his views to the Children's Hearing. As it happens the petitioner did attend the hearing of 7 September 2017 briefly as he was present in the building in which the hearing was being held. However he was not permitted to take part in the hearing and was asked to leave. He was not informed of the decision of the Children's Hearing held on that date or provided with written confirmation of that decision or the reasons for it. While the record of proceedings of the Children's Hearing of

7 September 2017 suggests that the majority decision of the hearing was that contact between DEF and ABC should be supervised, that aspect of the decision was not then recorded on the CSO. ABC attempted to lodge an appeal against the decision of the Children's Hearing of 7 September 2017 in terms of section 154 of the 2011 Act. The Principal Reporter contended that the appeal was incompetent as being both outside the time allowed for an appeal and also because ABC did not fall within the categories of person who could competently appeal. It was conceded on behalf of ABC that the appeal was incompetent. Following the Children's Hearing of 7 September 2017 contact between DEF and ABC was supervised by or on behalf of the first interested party.

[7] The Principal Reporter arranged for a further Children's Hearing to take place on 5 December 2017 to review of DEF's CSO and in relation to the contact directions, including between DEF and ABC. On 3 November 2017 solicitors instructed by ABC wrote to the Reporter (the letter is no 6/6 of process) raising the issue of ABC's participation in the Children's Hearing. The Reporter responded by letter of 9 November 2017 (no 6/7 of process) indicating an intention to invite ABC to the Children's Hearing and confirming that it would be for the chair of that hearing to decide whether ABC would be allowed to attend and for how long. ABC was invited to produce written information that he wanted to be considered at the Children's Hearing. ABC provided such written information by letter of 27 November 2017. On 5 December 2017 the Children's Hearing continued the CSO in respect of DEF and varied the directions regulating contact between the siblings. In particular it was specified that DEF would have unsupervised contact with his siblings (including ABC) for a minimum of once per fortnight for a minimum of two hours and that DEF would have no unsupervised telephone contact with either his parents or his siblings (including ABC). ABC was not provided with papers or other information that were to be before the Children's Hearing on 5 December 2017.

He was permitted to attend the hearing and was accompanied by his solicitor. ABC and his representative were told of the decision of the Children's Hearing at its conclusion, although they were not provided with written confirmation or reasons for the decision.

[8] At no stage has the Principal Reporter referred ABC to a pre-hearing panel in the exercise of his discretion in terms of section 79 of the 2011 Act. ABC has not applied to be deemed a relevant person in terms of section 81 of the 2011 Act. Accordingly, in relation to the Children's Hearings in September and December 2017, ABC was not treated as a relevant person, with all the rights and obligations that flow from that status.

Arguments for the petitioner

[9] Senior counsel for the petitioner contended that the decision making process in September and December 2017 did not provide the requisite article 8 protection for ABC standing his lack of involvement in the September hearing and the limited involvement permitted at the time of the December hearing. She contended that the interference with ABC's established family life with DEF was accordingly unlawful. As neither of the principal respondents contended that ABC did not have established family life with DEF in terms of article 8 ECHR at the relevant time, one of the main issues became that of the extent if any, to which different degrees of relationship attracted different substantive rights. The petitioner's position was that, standing ABC's established family life, the decisions of the Children's Hearing, which by definition could interfere with that family life, without ABC's participation, were in the circumstances unlawful.

[10] Ms Brabender contended that both ABC and DEF have the right to respect for their family life in terms of article 8(1) ECHR. That right was not restricted to the maintenance of a reasonable relationship. While the issue of sibling contact was one about which the Children's

Hearing could make decisions, the broader decisions made by the Children's Hearing engaged both ABC and DEF's right to respect for family life. As family life between the siblings was established, the starting point could not be some watered down version of ABC's rights under article 8 ECHR.

[11] On the question of whether the decisions of the Children's Hearings of 7 September 2017 and 5 December 2017 interfered with ABC's right to respect for family life, senior counsel contended that they did so interfere. Considerable reliance was placed on the UK Supreme Court's consideration of this issue in the case of *Principal Reporter* v *K* 2011 SC(UK) SC 91. There, Lord Hope and Lady Hale had confirmed, under reference to *Johansen* v *Norway* [1997] 23 EHRR 33 and *L* v *Finland* [1994] 18 EHRR 342, that 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 with that family life. The decision of a Children's Hearing was specifically included as one that would constitute an interference with the family life of a child and (in the context of that case) the parent with whom he or she lives and also with the family life of the child and the other parent. Any order that there was to be no contact between parent and child would manifestly interfere with family life. (*Principal Reporter* v *K* at para 40).

[12] More importantly from the petitioner's perspective in this case, the UK Supreme Court in *Principal Reporter* v *K* emphasised also the positive procedural obligations inherent in the right to respect for family life. Under reference to the decision in *W* v *UK* [1998] 10 EHRR 29 the court confirmed (at paragraph 41) that parents must be enabled to play a proper part in the decision making process before the authorities may interfere in their family life with their children. Ms Brabender submitted that those requirements were equally applicable to someone in ABC's position. As decisions of the Children's Hearing could restrict or limit his enjoyment

of family life with DEF those decisions were capable of interfering with his right to respect for family life. The positive procedural obligations in respect of the Children's Hearing process amounted to a requirement that ABC be involved in the decision making process to a degree sufficient to provide him with the requisite protection of his interest. If that involvement is not ensured, it would amount to a failure to respect ABC's family life and so the interference with it would not be capable of being regarded as necessary in terms of article 8(2) ECHR. As every review of a compulsory supervision order includes a review of all measures relating to a child including a decision on whether compulsory supervision is needed at all, there is a separate interference with family life on each occasion of such a review. Ms Brabender accepted that a simple review of a contact direction is more limited but pointed out that the September and December Children's Hearings were not restricted to the issue of contact but were global reviews. The stage at which ABC's right to respect for family life required protection was not simply when the decision to accommodate his sibling was taken. In terms of the structure of the 2011 Act, a CSO has a maximum lifespan of 12 months, a period that had expired by the time the review hearings of September and December 2017 took place.

[13] In anticipation of counsel for the third respondent relying on a distinction between the article 8 rights of parents and those of grandparents or siblings, senior counsel contended that siblings such as ABC were a central part of the core family unit and so could be distinguished from grandparents, uncles and aunts and other wider family who might not have lived with the child about whom the Children's Hearing will take decisions. That limitations were imposed on ABC's enjoyment of family life with DEF could not be disputed. There were three particular restrictions or limitations on that family life on 7 September 2017, namely the continuation of a CSO accommodating DEF away from home, the imposition of a limitation of direct contact in terms of frequency and duration and the prohibition of any indirect contact (such as by

telephone) against a background of the limitation of physical contact. Insofar as it might be suggested that the decisions on contact were supportive of the maintenance of a relationship between siblings rather than a limitation, counsel submitted that such an argument could go to justification but could not answer the question of whether there was interference with family life. Undoubtedly there would be circumstances where it was justifiable to interfere with the established family life of siblings on welfare grounds but the issue raised in these proceedings was the level of involvement of the party (ABC) in the process in which such limitation was said to be justified. The issue was whether ABC's involvement, such as it was, in September and December 2017, was sufficient to protect his interest and make the interference lawful. The merits of the decisions taken by the Children's Hearing were not at issue, only the positive procedural obligation as outlined by the Supreme Court in *Principal Reporter* v *K.* While the focus in that case was on parental relationships, the *ratio* could be easily read across to include siblings. In particular, at paragraph 43 of the decision in *Principal Reporter* v *K*, reference is made to there being insufficient procedural safeguards where "the family were not sufficiently involved in the decision making process". Limitations on sibling contact were just as fundamental, insofar as the effect on children are concerned, as a parent's contact with his or her child.

[14] Ms Brabender acknowledged that in *Principal Reporter* v *K* the Supreme Court had been concerned with the interpretation of the previous statutory scheme for Children's Hearings in terms of the Children (Scotland) Act 1995 and in particular the effective participation of the unmarried father. It was noteworthy, however, that when the case had been argued before the Supreme Court it was known that the Children's Hearings (Scotland) Act 2011 was being promulgated. Against that background and notwithstanding that the case involved only an

unmarried father with no parental responsibilities and rights, the UK Supreme Court specifically included others in its conclusion, which was stated in the following terms:

> "In conclusion, therefore, a parent (or other person) whose family life with the child is at risk in the proceedings must be afforded a proper opportunity to take part in the decision making process. As currently constituted the Children's Hearing system violated the art 8 rights of this father (and indeed of his child) and risks violating the rights of others in the same situation" (paragraph 48).

The court went further in specifically addressing the situation of those who are not parents in considering how the previous legislation might be read down. The judgment specifically notes (at paragraph 68) that persons other than parents may have article 8 procedural rights which require to be protected. While noting that if all that is at risk is informal contact with the wider family the participation of each parent and the child will in most cases afford adequate procedural protection, the court emphasised that:

> "…there are cases in which the child's hope of reintegration in her natural family depends upon maintaining the close relationship established with a grandparent or other family members. There would then be a procedural obligation to involve that relative in the decision making process."

[15] It was on that basis that the court considered that the potential for violation could be cured by inserting the words "or who appears to have established family life with the child with which the decision of a Children's Hearing may interfere" into section 93(2)(b) of the 1995 Act. That subsection had already been read down in the case of *Authority Reporter* v *S* 2010 SC 531 to include any parent enjoying a right of contact under part 1 of the 1995 Act.

