



P1229/17 Petition of ABC v Principal Reporter and Others [2018] CSOH 81

On 31st July 2018 judgement was issued in a petition for judicial review. The petitioner ABC challenged decisions made about his contact with his sibling DEF at two Children's Hearings in September and December 2017. ABC was born in October 2003 (now aged 14 years). DEF was born in October 2010 (now aged 7 years). Both siblings lived with their parents until June 2016, when they were accommodated with different foster carers as a result of directions in Compulsory Supervision Orders made by Children's Hearings. ABC returned to the care of his parents in July 2017. DEF remained in foster care. The case challenged the statutory test for relevant person status.

At a Children's Hearing on 7th September 2017 the Panel restricted ABC's contact with DEF to supervised contact for a minimum of two hours once a fortnight and prohibited telephone contact between them. ABC had not been notified of the hearing, or provided with any papers from the hearing. The Reporter did not consider that ABC met the definition of a person entitled to be deemed a relevant person. An attempt to appeal the decision was deemed incompetent; ABC did not fall within the category of persons entitled to appeal. ABC was notified of, and attended, a further Children's Hearing on 5th December which amended the contact direction to include unsupervised contact between ABC and DEF for a minimum of two hours once per fortnight and continued the restriction on telephone contact. ABC attended the hearing with his solicitor and was advised of the hearing's decision but was not given reports or the written reasons. At no stage did the Reporter exercise discretion to refer ABC to a pre-hearing panel to consider whether he may be deemed a relevant person under s79 of the 2011 Act and ABC did not apply to be deemed a relevant person under s81 of the Act.

The Lord Advocate was a respondent in the petition alongside the Reporter, and the siblings' parents were conjoined as interested parties, as was the supervising local authority, East Lothian Council.

Key points of argument

For the petitioner; ABC had 'established family life' with DEF which attracts protection under ECHR Article 8. Any 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. Decisions of the Children's Hearing interfered with ABC's right to respect for family life. In some cases it is acknowledged that interfering with established family life of siblings is justifiable on welfare grounds. Family members must be enabled to play a proper part in the decision making process before authorities may interfere in their family life. ABC was not able to participate, or participate fully, in hearings which affected his family relationship with DEF. ABC could not satisfy the test introduced in the 2011 Act of 'a significant involvement in the upbringing of DEF' and therefore was ineligible for the procedural protections under sections 79 and 81 of the Act. Steps taken by the Reporter to include ABC in the December hearing were acknowledged but insufficient to protect ABC's rights. ABC has legal capacity in his own right and his rights could not simply be protected by his parents' right of appeal.

For the Reporter; ABC had established family life with DEF with which decisions of the Children's Hearing could interfere. However ABC had a remedy in that he could have applied to a pre-hearing panel to deem him a relevant person. The statutory test was whether someone had significant 'involvement' not 'responsibility' for upbringing and this was elastic enough to include circumstances akin to those of ABC. In addition the overall Hearings process protected his Article 8 rights. Although the Reporter had not been convinced ABC was a relevant person, he could still have insisted on a pre-hearing panel and thereafter would have been entitled to review and appeal any decisions of the pre-hearing panel. If the court considered that ABC could not bring himself within the statutory test, 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 into the legislation to ensure it was ECHR Convention compliant. In any event ABC had not been handicapped by the conduct of the process.

The Lord Advocate broadly adopted the position of the Reporter on Convention compliance. When a child is taken into care there is general interference with the parents' right to respect for family life as protected by Article 8. There are few cases in ECHR caselaw addressing the rights of relatives in collateral relationships with children in the care of public authorities. The two decisions under challenge had conferred a minimum amount of contact. The contact arrangements involved balancing all respective interests, beginning with those of DEF. Under the current scheme parents have the 'leading status'. The right to be heard could have different features and the rights and interests of other interested parties were also relevant, such as, in this case, the mother's concern about ABC's access to information in the reports.

The second and third interested parties, the children's parents, agreed with the petitioner's position. The first interested party, the local authority, stated that it had complied with its relevant statutory duties.

The decision

- *Principal Reporter v K* set out 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. That required to be read into the statutory test under the 1995 Act for relevant person status. [49]
- The 2011 Act introduced a new test of ‘having, or recently having had ‘a significant involvement in the upbringing of the child’, which replaced the previous test in the 1995 Act which, following *Principal Reporter v K*, required to be read in a way which was Convention compliant.
- The primary function of the relevant person is procedural, and provides an important check on state intervention in the life of a child. Persons other than parents may appropriately and necessarily fulfil the function of relevant person. [para 50]
- The nature of relationships requiring protection in the context of Children’s Hearings should not be restricted to a particular category or class; what matters is whether an actual relationship with the child is at risk in the proceedings, not the class or category of that relationship. The approach should be inclusive. [52]
- The statutory test in section 81 (3) is a factual test, not qualified by any welfare test and should be construed purposively. **It is a narrower test than that in *Principal Reporter v K*** and the effect of the inclusion of the word ‘upbringing’ excludes some persons who would have been included under the 1995 Act as read down by the Supreme Court. It conflicts with the UK Supreme Court’s requirement for an inclusive rather than a restrictive definition. [55]
- It is correct that ABC could not bring himself within the test in s81(3) for deemed relevant person and therefore could not utilise the mechanisms to be deemed a relevant person and participate fully. [59]
- Although in many cases the parents’ involvement as relevant persons is sufficient to protect the interests or some or all of their children, this did not apply to ABC, who has legal capacity and contends that his parents cannot formally represent his interests.
- The test should be read down to include 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). [60]
- The difficulties ABC encountered are attributable to the unduly narrow test in s81(3) rather than any actions on the part of the Reporter or decisions of the Children Hearing. [61]

Next steps

This judgment proposes amending the statutory test in s 81(3)(a) in the 2011 Act which a person must meet to be deemed a relevant person status by reading into the existing test the additional words in italics:

“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 ***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***”.

Persons with an automatic right to be a relevant person will continue to be afforded that status. The Reporter will be alert to the need to involve other family members, including siblings as appropriate, where a hearing is likely to consider making a decision which affects their family relationship or meaningful contact with the child and consult the Panel about how that should be managed if need be. When considering the status of individuals, pre-hearing panels and hearings need to have regard to the quality and extent of family relationships in deciding whether to confer relevant person status. The nature of the person's relationship with the child is important: just because someone is a member of a child's family does not automatically merit relevant person status.

The law is evolving in this area and training and practice notes will be revised to reflect this and other pending cases. Meantime panel members are expected to have regard to the decision summarised above when being asked to consider deeming a family member without parental responsibilities as a relevant person.

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