SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 1

B1055/19

JUDGMENT OF SHERIFF SHERIFF ALISON STIRLING,
ADVOCATE

in the cause

APPEAL TO THE SHERIFF UNDER SECTION 154 OF THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

by

JS

Appellant

Act: Aitken, Advocate et Yule
Alt: Deighan

Edinburgh, 19 November 2019

The sheriff, having resumed consideration of the cause, allows the appeal and varies the compulsory supervision order by including in it (1) a requirement that the implementation authority arrange that the child will provide a sample by way of cheek swab for the purposes of a DNA test to establish if the appellant is her father and (2) a requirement that the implementation authority facilitate the taking of a cheek swab from the child and the instruction of a paternity test to establish if the appellant is her father.

Note

[1] The issue for determination in this appeal is whether the decision of a children's hearing to refuse to add a measure to a compulsory supervision order to require the local authority to organise a DNA test was not justified.

Background

[2] The child was born on 21 November 2017. On 9 March 2018 the mother of the child and the appellant accepted the grounds of referral, and the sheriff found those grounds to be established without the need for a hearing of evidence. The grounds referred to the sheriff by the reporter were that the child was likely to suffer unnecessarily or her health or development was likely to be seriously impaired due to lack of parental care and that she had or was likely to have a close connection with a person who had carried out domestic abuse (sections 67(2)(a) and (f) of the Children's Hearings (Scotland) Act 2011). In both grounds the reporter asserted that the appellant was the child's father. The establishment of ground 67(2)(f) in particular appears to have relied on the appellant being the child's father. The reporter, the mother and the appellant all agreed that the appellant was the father. A compulsory supervision order was made.

[3] Sometime thereafter, the mother claimed that the appellant was not the child's father. The appellant continued to attend children's hearings as a relevant person. At a children's hearing on 19 February 2019 the appellant sought contact, but contact was refused. That hearing decided that the question of reinstatement of contact between the child and the appellant should be deferred until the question of paternity was fully resolved. On 20 June 2019 the appellant requested a review hearing. That hearing took place on 24 July 2019 and was deferred to obtain the advice of the National Convener.

[4] At the children's hearing on 19 August 2019 the hearing refused to add a measure onto the compulsory supervision order to require the local authority to organise a DNA paternity test. They reached that decision on the basis of the advice they had received from the National Convener that it was not competent to order the child to undergo a mandatory DNA test. The reporter had advised the hearing that such an order might be competent, but

only if it was necessary. In the event that such an order was competent, the hearing held that it was not necessary to make the order. The basis for this decision was that contact between the appellant and the child was not in her best interests, and that the appellant had other means to attempt to establish paternity. The hearing did not record their decision to refuse the DNA test as a separate decision. Instead they recorded their reasoning alongside their reasons for refusing contact, although the appellant had not sought contact. In addition to their reasons for refusing contact and for refusing to order a DNA test, the hearing recorded that the reporter had raised the question about whether the appellant was a relevant person and had advised that in future the reporter might not treat him as a relevant person due to disputed paternity.

The Advice of the National Convener of Children's Hearings Scotland

[5] In terms of section 8 of the 2011 Act the National Convener may provide advice, including legal advice, to a hearing. The explanatory note to the section makes it clear that this is so that a hearing does not rely on the Principal Reporter or any legal representative appearing before them for advice, to make sure that the hearing is properly equipped to consider the submissions made by all parties and to secure the independence of the hearing. The hearing is not bound to follow the advice of the National Convener, but in this appeal they expressly did so.

[6] The National Convener's advice makes no reference to the Children's Hearings (Scotland) Act 2011. Nor is there any reference to the European Convention on Human Rights. Reference is made to the Law Reform (Parent and Child)(Scotland) Act 1986 (erroneously referred to as the "Parent and Child (Law Reform) (Scotland) Act 1986"). After

discussing and advising on various matters of law, the National Convener advised that the questions for the hearing were:

> "Even if the mother consented to the DNA test, is it necessary for the hearing to know whether the putative father has a genetic relationship with the child in order to determine whether compulsory supervision is necessary and/or to determine contact. That doesn't appear to be the case.
>
> It may or may not be in the child's best interests to have the question of parentage resolved at some stage but is that inextricably linked to the hearing's determination of compulsory measures in this case at this time?"