[16] Senior counsel pointed out that ensuring effective participation in the Children's Hearing had been an issue for many years. In *McMichael* v *UK* [1995] 20 EHRR 205 it was held that the parents of a child had not been afforded effective participation in a Children's Hearing concerning their child where they had not been provided with copies of the report available to the hearing. In anticipation that counsel for the third respondent would rely heavily on the case

of *Boyle* v *UK* (App No 16580/90) (9 February 1993) senior counsel noted that, despite that case being of considerable age, the actual finding was that an uncle who had spent only some weekends with the child in question and who was not then allowed to participate in care proceedings in England had suffered a breach of his article 8 rights. Accordingly even if ABC's relationship with DEF was to be categorised only as a meaningful relationship, it was still likely that his article 8 rights had been interfered with. The failure to tell ABC about the Children's Hearing in September 2017 or to provide him with paperwork or an opportunity to participate were all illustrative of a lack of effective participation. Further, without any locus in terms of the legislation ABC had been unable to present a competent appeal against that decision. While it was accepted that ABC had been informed of the December hearing and allowed to attend with his legal representative, the arguments about a lack of paperwork or an opportunity to review or appeal remained pertinent for that hearing also. There were considerable analogies with the position of the natural father in the case of *McMichael* v *United Kingdom*. Both Mr McMichael and ABC had an established family life but no right to appear in the Children's Hearing. This led to a breach at least of the procedural obligations of article 8.

[17] Against the background of the undisputed facts of the case and in the absence of any decision on permanence in relation to DEF, Ms Brabender submitted that the Children's Hearing had been required to consider at each review hearing whether a necessary measure was to require that DEF be accommodated away from home. That put the decision squarely within the category referred to in paragraph 68 of *Principal Reporter* v *K* where there was a procedural obligation to involve any relative with whom the child may or may not be re-integrated a decision on which depended upon maintaining the close relationship between them. Only by including ABC as a relevant person could those procedural requirements have

been fulfilled. Accordingly, the mechanism by which someone could be deemed to be a relevant person required examination.

[18] The petitioner's submission was that the statutory and procedural mechanism by which a person may be deemed to be a relevant person could not and did not afford ABC the requisite protection of his interests. Rule 22 of the 2013 Rules requires the Reporter to notify certain persons of the date, time and place of the Children's Hearing. Those persons include the child, each relevant person, any appointed safeguarder, the chief social work officer, the National Convener and, most relevantly in relation to this case "any individual other than a relevant person who appears to the Reporter to have or recently have had significant involvement in the upbringing of the child". The terms of Rules 23 and 24 of the 2013 Rules were also significant because, had the Reporter considered that ABC **could** fall within the category of having had significant involvement in the upbringing of DEF, he would have required to give notification of the matters specified in those rules to him. It was acknowledged that section 126 of the 2011 Act provides for reviews only of contact directions and limited circumstances. However if the Reporter had categorised the hearing of 7 September as such a review, he would have had to notify ABC of that hearing in terms of Rule 81 of the 2013 Rules. Rule 81 provides for the notification in advance of a Children's Hearing to persons who have a right of contact in terms of a contact order or a permanence order of that person's right to attend a Children's Hearing. It was apparent from the undisputed facts that the Reporter had not notified ABC of the September hearing in terms of that rule.

[19] The introduction of a pre-hearing panel system to determine certain issues including whether to deem a person a relevant person for the purposes of participation in the Children's Hearing arguably provides a route for those such as ABC to seek to be included in that manner. However, Ms Brabender contended that as section 79(2) of the 2011 Act gave the Reporter a

discretion to refer to a pre-hearing panel the question of whether ABC should be deemed a relevant person and had not done so, the starting point was that s/he had clearly not considered that ABC could fall within the definition of someone who had or recently had a significant involvement in DEF's upbringing. Although section 79(2)(a) requires the Reporter to refer the issue of whether someone is a relevant person to a pre-hearing panel if requested to do so by an individual such as ABC, where ABC did not know in advance that the September 2017 hearing was taking place, he would not have been able to make such a request. In any event, even in relation to the December hearing of which notification had been given, ABC could not, according to senior counsel, have satisfied the test of "a significant involvement in the upbringing" of DEF because of the connotation of having had a parental role that the term "upbringing" requires. The ordinary meaning of the test introduced in the 2011 Act restricted those who can be included as relevant persons to those who had fulfilled some sort of parental or educative function and not someone who had enjoyed the established family life of a sibling by being part of the core family of the child in question. Ms Brabender submitted that it had been incumbent upon the Scottish Parliament to make the 2011 Act article 8 compliant and that could easily have been done by incorporating the words read into the previous legislation by the UK Supreme Court. Having introduced a new and very different wording into the legislation, someone such as ABC, who would have fallen within the definition of relevant person under the previous legislation as read down by the Supreme Court, could not bring himself within the new provision. The test of "significant involvement in the upbringing of the child" was an invention of the parliamentary draftsman and was much narrower than the previous test as read down by the UK Supreme Court.

[20] Ms Brabender submitted that section 81 of the 2011 Act could not be read down to include anyone with established family life with which the decisions of the Children's Hearing

may interfere as to do so would "go against the grain" of the legislation. While coincidently a sibling might have some involvement in the upbringing of another child in the family the determining factor in the current test was that it was necessary to be acting in a parental role in order to be a relevant person. Accordingly ABC could not bring himself within the terms of significant involvement in upbringing in section 81(3). A further difficulty for him was that the Principal Reporter remains the gatekeeper for the route to the Children's Hearing in terms of the 2011 Act. In order to ask for a pre-hearing panel to deem him a relevant person ABC would have to know of the hearing. It was not in dispute that he did not know of the September hearing. So far as the December hearing was concerned the letter 6/6 of process from ABC's solicitors to the Reporter's administration notes that ABC's representatives have information about the forthcoming hearing on 5 December and records that in the solicitor's view section 81 is not the appropriate procedure for ABC to seek to attend and so asks how the Principal Reporter intends to ensure that his rights are protected. The Reporter's response (number 6/7 of process) was that ABC would be invited to attend on 5 December but whether he would be allowed to participate would be at the discretion of the Children's Hearing. While it was likely that the Reporter would suggest that the legislation could be read down if necessary, senior counsel for the petitioner pointed out that ABC had no opportunity at all to seek to attend the September hearing; that the Reporter did not inform him of any right he may have nor was any pre-hearing panel arranged on the basis that it seemed to the Reporter that ABC fell within the definition of relevant person.

[21] It was anticipated that counsel representing the Reporter would seek to rely on section 126 of the 2011 Act as an alternative mechanism through which ABC could participate. Section 126 (reproduced in part in paragraph 2 hereof) provides for reviews of contact decisions in limited circumstances. The Reporter must arrange a Children's Hearing for the purposes of

reviewing the contact direction in those circumstances, which include if he is requested to do so by an individual who is not a relevant person but who claims that he or she has (or recently has had) a significant involvement in the upbringing of the child. That condition is the one specified in Rule 81(3)(a) of the 2013 Rules. Quite apart from the obvious point that section 126 involves the same test of significant involvement in the upbringing of the child complained of, the Reporter should not be permitted to rely on the alternative mechanism in section 126 where, as gatekeeper, the Reporter had not sought to invoke that mechanism. It was questionable whether section 126 was apposite as a provision for those with an interest only in maintaining contact standing the use of the same test of significant involvement in the upbringing of a child which would permit those with contact to become relevant persons if they could fulfil it. The Reporter should not be permitted to contend that ABC should have invoked section 81 or that section 126 was applicable standing that the Reporter considered that those provisions did not apply to him.

[22] Turning to the particular circumstances of the December 2017 hearing, Ms Brabender submitted that the petitioner's article 8 rights were not sufficiently protected through the steps taken by the Reporter. ABC was not issued with papers, had no right of appeal or review of the decision of the Children's Hearing and had a restricted ability to contribute there. The Reporter was likely to contend that ABC had been able to hear and respond to the positions of others but that was not possible where he had not been able to read and respond to reports, particularly that of the implementation authority, a report which he has still not been able to access. The fact that ABC's parents had a right of appeal did not resolve matters. Unless it was suggested that they could have appealed on the basis that ABC's article 8 rights had not been complied with, something which would be of dubious competency, it was not clear how this could resolve matters.

[23] For the reasons already given it was submitted that the Act could not be read in such a way as to be ECHR compliant. Parliament had chosen to create a situation where only people with significant involvement in the **upbringing** of a child could participate in the Children's Hearing. That was clearly incompatible with article 8 ECHR. If it was suggested that a sibling could go to the Sheriff Court to secure a contact order and then seek to invoke section 126 of the 2011 Act in order to participate in limited circumstances that would not resolve matters. In any event section 126 included the same definition as that for a relevant person. It was noteworthy that the note of argument for the third respondent had not mentioned compatibility or reading down. So far as damages were concerned Ms Brabender relied on *Medway Council* v *M & T* [2015] EWFC B164 at paragraph 90. She submitted that the sum sought by the petitioner was, in light of the nature of the breach, necessary to afford ABC just satisfaction.

Submissions for the first respondent

[24] For the Principal Reporter, senior counsel Mr Dunlop moved that his first to fourth pleas should be sustained and the petition dismissed. He conceded at the outset that ABC had established family life with DEF with which the decisions of the Children's Hearing could interfere. He gave two separate reasons why the petition should fail. First ABC had failed to resort to alternative remedies available to him in terms of the legislation and secondly his article 8 rights were adequately protected in this case looking at the procedure as a whole. In general terms the 2011 Act will represent the appropriate balance between the right of the subject child and the right of any relative in the vast majority of cases. For good reason the legislation did not impose rights and obligations on siblings generally. For example the obligations on a relevant person can include criminal sanctions for non-attendance. It was generally appropriate for a relevant person to be restricted to those fulfilling a quasi-parental

role. The current petition was really about cases "at the margins". For such relatively unusual cases the appropriate way is for the individual to make an application to a pre-hearing panel not to invoke the supervisory jurisdiction of this court. The petition was inept standing that alternative remedy.

[25] On the interpretation of section 81(3) of the 2011 Act, it was noteworthy that, while the panel **must** deem a person to be a relevant person if they have had significant involvement in the child's upbringing, the ability to seek to participate the Children's Hearing was not restricted to that. In any event the expression "significant involvement in the upbringing", while not defined in the Act, was elastic enough to be capable of being adapted to circumstances akin to those of ABC, especially read with section 3 of the Human Rights Act 1998. It was noteworthy that the concept was of **involvement** in upbringing not **responsibility f**or upbringing. Involvement was a broader concept than responsibility and although in nearly all cases the involvement would be in a parental sense it did no violation to the language of the statute to include a close sibling in an appropriate case. Conversely, a chaotic situation would be introduced if every single sibling was held to be within the definition in the legislation. While any such person could apply to be a relevant person it should not be automatic. In order to succeed, the petitioner had to be able to contend that he could never be able to bring himself within the definition. As the words were capable of including somebody in his position, ABC was unable to do that.

[26] Reference was made to the Inner House decision in the case of *CF* v *MF & GF* 2011 Fam LR 83 at paragraphs 54 and 55. Lord Malcolm had there observed, in the context of grandparents seeking to be deemed as relevant persons for the purpose of attendance at the Children's Hearing, that if there is a valid case under article 8 ECHR, one would expect the statutory test for relevant person status in the 2011 Act to be met and vice versa. In other words

the test in the 2011 Act broadly coincides with the inclusion of all those with established family life under article 8. Further, Lord Malcolm had emphasised that the statutory test, while using open ended phrases such as "significant" and "recently" left room for a spectrum of reasonable and thus justifiable decisions. The case represented recent Inner House authority on the test in the 2011 Act and supported the elastic nature of the test proposed on behalf of the Reporter. If ABC had a valid case under article 8 the expectation would be that the statutory test would be met. Following *Principal Reporter* v *K* a person seeking to be deemed as a relevant person had to be someone whose rights would be interfered with but for the procedural protections of article 8. Reference was made also to the case of *MT* v *Gerry* 2015 SC 359 in which an Extra Division had considered the definition of relevant person in the 2011 Act. The ratio of that case is that section 81(3) of the Act is directed towards conferring standing at the Children's Hearing, a question that did not involve the welfare of the child test. The issue was whether a person has had an involvement in the upbringing of the child of such significance as to give rise to a relationship calling for the procedural protection of constituting the individual as a party to the proceedings with all the procedural obligations and rights which that status entails (paragraph 14). However the court went on to look at the adjective "significant" and indicated that because it lacks precision it requires to be construed purposively. Under reference to *Principal Reporter* v *K*, the court had there reiterated that it was not every involvement in the life of a child that called for such procedural protection.

[27] Another Inner House decision looking at section 81(3) of the 2011 Act was the *Stated Case* by *AR* [2015] XA110/15 in which a step-grandmother sought to challenge the decision of a sheriff at Glasgow refusing her appeal against the decision of a pre-hearing panel that she was not a "relevant person". Referring back to *MT* v *Gerry* the court found that the sheriff had erred, but Mr Dunlop sought to draw attention to *obiter dicta*, consistent with what the later case

of *CF* v *MF* and *GF* cautioned, namely that as a matter of fact, if a party meets the statutory test in section 81(3) he or she will almost certainly have article 8 rights and vice versa, albeit that these are two separate matters (paragraph 11). Taking these three decisions together, Mr Dunlop submitted that it was clear that if there was any dispute about whether someone was a relevant person and fulfilled or could fulfil the statutory test, the place to test that was at a pre-hearing panel. That tribunal was required to act compatibly with ECHR and its decisions are subject to comprehensive rights of appeal. In the present case it was accepted that the position of ABC was considered by the Reporter who felt that he did not meet the requirements of the relevant person test. However that initial view did not bind anyone and ABC could still have applied under section 81 or even section 126 in order to participate. Although it was conceded that ABC and DEF had an established family life with each other, they had been separated since June 2016 and the steps taken by the Reporter to involve ABC to some extent in DEF's hearings were sufficient. It was submitted that the proceedings had to be looked at "as a whole" and when that was done sufficient protection to ABC's rights had been afforded. The fact that the Reporter was still not convinced that ABC was a relevant person did not alter his ability to insist on a pre-hearing panel. An example of a sibling having been ultimately held to fall within the definition of relevant person could be found in *V* v *Locality Reporter* 2013 Fam LR 69. That case proceeded under the previous legislation but the question in these proceedings was whether the 2011 Act is capable of being read to include a sibling who requires procedural protection and Mr Dunlop submitted that that question should be answered in the affirmative.

[28] The Reporter may not have full information about every sibling in a family and so it would be unworkable to hold a pre-hearing panel for every sibling. It was noteworthy that 40 years of Strasbourg jurisprudence had nothing to say about the requirement to involve

siblings in care proceedings. Only in exceptional cases would a child's sibling need or want to be regarded as a relevant person. If all siblings who had lived with the subject child were to be included that would run counter to the legitimate interest, noted in *Principal Reporter* v *K*, in restricting the number of those participating in the Children's Hearing. The sense of the legislation was that relevant persons are all those stipulated in the Act and anyone else who comes forward or is identified by the Principal Reporter as having had the necessary degree of involvement with the child. In recognising that those without parental authority may have less involvement with a child, the legislation reflects a balance between the need to comply with article 8 ECHR and the undesirability of having those with lesser involvement as full participants. The procedural aspects of article 8 ECHR are complied with because of the right to review matters and appeal decisions of the pre-hearing panel. Only if ABC can satisfy the test set out in *Principal Reporter* v *K* and show that the current regime is not affording him the necessary procedural protections can he argue that there is a breach of the convention. The legislation can be properly construed without any reading down. However, the Reporter's secondary position was that, if the court considered that ABC could not bring himself within the definition of the 2011 Act as it currently stands, the words "or persons whose established family life with the child may be interfered with by the hearing and whose rights require the procedural protection of being a relevant person" could be read in. It was submitted that a reading down of that type would not innovate on legislation any more than the cases of authority *Reporter* v *S* or *Principal Reporter* v *K* and would not go against the grain of the legislation. The 2011 Act was seeking to achieve convention compliance and the Scottish Parliament could not have intended to legislate in a manner contradictory to the UK Supreme Court's decision in *Principal Reporter* v *K*. Accordingly, if inadvertently, not all situations were covered by the legislation without reading down, that could be done.

[29] In relation to Ms Brabender's arguments about section 126, Mr Dunlop submitted that it was entirely understandable that the legislation would provide for a less all-encompassing role in the Children's Hearing process for those who are not relevant persons. This would normally involve someone whose ability to interact with the child may be affected by the decisions of the Children's Hearing but who does not seek to have the full rights and obligations of a relevant person. In any event it was clear that ABC could have made an application under section 81, regardless of the prospects of success of that application and so while the alternative route of section 126 was easily available for someone in ABC's position it was not one he needed to pursue. The difference between the two types of application was simply the level of involvement in the Children's Hearing process that would result. It was accepted that the test of significant involvement in the upbringing of the child applied to both where someone did not have a court contact order. However, the regime of the 2011 Act read in light of the Human Rights Act 1998 required a coherent mirroring of article 8 rights and the definition of "significant involvement in the upbringing of the child". Further, because there were obvious differences between the statutory purposes of section 81 and section 126, if the court was minded to read down section 81(3) that could be done without having to read down section 126 and, as indicated, without going against the grain of the legislation.

[30] On the issue of ABC's particular situation, the Reporter's position was that while his involvement was more than the category of "informal contact with the wider family" it was not, on the other hand in the "hope of re-integration" category described in *Principal Reporter* v *K*. In a recent Strasbourg judgment in the case of *ML* v *Norway* (7 September 2017, application number 43701/14) the court had referred back to the general principles set out in *K & T* v *Finland* and *YC* v *United Kingdom* [2012] 55 EHRR 33 to reiterate that the question is whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be

taken, the person has been involved in the decision making process, seen as whole, to a degree sufficient to provide them or him with the requisite protection of their interest and have been able fully to present their case. It was submitted that the 2011 Act strikes the appropriate balance between respecting the rights of a child such as ABC and avoiding interference with other rights, including those of the child DEF. The need to restrict the number of participants at the Children's Hearing should not be under estimated. Every relevant person is obliged to participate fully and to see all documentation. There were circumstances in which that could involve exposure to distressing information. In the present case, notwithstanding the view taken by the Reporter in relation to whether ABC fulfilled the "significant involvement in upbringing" test a procedure had been adopted to invite him to the hearing and have him represented by his solicitor and make written representations. He and his solicitor had been present throughout the December hearing and had been able to take part. The main complaint in relation to the December hearing seemed to be a lack of documentation and senior counsel for ABC had relied on the case of *McMichael* v *UK*. However each case was fact sensitive and it could not be said that in every case someone in ABC's position should be in the process and automatically receive all documents. The court could not make a determination on whether full access was necessary in this particular case and so could not conclude that ABC should have been in the Children's Hearing as a relevant person. So far as the September 2017 hearing was concerned the Reporter's position was that ABC had been present but not represented and the chair of the hearing considered that the action of the mother was distressing ABC and so asked him to leave. Looking at the procedure overall the Reporter had afforded ABC an objective and meaningful review of his claim for contact with DEF. In those circumstances the proceedings as a whole were article 8 compliant. It was consistent with *Principal Reporter* v *K* that the steps necessary to protect someone's article 8 rights will differ according to their age, the nature of

their relationship with the subject child and other factors. The situation was more nuanced than was contended for the petitioner. For the petitioner's argument to succeed, the Reporter would have to consider each and every sibling in a family and write to each every time there was a review of the issue. This would involve numerous formal letters from the Reporter to the administration to children who might find that intimidating or distressing. There was also a concern that it could cut across the need for privacy of the proceedings as it was important to keep the subject child's circumstances as confidential as possible.