Issues in dispute

[7] Both parties had lodged lengthy written submissions which they adopted and expanded upon in oral submissions.

[8] The issues in dispute are:

1. Whether it is competent to include a measure on a child's compulsory supervision order requiring a sample to be taken from a child for the purposes of DNA paternity testing and to order that the implementation authority arrange such an appointment and facilitate the taking of the sample and the DNA test.
2. The tests to be applied when adding a measure to a compulsory supervision order. Whether the tests to be applied are contained in sections 25 (welfare), 27 (views of the child) and 28 (no order principle) of the 2011 Act or in section 138 of the Act (necessary for the protection, guidance, treatment or control of the child).
3. Whether the hearing had failed to act in accordance with the Article 8 right to respect for private life of the child and the appellant.

4. If the decision is not justified, whether the appeal should be remitted to a hearing or whether the court should vary the order.

Submissions for the appellant

Competency

[9] Counsel for the appellant submitted that it was competent for a children's hearing to include a measure on a child's compulsory supervision order which required that a sample was taken from a child for the purposes of DNA paternity testing and to order that the implementation authority arrange such an appointment and facilitate the taking of the sample and the DNA test. He referred to section 83(2)(f), (h) and (i) of the 2011 Act, and submitted that the taking of a DNA sample by cheek swab was a "medical or other examination" of the child (section 83(2)(f)) or alternatively it was a "requirement that the child comply with any other specified condition" (section 83(2)(h)). The implementation authority specified in the child's compulsory supervision order, namely the local authority, required to implement the terms of the order and that included "securing or facilitating the provision for the child of services of a kind which the implementation authority does not provide" (section 83(1)(b) and section 144(1), (3)). That covered facilitating a cheek swab and instructing a DNA test. A measure in terms of section 83(2)(f) or (h) was a mandatory requirement, superseding the consent of a parent. The only restriction to the effectiveness of such a measure was in terms of section 186, which related to the requirement to obtain the consent of a child with capacity. There was no such restriction regarding parental consent, which implied that such a measure could be implemented in the absence of parental consent. Thus a compulsory supervision order with an order for DNA testing would

suspend the mother's parental rights and responsibilities which were incompatible with its terms and override her obstruction to identifying paternity.

[10] With regard to the reporter's written submissions on enforceability, counsel submitted that it was hypothetically possible that a GP or a DNA testing company might refuse to implement an order but he suggested that that was unlikely. The order ought not to be refused on this basis. The court or children's hearing could bind the implementation authority to order the sample and the test. If a difficulty arose, the remedy was for the implementation authority to require a review on the basis that the order was not being complied with: section 131(2)(b).

The test to be applied to measures included in a compulsory supervision order

[11] Counsel referred to the reasoning given by the children's hearing for refusing to add the measure relating to DNA testing. The hearing had reached their decision based on the lack of contact, the appellant's past behaviour and his opportunity to establish paternity elsewhere. That analysis of necessity failed to deal with the benefit to the child of having the dispute about paternity resolved. The hearing looked at contact first and ignored the reasons given by the hearing in February 2019 that resolution of paternity was the key to whether there should be contact. The appellant had sought a DNA test, the hearing had said it was not necessary and, in doing so, had failed to address the correct tests, namely whether it was in the best interests of the child and accordingly necessary. The child's mother had attended an earlier hearing with another man, claiming he was the father. It was in the child's best interests throughout her childhood, for possible permanence order proceedings, and for her medical and genetic heritage for paternity to be resolved (Wilkinson and Norrie, The Law Relating to Parent and Child in Scotland 2013, 3rd ed, 3.28, 3.30). It was a "vital

interest" and important to the child throughout her life: *Mikulic* v *Croatia* (Application no 53176/99, 7 February 2002; *Mifsud* v *Malta* (2019) 69 EHRR 22. There was a competent order which the hearing could have made, but they refused to do so.