[31] When asked whether he accepted on behalf of the Reporter that the definition of relevant person was narrower in the 2011 Act than it was under the 1995 Act as read down by the Inner House in *Authority Reporter* v *S* and the Supreme Court in *Principal Reporter* v *K* Mr Dunlop responded that he did not. He submitted that if the current test is read in light of section 3 of the Human Rights Act 1998 and Lord Malcolm's view in *CF, MF & GF* the provision could be read as if it said "established family life with which decisions of the children may interfere" even though the legislation did not include those words. The chronology of events in this case should be noted. Proceedings were first initiated in 2015 and a CSO had been in place from June 2016. ABC had secured legal representation from as early as February 2016 from child law experts, albeit in connection with his own CSO in the first instance. Prior to June 2016 ABC was living with his parents who were legally represented and fully aware of what was going on. It was not unreasonable to think his parents would keep him involved. In any event the section 79-81 process could have been invoked by his parents who were both relevant persons. The Strasbourg jurisprudence was consistent with the proposition that different natures of relationship require different levels of participation (*Boyle* v *United Kingdom*). It was possible to have meaningful participation without full relevant person status as illustrated by section 126 of the 2011 Act. In any event ABC's parents might be expected to act in his best

interests including by taking an appeal. It was not being suggested that ABC's appeal would run in the parents' name as guardians but as relevant persons they had a locus to complain on his behalf. It could not be said that ABC's parents had no interest in ensuring that his article 8 rights were complied with. The situation that had evolved with ABC, namely to invite him to attend and participate in the Children's Hearing in December 2017 but not be included as a relevant person was more appropriate than what the petitioner sought. In short, nothing had been done that handicapped ABC in any way. The petition was unfounded and no question of incompatibility arose, which failing any concern could be resolved by a reading down. Even if there was a difficulty with the legislation, there had been no breach by the Reporter and so no damages could be secured against the first respondent. No issue was taken on the quantum of damages.

Submissions for the third respondent

[32] For the third respondent Ms Dunlop QC moved that the third respondent's pleas in law should be upheld and the petition dismissed. She clarified that the third respondent had no position on the Reporter's submissions about the petitioner's failure to exhaust remedies. So far as the article 8 ECHR arguments were concerned she endorsed what was said by Mr Dunlop for the Reporter on that issue and presented further arguments. Ms Dunlop clarified that the Lord Advocate now conceded that the petitioner in this case has established family life protected by article 8. However, it was not accepted on behalf of the third respondent that any interference with the petitioner's article 8 rights had been identified. Taking the child DEF into care interfered with the rights of the parents and affected a number of family relationships, but it did not follow that each suffered interference with their article 8 rights. The actual breach alleged by the petitioner was that by restricting contact between him and his sibling the

Children's Hearing interfered with his article 8 rights. As a matter of fact that was not what had occurred as the Children's Hearing had made provision for contact at a minimum frequency for a minimum period of time. The third respondent's *esto* position was that if there had been interference with ABC's article 8 rights such interference was justified by article 8(2) and the need to protect the rights and freedoms of DEF. The process had given adequate protection to ABC's interests. Ms Dunlop submitted that in attempting to establish a breach of his rights under article 8, the petitioner had relied on a construct from a case analysis, but when one looked at what the Children's Hearing in fact decided it could be seen that there was no breach of article 8.

[33] In *K & T* v *Finland* 36 EHRR 18, a grand chamber decision of the Strasbourg Court, it was confirmed (at paragraph 151) that contact between parent and child constitutes a fundamental element of family life and domestic measures that hinder contact amount to an interference with the right protected by article 8 ECHR. Such interference is only a violation, however, if it is not necessary in a democratic society in terms of article 8(2). Further it was for the national authorities to strike a fair balance between the best interests of the child and the rights of the parents when access was being considered (paragraph 194). Ms Dunlop referred also to the decisions in *YC* v *United Kingdom* [2012] and *ML* v *Norway* [2017] which Mr Dunlop had cited. On the issue of *locus standi* she referred to *Haase* v *Germany* [2008] 46 EHRR 242. The court had there confirmed (at page 257) that parents in conflict with the authorities can represent their children where the concern is that those children's article 8 rights may be breached. Counsel accepted, however, that in a situation where the child has his own representative a distinction may be drawn. Considerable reliance was placed on the case of *Boyle* v *UK* [1993] application number 16580/90. It was acknowledged that this was a decision only of the European Commission of Human Rights and that the case had subsequently settled. It had a bearing,

however, on difference in treatment where relationships were collateral or horizontal. The applicant in that case contended that he had enjoyed a very close relationship with the child, his nephew, and stated that he was a "father figure" to the boy. Although he had never lived together in family with him, the Commission expressed the view that cohabitation was not a prerequisite for the maintenance of family ties which are to fall within the scope of the concept of family life (paragraph 43). The decision confirms that when a parent is denied access to a minor child taken into care there is in general interference with the parents' right to respect for family life as protected by article 8. This is not necessarily the case however where other close relatives are concerned and the Commission stated that access by relatives was normally at the discretion of a child's parents and that where a care order has been made in respect of the child the control of access passes to the local authority subject to there being a reasonable opportunity to maintain the relationship (paragraph 46). In the *Boyle* case it was the termination of access between uncle and nephew that led to the Commission finding a breach of article 8.

[34] Senior counsel for the third respondent made several propositions arising from the European jurisprudence. First, the best interests of the child are of crucial importance. Secondly, in the interests of the child refusal or restriction of access may be required. Thirdly, in a question concerning procedure the issue will be whether the person seeking access has been involved to a degree sufficient to protect their substantive interests. Fourthly, a wide margin of appreciation is accorded to the domestic authorities in relation to a decision to take a child into care, with stricter scrutiny called for regarding, in particular, restrictions on parental rights of access. Fifthly, the domestic authorities required to strike a fair balance between the interests of the child and those of the parents with the possibility that the interests of the child may override those of the parents. Finally, there were very few cases addressing the rights of relatives in collateral relationships with children in the care of public authorities with *Boyle* v *United*

Kingdom being the sole example identified. While it was important that stricter scrutiny was required where there were access restrictions, these were generally taken to be restrictions on a parents' right of access. Ms Dunlop reiterated that in the present case the two decisions under challenge had in fact regulated contact between ABC and DEF and had conferred a right to a minimum amount of contact. She disputed the petitioner's position that the hearing had restricted contact. As DEF resides at an undisclosed address specifying a minimum period of contact could not be regarded as a restriction as there was no other way of facilitating contact without the intervention of the Children's Hearing. So far as the third respondent was concerned the starting point should be the formulation in *Boyle* v *United Kingdom*, namely that the substantive right is to have a reasonable opportunity to maintain the relationship. It was the decision to accommodate DEF in June 2016 that had diminished the contact between ABC and DEF rather than the decisions concerning contact which the hearing has subsequently taken. The inevitable reduction in the frequency of contact between the siblings stemmed from a valid decision about DEF's care taken by the body statutorily entrusted with that role. There had in fact been contact directions in place between DEF and his siblings since 2016. The level of contact with ABC had not changed from a minimum of two hours per fortnight since September 2016. The hearing of 5 December 2017 had served to increase the availability of unsupervised contact. ABC had been allowed to make representations in accordance with section 78(2) of the 2011 Act and Rule 60 of the 2013 Rules all as outlined by senior counsel for the Reporter. The contact arrangements involved balancing all respective interests, beginning with those of the child DEF.

[35] It was not suggested that the participation of ABC's parents in the Children's Hearing was sufficient to meet the article 8 procedural requirements. However where the parents were fully supportive of the sibling's contact claim there was a congruence between their interests

and his, not a conflict. The absence of conflict was relevant in considering the extent of the procedural requirements necessary to protect ABC's interests. His parents were in a position to make submissions on contact before the Children's Hearing which in turn took decisions on contact in DEF's interests as they were bound to do. Reference was made to the Children's Hearing decision of 5 December 2017 and the details of the contact decision made. Ms Dunlop submitted that the lens through which sibling contact was approached was the primacy of best interests.

[36] Responding specifically to the submissions that had been made by senior counsel for the petitioner, it was said that permeating the argument for the petitioner had been the implication that Parliament should have adopted the wording for relevant person set out in *Principal Reporter* v *K.* Chronologically, the Children's Hearings (Scotland) Bill had been introduced in February 2010 and was passed in November 2010 just before the decision in *Principal Reporter* v *K* in December of that year. In any event there was no simple read across that could be done. Parliament had decided on a new provision for relevant persons and separate possibilities for contact directions only. It was submitted that the learning from the *Principal Reporter* v *K* case was diffused through the legislation as it now stands. It was too simplistic to suggest that because the UK Supreme Court's wording was not brought in to the 2011 Act the legislation was not ECHR compliant. One had to look at the whole scheme as it now is. Further, the petitioner's position was that the group of people with established family life with which the decisions of the Children's Hearing may interfere is coextensive with the group of people entitled to relevant person status. However, the group of people who have established family life which would not be interfered with would then be quite small, all others being entitled to relevant person status. It was noteworthy that in the Strasbourg decisions the number of people with article 8 rights is very wide and includes not just those with actual kinship but also

cohabitants and wider family. It was clear that not all could be given identical procedural rights. The picture could be viewed as one of concentric circles with the child in the middle. To be in the first ring it was necessary to have established family life. Ms Dunlop submitted that when the UK Supreme Court had referred to "core family unit" at paragraph 38 of *Principal Reporter* v *K* the reference was to parents and their children and not to the collateral relationship of sibling to sibling. The right to be heard could have different features and the rights and interests of other interested parties were also relevant. For example in the present case the third interested party had raised a point about not sharing documents with ABC. Accordingly, there were many elements to weigh in the balance to keep the numbers at the Children's Hearing properly restricted.

[37] Under the current scheme parents have what Ms Dunlop described as the "leading status" which could be granted to others on satisfaction of a factual test. Those who are parents enjoy stipulated rights and responsibilities under the legislation and that status is extended to people fulfilling that function on a *de facto* basis. In cases of state intervention where the state becomes involved in the raising of the child the parents' position is inevitably compromised. The noble aspiration enunciated in *Principal Reporter* v *K* of "enlisting the family" might be over-optimistic in cases of this sort. Attention was drawn again to the Inner House decision in *CF* v *MF & GF* 2017 Fam LR 83 and in particular to the opinion of Lord Drummond Young in that case at paragraph 4 where his Lordship stated that the primary function of a relevant person was essentially procedural and that provided an important check on intervention by public authorities in the life of a child. Typically that check would be performed by members of a child's family with a view to preserving the family connection and to monitor the involvement of public authorities. Ms Dunlop submitted that this was an acknowledgement that people "wear more than one hat" in the life of a child. Only the relevant person is an

essential participant but others may have something to offer. It is more difficult to see it as necessary for a sibling to perform the roles described by Lord Drummond Young unless they had played a caring or "raising the child" role in which case they would fall easily within the current definition.

[38] When asked whether the 2011 Act definition of relevant person was narrower than the 1995 Act as read down by the UK Supreme Court, the position for the third respondent differed slightly from that of the Principal Reporter. Ms Dunlop would not be drawn into accepting that the definition was narrower but conceded that it was certainly a different test. She suggested that the use of the indefinite article "a" prior to the words "significant involvement" provided for a greater number of people being potentially included. She suggested that the definition in the legislation could be apposite for some siblings but probably older siblings. She contended that the scheme as a whole was convention compliant. She suggested that the test of "a significant involvement in the upbringing of the child" could be given a fairly generous interpretation but that the test was not the same as previously and to that extent she departed from the primary position on behalf of the Reporter when he had indicated that it effectively mirrored the previous position. She agreed with much of what Mr Dunlop had argued for the Principal Reporter but could not agree that the word "upbringing" did not connote a sense of raising the child. While it was acknowledged that the UK Supreme Court in *Principal Reporter* v *K* had very deliberately not restricted the reading down to fathers, nonetheless the case was not a discussion of the position of siblings and *K* was an unmarried father at the centre of the hearing process.

[39] Finally Ms Dunlop contended that it was possible to have adequate protection without relevant person status, the latter not being the litmus test for that protection. It was not wrong for the legislation to adopt a calibrated approach and as the petitioner did not fall within

definition of someone with parental responsibilities and rights or even quasi-parental status it was not controversial for him to have procedural input short of that afforded to those who do. Seen in the round the procedural involvement which the petitioner had amounted to respect for his family life in accordance with article 8. As damages were not sought against the third respondent Ms Dunlop had nothing to say on that. She did not invite any reading down of the provision at all and thought that there was a "danger of the child becoming lost" if reading down took place. The grain of the legislation is to define carefully the status of a relevant person and that was already comprehensive. However if the court was driven to the position of reading words in Ms Dunlop considered it would be preferable to look at section 126 and the applicable order (SSI 2013/193). There could be what she described as a "legislative fix" in the sense that something could be added to the order which might offer greater clarity for the future. Accordingly, if the court identified a clear incompatibility a By Order hearing could be fixed at which the possibility of using such a legislative fix could be discussed.

Arguments for the interested parties

[40] For the first interested party, the implementation authority, Ms Cartwright made a brief submission. She did not insist in any of her pleas in law and did not align herself with any other party's pleas in law. Her position was that the case did not turn on the implementation authority's duties and fulfilment of them. The purpose of her submission was to draw attention to the wider aspects of the local authority's duties particularly in connection with the preparation of reports. She drew attention to The Looked After Children (Scotland) Regulations 2009/210 ("the 2009 Regulations") enacted under subsections 17(2) and (3) of the 1995 Act. Those made provision for information gathering, assessment and the creation of the child's plan. Regulation 3 makes provision for information to be obtained by the local authority in

respect of a child to be or being looked after by them. The first interested party had lodged an affidavit to support its position (number 35 of process). The terms of that affidavit, sworn by the senior social work practitioner, made clear that ABC's views had been sought before any recommendation was made by the implementation authority to the Children's Hearing. The council had fulfilled all of its reporting duties when the Children's Hearing had been called. The broader aspects of the decision making process were not really under challenge. The local authority had complied with all of its statutory duties, in particular that of securing ABC's views and to that extent his participation had been ensured.

[41] For the second interested party, Mr Aitken aligned himself with the petitioner's position and submitted that the current legislation is defective in relation to participation in the Children's Hearing by those who are not parents. He contended that it is not simply the terms of section 81(3) and section 126 of the Act that are defective but the scheme itself. First, however, he addressed the issue of whether his client, ABC's father, could somehow represent ABC's interests either at the Children's Hearing or on appeal from decisions of the Children's Hearing. He submitted that as ABC clearly has legal capacity his parents cannot act for him absent his consent. Section 15(5) of the Children (Scotland) Act 1995 makes this clear. A "transaction" is defined in section 9 of the Age of Legal Capacity Act 1991 and includes the bringing or defending of civil proceedings. Accordingly, ABC's parents could no longer exercise parental responsibilities and rights so far as proceedings for him were concerned. It had appeared from the notes of argument of the first and third respondents that they would contend that the position was otherwise although that had not been developed in argument.

[42] Mr Aitken made four succinct and helpful points in relation to the principal argument for determination in this case. First, he addressed the issue of the meaning of "a significant involvement in the upbringing of the child". He noted that this test had already resulted in

three Inner House decisions and one of the Sheriff Appeal Court and advised that there were others "in the pipeline". While none of the previous cases addressed the specific issue of a sibling such as ABC, it could easily be said that the test introduced by the Scottish Parliament has been causing significant problems in practice. It was submitted that if the Reporter's suggestion that the provision could be given a very wide interpretation without the need for reading down the result would be that a child's ability to access it would be insufficient. Even if Parliament had intended a wider interpretation that was not in fact being adhered to and in practice a narrower, more restrictive interpretation was being placed upon it by Reporters. Secondly, in response to the criticisms of an "all or nothing" status it was the legislation that created this for relevant persons, save for one ineffective attempt in section 126 for a provision in relation to contact, Mr Aitken submitted that if a child was not told about a Children's Hearing that was to take place in relation to his siblings with whom he had established family life and was not given the right to participate, the legislation did not give adequate protection to his article 8 ECHR right. Counsel stressed that an invitation to attend was insufficient because the participatory right included the making of representations, access to papers, being informed formally of a decision and a right to appeal. Thirdly, while the "halfway house" of section 126 went some way to provide for involvement without full relevant person status for those who may not want it the provision did not ultimately succeed in achieving that. The conditions of section 126 require to be engaged and these include that there has to be a CSO in place and the Children's Hearing has made a contact direction. Accordingly, section 126 cannot be relied on if contact is the important issue but no direction has been made. Further, it is engaged only for those who either have a contact order, which would be unusual for siblings, or where there is a permanence order or where someone claims that they satisfy the "significant involvement in the upbringing of the child" test which of course would allow them to be included as a relevant

person. As ABC has no contact order and cannot satisfy the relevant person test section 126 does not cure his particular difficulty. So far as the argument that allowing full participation by siblings such as ABC would entitle them to documents which might be inappropriate or upsetting, Mr Aitken pointed out that it was easy to consider examples of reports whose release to a wider group might be problematic. However, as section 178 of the 2011 Act allows the Reporter to withhold reports from the subject child but not from a relevant person, the legislation already anticipates that anyone falling within the definition of relevant person will see those reports whether appropriately or not.

[43] Fourthly and finally, Mr Aitken discussed the time frame in which the provisions of section 79-81 operate. Section 81 applies where there is a reference to a pre-hearing panel in terms of section 79(2)(a) and so when a Children's Hearing has already been fixed. After that short window, the opportunity for a pre-hearing panel is closed again until a subsequent Children's Hearing is pending. Someone in ABC's position cannot trigger the holding of a Children's Hearing and the Reporter can only do so for limited purposes. This was important because rule 22 of the 2013 Rules provides for notification of a Children's Hearing to someone in ABC's position only if it is considered that he meets the relevant person test. Accordingly, it could be seen that seeking to be deemed a relevant person using those provisions of the legislation was not a remedy in the way suggested by senior counsel for the Reporter. One of the difficulties that the current legislation has introduced is that, where previously a person who could bring himself within the definition of relevant person if he met the statutory criteria as read down by the UK Supreme Court was automatically included with full participatory rights, the 2011 Act requires him to apply to be regarded as such. The introduction of that requirement to apply to be a deemed relevant person against the background of the narrower test resulted in ECHR incompatibility, all as outlined by senior counsel for the petitioner.