[12] Counsel submitted that the reporter's reliance on section 138(4) of the 2011 Act as a test of necessity was a misunderstanding of that provision. Counsel accepted that section 138 was engaged, as it set out the powers of the hearing on review. In terms of section 138(3) the hearing had the power (a) to terminate the compulsory supervision order, (b) to vary the compulsory supervision order, and (c) to continue the compulsory supervision order for a period not exceeding one year. In terms of section 138(4) the hearing could vary or continue a compulsory supervision order only if satisfied that it was necessary to do so for the protection, guidance, treatment or control of the child. This necessity test was only applicable to the making of a compulsory supervision order, but it was not a test to be applied to the measures attached to the order such as a contact order. Contact with a parent was not "necessary … for the protection, guidance, treatment or control of the child". Making a contact order involved a wider, welfare analysis and did not need to fit into one of the four categories.

[13] The test set out in section 138(4) was also found in section 91(3)(a), which applied when the grounds hearing was considering making a compulsory supervision order for the first time. Counsel submitted that that test was not applicable to the measures to be attached to the compulsory supervision order such as contact (section 83(2)(g)) and a medical or other examination (section 83(2)(f)(i)). The tests to be applied to those measures were set out in sections 25 to 28. In terms of section 25 the welfare of the child throughout childhood is the paramount consideration. It applies to decisions reached about measures to be attached to compulsory supervision orders and it is not bound by the necessity that the

measure is for the protection, guidance, treatment or control of the child. Section 27 relates to the views of the child, although the child in this case is too young to express a view. Section 28 is the "no order" principle. Counsel submitted that, properly understood, it is section 28 which might be described as the "necessity" test. There was an element of "necessity" there because any order made was an interference with Article 8 rights and hence required to be "necessary". Nothing in sections 25 to 28 limits the powers to the test set out in 138(4).

[14] Counsel submitted that had the hearing properly directed themselves to the appellant's request for a DNA test, the hearing would have had regard to the child's welfare throughout childhood as their paramount consideration. The hearing should have looked at her best interests and reached a view on it with regard to the child's views (of which there were none) and then decided whether it was better to make an order or not. The hearing knew that the mother was not consenting to the test and that therefore paternity would not be resolved. The mother had not lodged a notice of intention to defend to the action for declarator, and in that action the court would need to proceed by inference in an undefended action. It was clearly in the child's best interests to have the matter definitively resolved. The suggestion that the appellant should proceed by way of declarator of parentage was as unsatisfactory as the suggestion that the unmarried father in *Principal Reporter* v *K* should proceed by raising an action in the sheriff court for a section 11 order and for the same reasons ([2010] UKSC 56, 2011 SC (UKSC) 91 at [33]). Neither the National Convener nor the children's hearing had recognised this.

[15] Counsel submitted that if the appellant is found to be the father of the child, he will seek contact. That request will be determined on a welfare basis. Establishment of paternity

will also allow him to participate in any permanence order proceedings. There are huge issues at stake, and the hearing's eyes were closed to these.

[16] Further detailed criticisms were made of the National Convener's advice. The advice was plainly wrong in law. The hearing had followed that advice and had also erred in law.

Article 8 right to respect for private life

[17] Counsel submitted that sections 25 to 28 were clear in their terms, the hearing had failed to apply these tests and accordingly there was no need to go into his human rights argument in detail.