[44] Ms Gilchrist for the third interested party, ABC's mother, confirmed that she was wholly supportive of the petitioner's position. She sought to clarify that while ABC had instructed legal representation from about March 2016 that had been in relation to him being a subject child before the Children's Hearing. Secondly, in relation to her own note of argument which indicated that her client had a concern about ABC seeing some of the material before the Children's Hearing, the third interested party did not object to ABC participating fully including viewing all reports and material. Her concern was simply he might become distressed in relation to some aspects of it but she did not object. Thirdly, she sought to align herself specifically with Mr Aitken's submissions.

The petitioner's reply

[45] Ms Brabender made a number of points in reply. In relation to the submission made on behalf the implementation authority, she pointed out that the affidavit number 35 of process in particular paragraphs 14 and 15, made clear that contact with other siblings of ABC and DEF took place but made no specific mention of ABC at all. It was Ms Brabender's information that there had been no involvement by the relevant social worker with ABC prior to September 2017. Paragraph 16 of that affidavit makes clear that the social worker had no direct contact with ABC at any stage and so there could have been no assessment by the implementation authority of ABC's contact with DEF.

[46] Ms Brabender contended that reading down section 81 of the 2011 Act in the manner suggested by Mr Dunlop was not an answer to the incompatibility of section 200 and its definition of relevant persons because only if ABC would be able to use section 81 procedure would that be possible. She submitted that the failure had been that of the Principal Reporter to acknowledge that ABC may be a relevant person. Rules 22 – 24 of the 2013 Rules imposed

duties on the Reporter as a gatekeeper and required him to notify any individual who has or recently has had significant involvement in the upbringing of the child. The Reporter's failure to do that was a breach if he contended that ABC could fall within that definition. The analogy was that the Reporter had failed to tell ABC that a race was about to be run and that he (the Reporter) was the one who could fire the starting pistol. So far as the third respondent's position was concerned it appeared to be an acceptance that the current test in section 81 narrowed the categories of person who could be relevant persons to those who fulfilled a parental role which conflicted directly with *Principal Reporter* v *K*. The idea that there was a fall-back position or "halfway house" where someone could attend the Children's Hearing and partly contribute was something that was provided in the 1995 Act also but had not been sufficient to remedy the perceived ECHR compatibility in *Principal Reporter* v *K.* The inability of ABC to bring himself within the narrower definition of section 81 proposed on behalf of the third respondent resulted in at least section 81 being incompatible for someone in ABC's position. The reason that a declarator that section 126 of the Act was also incompatible was because that section had to be read in conjunction with rule 81 of the 2013 Rules. Ms Brabender also submitted that the third respondent's suggestion of putting the case out By Order so that a "legislative fix" could be contemplated if there is a problem with the legislation would do nothing to assist ABC, whose petition had to be dealt with on its terms. She was not however opposed to a By Order hearing to consider the matter of reading down the legislation generally if that is what the court intended to do.

Discussion

[47] The creation and operation of the Children's Hearing system is something of which this jurisdiction is justifiably proud. There is no suggestion in these proceedings that the Children's

Hearing continues to be anything other than an eminently appropriate forum for consideration of compulsory supervision measures (now orders) that may be required to secure the welfare of children who have need of those. For many years, however, there have been challenges to the restricted participation or lack of ability to participate in the Children's Hearing by those who claim that they have an interest or a right to do so. The current petition represents such a challenge and is accordingly not concerned with the merits of any of the decisions made by the Children's Hearing in this case. The nature of the Children's Hearing is that, as a bespoke tribunal, it differs from a court in that it is not in any sense public and the environment is intended to be less formal and facilitative of open discussion about the subject child's particular needs, albeit that its procedure requires to be ECHR compliant. While this case is the first to challenge the particular definition placed on relevant persons or deemed relevant persons under the Children's Hearings (Scotland) Act 2011 there have been several cases involving the way in which the test under discussion in this case should be applied by the pre-hearing panel. The three Inner House decisions referred to in argument are in that category. The novel feature of this case is that a direct challenge to the ECHR compatibility of the test for relevant person status is presented.

[48] As senior counsel for the petitioner pointed out, the challenges to restrictions on participation in the Children's Hearing stretch back well over two decades and have included both domestic challenges and cases in Strasbourg. The culmination of that tract of authority in domestic law is the decision of the UK Supreme Court in *Principal Reporter* v *K* 2011 (UKSC) 91. While that decision involved a father without parental responsibilities and rights and concerned the interpretation of the previous legislative scheme in Part II of the Children (Scotland) Act 1995, it is of direct applicability to the issues I have to determine in a number of respects. As a decision of the highest court of the United Kingdom on a Scottish civil appeal its *ratio* is

indisputably directly binding on the Scottish Courts. The case represents the most recent authority at the highest level of the relationship between article 8 ECHR and participation in the Scottish Children's Hearing process. Notwithstanding that the case involved a father who contended no more than that a *parent* in his situation, namely one without legal rights but a *de facto* relationship, ought to be included in the definition of relevant person, the court took the opportunity, somewhat prophetically as it has turned out, to read into the previous legislation words that would be consistent with the general statements of principle it was laying down. Further, a number of the arguments against wider participation in the Children's Hearing such as the need to restrict numbers, the dissemination of material that might be inappropriate and other perceived practical difficulties were all canvassed before the Supreme Court as reasons to restrict participation in the Children's Hearing in *K* as they were in argument before me. In my view, that the court intended to resolve in a broader sense the arguments about participation in Children's Hearings for all relevant family members can be illustrated by the following paragraph from the judgment which bears repeating in full:

> "(68) Senior counsel for the appellant's second solution was to insert the words 'or appears to be a parent who has a *de facto* family tie with the child' into sec 93(2)(b)(c). This comes much closer to addressing the incompatibility which this court has found. However it may not go far enough. Persons other than parents may have art 8 procedural rights which require to be protected. This is not as dramatic an extension as it may seem. It is not every aspect of family life which attracts procedural protection. The family succession rights which were in issue *Marckx* v *Belgium* or more recently in *Pla* v *Andorra*, are not affected by the children's hearing. The uncle and aunt in *Jucius and Juciuviene* v *Lithuania* would be covered by the existing wording of sec 93(2)(a)(c), as it appears would be the grandparents in *Bronda* v *Italy*. If all that may be at risk is informal contact with the wider family, then the participation of each parent and the child will in most cases afford adequate procedural protection for any art 8 rights which the child and other family members may have. But there are cases in which the child's hope of reintegration in her natural family depends on maintaining the close relationship established with a grandparent or other family members. There would then be a procedural obligation to involve that relative in the decision making process."

[49] As it was not disputed that the petitioner had established family life with DEF and that the decisions of the Children's Hearing might interfere with that family life (although the third respondent does not accept that there was such interference) then the decision of the UK Supreme Court that, in addition to parents and others with parental responsibilities and rights, relevant persons should include anyone "who appears to have established family life with the child with which the decision of a Children's Hearing may interfere" would on the face of it apply to someone such as ABC. The current legislation does not use those expressions but introduces a new test for those who do not have parental rights or are not natural parents and that is the test of having, or having recently had, "a significant involvement in the upbringing of the child". If that expression is not narrower than the 1995 Act definition as read down by the UK Supreme Court and is apposite to cover someone in ABC's position, then the petition must fail both because ABC had a remedy that he did not exhaust and also because that remedy is ECHR compliant. On the other hand, if the wording of the 2011 Act is not apt to cover someone in ABC's position and he is someone whose family life is actually at risk in the Children's Hearing process then the legislature may not have gone far enough to ensure the necessary procedural protection for his article 8 rights as that is now understood in the Children's Hearing context. It is not a question of whether the Scottish Parliament should have used the same words as the Supreme Court ultimately read into the 1995 Act; rather it is a question of whether the particular expression used cannot be interpreted so as to include all those entitled to that protection and therefore must either be read down, which failing be declared to be incompatible with ECHR. This is because in my view the clear *ratio* of the relevant part of *Principal Reporter* v *K* was that all those who could fulfil a factual test of having "established family life with which the decisions of the Children's Hearing may interfere" must be able to participate fully in those hearings.

[50] Having identified the central question for determination, it may be useful next to consider the three Inner House decisions issued since the coming into force of the 2011 Act that have a bearing, albeit indirectly, on this question. Of course, none of the parties suggested that any of these decisions provide a binding authority on the point being raised by the petitioner in this case. Rather, the first and third respondents relied on them in support of a proposition that there was a close relationship between the procedural requirements of article 8 ECHR and the statutory test for relevant person status in the 2011 Act. Mr Dunlop went so far as to suggest that these were effectively identical, whereas Ms Dunlop accepted that the two are different. In *CF* v *MF & GF* [2017] CSIH 44 the Inner House allowed an appeal against a decision of a sheriff who had overturned a pre-hearing panel's decision that the grandparents in that particular case should not be deemed to be relevant persons. In fact the grandparents had at an earlier stage been deemed relevant persons and allowed to participate in hearings and the issue was about a subsequent decision deciding that they should no longer be deemed as such. There are two passages, however, in the decision that are of relevance and authoritative so far as the issue in this case is concerned. The first is a passage from the opinion of Lord Drummond Young (at paragraph 4) in the following terms:

> "… the function of the relevant person in the scheme of the legislation is of considerable importance. A relevant person is not concerned with the child's care in any direct sense; this is why, in *MT* v *Gerry* the court drew a distinction between involvement in day to day care, where the best interests of the child are paramount, and involvement in upbringing, the underlying criterion for appointment as a relevant person. The primary function of a relevant person is in my opinion essentially procedural: to provide an important check on intervention by public authorities in the life of a child. In the most typical case it can be expected that such intervention will be by members of the child's family, with a view to preserving the family connection and to ensuring that the involvement of public authorities is effectively monitored by persons who have a familial interest in the child's upbringing. In many case preserving a connection with grandparents or other relatives more distant than the parents may be of vital importance in fulfilling this function."

Lord Drummond Young was not concerned with any challenge to the scope of the test in the 2011 Act in expressing that view and so I take the reference to "upbringing" as simply a reference to the wording of the provision. However, the passage first clearly emphasises the nature of the relevant person's function as a procedural but important check on state intervention in the life of a child and secondly gives a clear direction that "other relatives more distant than the parents" may appropriately and necessarily fulfil the function of relevant person. It seems to me that the passage takes care to avoid any suggestion of the kind of hierarchy of familial relationships for inclusion as relevant persons that was put forward by counsel for the third respondent in the present case.

[51] The other passage in *CF* v *MF & GF* relied on by the respondents was that of Lord Malcolm at paragraph 54. Under specific reference to the case of *Principal Reporter* v *K*, at paragraphs 68 and 69, Lord Malcolm refers to the comment about a procedural obligation to involve those such as grandparents in the decision making process being made "…in the context of an ongoing close relationship, and potential interference with someone's 'established family life' with a child." It was the absence of a current relationship between the grandparents and the child in *CF* v *MF & GF* that ultimately resulted in the decision of the pre-hearing panel to exclude them being a permissible one. There is no suggestion in the present case that there was an absence of an ongoing relationship between ABC and DEF. Lord Malcolm went on to agree with a passage from Sheriff Principal Scott in *KH* v *Children's Reporter* (unreported) 18 August 2016 that an argument in favour of relevant person status on behalf of a grandparent based on article 8 may be "circular", in the sense that "…if there is a valid case under art.8, one would expect the statutory test for relevant person status to be met." As I have already indicated, there was no suggestion that such a general statement somehow provided binding authority determining the question in this case. Its importance is two-fold, however. First,

there was no suggestion that the decision in *Principal Reporter* v *K* was somehow less relevant or not directly in point when dealing with a case under the 2011 Act, albeit that the context of the statements in the judgment of the UK Supreme Court required to be considered. Secondly, the reference to the relationship between article 8 and the statutory test in the 2011 Act was made not in the context of a challenge to the article 8 ECHR compatibility of the legislation but against a background of there being no dispute that grandparents were capable of being included within the provisions of the domestic legislation.

[52] The other Inner House cases referred to (*MT* v *Gerry* [2014] SC 359 and *Stated Case by AR (Appellant)* unreported, 17 December 2015) were also directed at rather different issues than those with which the present petition is concerned. The decision in *MT* v *Gerry* put beyond doubt that the task of the pre-hearing panel when considering whether someone should be deemed a relevant person under the 2011 Act was directed towards conferring standing and the fulfilment of a factual test of involvement in the upbringing of the child as opposed to consideration of the child's welfare. It is noteworthy however, that *Principal Reporter* v *K* was again referred to by the Inner House in that case in the context of a discussion about the significance of the involvement required for the procedural protection of constituting an individual as a relevant party in the Children's Hearing. At paragraph 14 of the opinion of the court it is noted that, since the adjective "significant" in that context has a lack of precision, it requires to be construed purposively. Reference is then made to *Principal Reporter* v *K* and the statement there (at paragraph 68) that it is not every involvement in the life of the child which calls for such procedural protection. Again there is no suggestion that the decision in *Principal Reporter* v *K* is somehow inapplicable or less relevant following the passing of the 2011 Act. In the last case, *Stated Case by AR*, Lady Dorrian, giving the opinion of the court in a passage that is clearly *obiter* accepted a submission that as a matter of fact, if a party meets the statutory test in

section 81(3) of the 2011 Act he will almost certainly have article 8 rights, and vice versa, but that they are two separate matters. The present case, it seems to me, concerns the point at which the two concepts can be seen so to separate. Accordingly, I reject the submission made by senior counsel for the third respondent that the decision in *Principal Reporter* v *K* cannot be read across to the new legislation. In my view, the whole point of the wider reading down very deliberately crafted by the UK Supreme Court in *Principal Reporter* v *K* was that the nature of the relationships requiring protection in this context could not and should not be restricted to a particular category or class. It is easy to think of situations where, for example, an uncle or aunt may have had sufficient involvement with a child such that their full participation is justified; equally a sibling or half sibling who has not been part of the child's core family might not be able to fulfil the test. But the sense of the requirement identified by the Supreme Court was that what matters is whether an actual relationship with the child is at risk in the proceedings, not the class or category of that relationship. None of the decisions since the passing of the 2011 Act referred to above indicate that there can or should be any departure from that inclusive approach.

[53] So far as the reliance on the case of *Boyle* v *United Kingdom* (App No 16580/90) is concerned, I do not consider that it really assists a determination of the issues in the present case. Of course the right to participation in any decision making process relating to a child will require consideration of the nature of the relationship between the applicant and the child in question. If anything, the case of *Boyle* supports the petitioner's argument that, if it is found that the legislation fails to provide an appropriate mechanism for someone whose family life is at risk in proceedings relating to child protection, then it is likely that any interference by the decision maker will not be regarded as "necessary" within the meaning of article 8(2) ECHR. I conclude that the issue of whether those other than parents should, in certain circumstances, be

permitted to participate in the Children's Hearing system in order to satisfy the procedural requirements of article 8 ECHR has been resolved authoritatively by the UK Supreme Court in *Principal Reporter* v *K*. There is no tension between what the Commission decided in the case of *Boyle* and what the UK Supreme Court set out at paragraph 68 of *K*. In my view, *Principal Reporter* v *K* does not express a "noble aspiration" but rather a recognition of the need for the state to be appropriately inclusive in allowing all those whose family life is at risk to participate in the decision making process, such that the category of relationship is not the determining factor.

[54] I turn to consider the scheme of the 2011 Act in relation to this issue. The innovation of a pre-hearing panel system does not relate only to the issue of whether an individual should be deemed to be a relevant person. Section 79(3) of the Act lists certain other matters that can be referred to a pre-hearing panel including, for example, whether a relevant person in relation to the child should be refused from attending the Children's Hearing. The particular matter at issue here, however, is the circumstances in which the Principal Reporter must or may refer the question of relevant person status to such a pre-hearing panel. On a plain reading of section 79(2) any particular individual can request the Principal Reporter to refer the matter of whether he is a relevant person to a pre-hearing panel and the Principal Reporter will be obliged so to refer. But the legislation and associated rules created two related difficulties for ABC. First, as neither the Principal Reporter nor his own legal advisors considered that ABC could fall within the definition of being an individual who had a significant involvement in the upbringing of the child, such a referral would have been meaningless, and any argument in support of it probably unstateable, because the pre-hearing panel applying that test could not have afforded him that status. Secondly, where an individual is unaware that a Children's Hearing is to take place, Rule 22 of the 2013 rules does impose a form of "gatekeeping" role on

the Reporter. Notification of the Hearing will be restricted to those that the Reporter considers could fall within the definition of deemed relevant person. There is an obvious circularity in that. It is for these reasons that section 81(3) is one of the provisions suggested to be ECHR incompatible. Section 126, read together with the relevant rules, does not assist someone in ABC's position as he would require to satisfy the deemed relevant person test in order to invoke that route. It is important not to lose sight of the list of those automatically included as relevant persons in section 200 of the Act. In broad terms, those included automatically through that provision are those, whether parents or otherwise, who hold or have had conferred on them, parental responsibilities and rights. Someone who seeks to be included as a relevant person but not falling within that category can only ever be a "deemed relevant person" by invoking the section 79-81 procedure. Senior counsel for the petitioner and counsel for the second respondent were critical of this mechanism and the role of the Principal Reporter as gatekeeper in it. It was pointed out that under the previous legislation as read down by the UK Supreme Court, anyone who as a matter of fact fell within the definition of having "established family life with which the decisions of the Children's Hearing may interfere" would automatically be entitled to participate fully in the Children's Hearing with all attendant rights, obligations and locus to appeal that flow from that. It may have been simpler to adopt the previous approach of automatic entry for those who can fulfil a relevant person test. Having considered matters, however, I have concluded that there is nothing inherently objectionable about separating those who qualify for full participation in the Children's Hearing as of right and those who assert that they fulfil certain factual criteria with the result that they be treated in terms of participation as in exactly the same category as those who are participating as of right. They are, as the legislation characterises them, persons who are deemed to be relevant persons if they can satisfy a factual test. A separate stage at which any dispute about whether they fulfil that

necessary test does not, in my view, fall foul of the procedural requirements of Article 8 ECHR. What matters is the substance of the test. Accordingly, I do not accept the contention that section 200 of the 2011 Act created the problem and is ECHR incompatible. It must be read with the mechanism provided in the primary legislation for including as deemed relevant persons those with no parental responsibilities where appropriate. While I acknowledge the challenges that will face an individual in ABC's position who does not know when a Hearing might take place, to some extent that difficulty was also faced by those under the previous legislation as read down by the courts who were still not regarded (sometimes wrongly) as fulfilling the test and so were not invited to Hearings. Only on discovery of their exclusion did they have the remedy of appealing to the sheriff, an appeal route available to anyone who the pre-hearing panel has refused to regard as a deemed relevant person. As I have already indicated, it is only if the substantive test in the chosen mechanism (section 81(3)), is not apt to cover someone in ABC's position and he is someone whose family life is actually at risk in the Children's Hearing will there be shown to be a problem with the legislation. Accordingly I turn to consider the wording of the particular test complained of.

[55] The test in section 81(3) is whether the pre-hearing panel "considers that the individual has (or has recently had) a significant involvement in the upbringing of the child". That is a factual test, not qualified by any welfare test and one which must be construed purposively (*MT* v *Gerry* at para 14). It is clear that the test does not actually require cohabitation with the child, or even a blood relationship, for it to be fulfilled. For example a foster carer may have significant involvement in the upbringing of the child. Similarly, an individual who provides day to day care for the child may have significant involvement in his or her upbringing but may not cohabit with him. The pre-hearing panel requires to consider carefully the detailed circumstances of each case to ascertain whether the particular involvement in the life of the

child concerned requires procedural protection by participation of the individual in question in the Children's Hearing as a deemed relevant person. I have reached the view that the test for deemed relevant person status in section 81(3) is a narrower test than that carefully crafted by the UK Supreme Court in *Principal Reporter* v *K.* The notion of "upbringing" clearly connotes a parental, educative or training role. Those who bring up a child may well not be parents but they will be carers or educators. Someone who has lived in a core family unit with a child and is several years older than him may have significant involvement in his sibling's life that cannot, even on a strained interpretation of the word "upbringing" be characterised as such but whose day to day family life will be interfered with by any decision that takes or keeps that sibling away from him and/or restricts contact with him. I conclude that the inclusion of the word "upbringing" in the statutory test, without clarification, has and will continue to have the effect of excluding from participation in the Children's Hearing those who would have been included under the previous legislation as read down by the Supreme Court. In this respect, I cannot accept the submission that the "learning from *Principal Reporter* v *K* is diffused throughout the legislation as it now stands", at least not in its entirety. The insertion of a new "upbringing" requirement conflicts directly with the UK Supreme Court's requirement for an inclusive rather than a restrictive definition.

[56] The primary position for the Principal Reporter is that ABC **could** fall within the definition of deemed relevant person in section 81(3) and that, while it was not for this court to determine whether or not he did, it was not inconceivable that a pre-hearing panel would have done so. However, the undisputed facts of this case include that the Principal Reporter (having presumably given careful consideration to that issue in terms of Rules 22-24 of the 2013 Rules in particular) considered that ABC did not appear to be someone falling within the definition, the third respondent in submissions did not appear to accept that ABC was likely to fall within the

definition and ABC's own solicitors, experienced child law practitioners, did not consider that he **could** fall within the definition. That the overall effect of the current legislation represents a narrowing of the previous approach is well exemplified by a decision of the sheriff in *V* v *Locality Reporter Manager Stirling* 2013 Fam LR 69. That case involved a 13 year old who sought to participate in a Children's Hearing in respect of decisions taken about her younger sister. The Reporter argued before the sheriff that a restrictive approach should be taken to the decision in *Principal Reporter* v *K*, pointing out that it had involved an unmarried father and not a sibling. The sheriff rejected that contention and found that *V*, the 13 year old, had established family life with her sibling with which the decision of the Children's Hearing might interfere and so satisfied the test as read down by the UK Supreme Court. Particular reference was made to the guidance provided by Lady Hale at paragraph 69 of *Principal Reporter* v *K* that, in borderline cases, it would be safer to include than exclude. The case is of interest simply because it illustrates that someone in ABC's position who on the face of it would have been a relevant person under the previous legislation as read down may have no route to be deemed a relevant person under the current legislation because of the innovation of the requirement to be involved in the "upbringing" of the child rather than simply having an established family life with him or her that is at risk in the proceedings

[57] I acknowledge the concerns expressed on behalf of the Principal Reporter that there are good reasons for restricting the number of participants in the Children's Hearing. However, just as that argument was insufficient to overcome the difficulties with the previous legislation, so I regard it as insufficient to resolve the difficulty with the test in section 81(3). This case is not about imposing rights and obligations on siblings generally. It concerns the inability of an individual who, by concession, has established family life with his sibling to participate fully in decisions that directly affect him. In this context, I would add that I am satisfied that the

decisions of the Children's Hearing in the present case undoubtedly interfered with that established family life. The *de facto* position in family life is that sibling contact is unlimited. Far from conferring any right of contact on these siblings, the decisions of the Children's Hearing altered that, first by imposing a CSO accommodating DEF away from the family unit and then by limiting the nature and frequency of any contact that was permitted. No issue was taken with the merits of those decisions but on the face of it they represent an interference with the established family life between ABC and DEF. That ABC would be involved in any re-integration of DEF with the core family unit is self-evident given that he was returned to live in that family unit in late July 2017. This places ABC squarely in the category of someone who has an interest not just in maintaining contact but in decisions about whether DEF will be re-integrated into the core family unit.

[58] For these reasons, I consider that those representing ABC were correct in identifying that he could not bring himself within the test for deemed relevant person in section 81(3) and so could not insist that the Principal Reporter refer that matter to a pre-hearing panel. It follows that ABC did not fail to exhaust any statutory remedies in the way contended for on behalf of the Principal Reporter. Those representing him had identified, correctly, that he could not invoke that statutory procedure. That said, the Principal Reporter cannot be criticised by interpreting the statute in a manner that, absent reading down, excluded ABC from being deemed to be a relevant person, which is the conclusion I have reached. It is not so much that the Principal Reporter breached ABC's article 8 ECHR rights; rather the difficulty ABC faced arose from the way in which section 81(3) is framed. The Principal Reporter's actions, on hearing that ABC wished to participate in the Children's Hearing, were not irrational or unreasonable in the circumstances. Attempts were made to allow him some level of participation, albeit not to the extent that he would be afforded as a deemed relevant person.

[59] How then should ABC's situation be resolved? Declarators of incompatibility of certain provisions of the 2011 Act are sought. I consider that to be both unnecessary and inappropriate. The starting point is section 3 of the Human Rights Act 1998, in terms of which I require to read and give effect to primary legislation in a way that is compatible with Convention rights. A declarator of incompatibility can only be made in terms of section 4 of that Act if that cannot be done. Section 200 would only be ECHR incompatible if there were no separate provisions allowing those with Article 8 rights who do not automatically qualify a route through which they can be afforded equivalent status. In the vast majority of cases, as senior counsel for the Principal Reporter pointed out, there is a dovetailing of the procedural requirements of article 8 ECHR and the provisions in question. However, in the particular circumstances of an individual such as ABC who does not profess to have been involved in the upbringing of a child but who has nonetheless established family life/significant involvement with that child with which the decisions of the Children's Hearing may interfere, the legislation is not drafted in a way that permits him to utilise the mechanism in sections 79-81 to be deemed a relevant person in order to participate fully and have a right of appeal against those decisions, and so there is a danger of incompatibility. I have concluded that the section 81(3) test, even if purposively construed, is not quite sufficient as it stands to allow those such as ABC to claim a right so to participate. ABC's particular position is that he has attained legal capacity and his parents cannot, therefore, formally represent his interests. Accordingly, his claim to participate in the hearing is not one that can be subsumed within his parent's right to complain on his behalf. In so concluding, however, I acknowledge that there may be many cases where the parents' involvement as relevant persons is sufficient to protect the interests of some or all of their children.

[60] While the Principal Reporter's primary submission that the test in section 81(3) is broad enough to be interpreted purposively without any reading down is attractive, for the reasons given I have concluded that matters cannot be resolved that way, particularly given the decisions of those involved in this case (and in others) that someone in ABC's position cannot properly fall within the test. I consider that the reading down proposed on behalf of the Principal Reporter, while somewhat inelegant, would resolve the difficulty that has arisen in this case and for any others in the particular position of ABC. That would involve reading down section 81(3) so that it includes the words "*or persons whose established family life with the child may be interfered with by the hearing and whose rights require the procedural protection of being a relevant person"* after the words "upbringing of the child" in section 81(3). That would resolve matters for ABC, who does not seek the form of lesser participation provided for in section 126 of the Act. Accordingly, it is unnecessary, for the disposal of this petition, to express a view on the issues raised about the terms of that section. No other parties suggested any appropriate wording for reading down of the legislation. However, Ms Brabender indicated that she would not oppose a By Order hearing to resolve the matter if the decision in principle was that the legislation required reading down. The particular reading down proposed by Mr Dunlop has the benefit of including as deemed relevant person only those whose rights require the procedural protection of full participation rather than any lesser right. Standing the need to restrict participation only to those who fulfil the test, those additional words, while arguably otiose, may serve to clarify the difference between those whose procedural protection may be provided adequately through those already involved as relevant persons and those who require that procedural protection in their own right. I consider that the reading down proposed on behalf of the Principal Reporter does not "go against the grain" of the legislation because, reading sections 200 and 80(3) together, the provisions are clearly designed to allow full

participation by all those with the requisite Article 8 rights and fall short on a point of drafting rather than principle.

Disposal

[61] It follows from the decision that I have reached that the difficulties ABC has encountered have arisen primarily from the unduly narrow test in section 81(3) (absent reading down) than any actions on the part of the Reporter or the decisions of the Children's Hearing In order to avoid the perceived incompatibility complained of I consider it necessary to read down the legislation. While the decisions of the Children's Hearing were made without ABC having an opportunity to invoke the provisions of ss79-81 of the 2011 Act, he will now be in a position to do so. It will be for a pre-hearing panel to apply the test as read down if an application is made. In relation to that matter, it is not for this court to conclude that ABC should have been a deemed relevant person at the time of the hearings of September and December 2017, just that he should have been able to apply to participate using the appropriate statutory route. Accordingly, I cannot be satisfied at this stage that the decisions of the Children's Hearings were unlawful. On the precise reading down, while I am minded to adopt the wording proposed on behalf of the Principal Reporter, I will, to reflect the importance of the matter, have the case brought out By Order in early course, both to give those parties who chose not to comment on the specific wording the opportunity to do so and in relation to any other orders to be made to reflect this Opinion, including for expenses, which I will meantime reserve. Finally, I record my gratitude to all Counsel involved for the high quality of the submissions presented to me in this difficult case.