[18] Article 8 was clearly engaged: the child needed to know who her father was, and the appellant needed to know that he had a daughter. Although the facts in *Mikulic* v *Croatia* (Application no 53176/99, 7 February 2002) and *Mifsud* v *Malta* (2019) 69 EHRR 22 were different from the facts in this appeal, the same principles applied. In particular the European Court had held that "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality" and that persons born out of wedlock seeking to establish who their father is "have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity" (*Mikulic* v *Croatia* paras 54 and 64). That applicant had complained in substance not of something that the State had done, but of its lack of action. As a public authority the children's hearing had a negative duty not to refuse improperly to facilitate steps which could have been taken to establish the child's paternity. They had a positive duty to take reasonable steps to facilitate the establishment of her paternity.

[19] The appellant had asked the children's hearing to utilise a power immediately available to them which would serve the "vital interest" of both the appellant and the child in uncovering the truth about an important aspect of their personal identity. The uncertainty could be resolved expeditiously and with a likely certainty of outcome. Neither the National Convener nor the children's hearing took into account the right to respect for the private life of each of the child and the appellant. The hearing knew that the continuing uncertainty as to paternity had an immediate and significant impact on the appellant's ability to be involved in the decision making process for the child going forward, as they had discussed whether he was a relevant person. Time was of the essence, and delaying the decision was not a reasonable option. The hearing had accordingly acted incompatibly with the Article 8 rights of both the appellant and the child. Their decision was unlawful, and therefore not justified. Counsel also referred to the duty on the State under the United Nation Convention on the Rights of the Child, Article 8, to establish a child's identity "speedily".

Disposal

[20] Counsel submitted that if the appeal were allowed, the court should vary the compulsory supervision order by including in it (1) a requirement that the implementation authority arrange that the child will provide a sample by way of cheek swab for the purposes of a DNA test to establish of the appellant is her father and (2) a requirement that the implementation authority facilitate the taking of a cheek swab from the child and the instruction of a paternity test to establish if the appellant is her father. These were competent measures which, when implemented, would resolve the dispute over paternity in the best interests of the child. They were consistent with the court's Human Rights duties.

There was no merit in remitting the appeal to the hearing with a direction, because the case turned on matters of law. The court had as much information before it to make an appropriate disposal as any remit hearing would have. If the court held that the hearing had acted incompatibly with the European Convention on Human Rights by failing to include the measures on the compulsory supervision order, then the court's failure to utilise the immediate remedy open to it would be unlawful.

[21] Furthermore the appellant's status as a "relevant person" was under challenge. The reporter no longer accepted that he was a relevant person. Although the reporter had indicated to the court that as a matter of fairness she would invite the appellant to the next hearing so that he could make submissions on DNA testing, she had also indicated that it would be for the chair of the hearing to decide if he could attend for all, part or any of the hearing. A remit to the hearing might deprive the appellant of the right to ask for the measures to be included at the remit hearing. He would not be entitled to see the reports, to representation or to legal aid and would have no right of appeal. A remit could be a potentially ineffective disposal.

Submissions for the reporter

Competency

[22] At the children's hearing, the reporter's position was that requiring a DNA test "may be competent" but only if the hearing felt it necessary. In the written submissions the reporter's position was that it is "probably competent" but might not be enforceable and hence unnecessary, the argument being that an ineffective measure cannot be a necessary measure and there is a necessity test. The reporter submitted that while a measure could require the implementation authority to make arrangements, it could not require a medical

practitioner or DNA testing company to provide services. The practitioner might take the view that the mother's consent was required. It was an offence under the Human Tissue Act 2004 for any person to have bodily material for DNA analysis without the consent of a parent with parental responsibilities in relation to the child (section 45, schedule 4 paras 2 and 3). It was not clear whether the measure requested by the appellant would make it lawful. If a measure could not be implemented the implementation authority would require to seek a review of the compulsory supervision order in terms of section 131 of the 2011 Act.

[23] The reporter also submitted that taking a sample did not necessarily fall within the terms of section 83(2)(f), although she accepted that section 83(h) and (i) provided an alternative route and that the particular subsection would not need to be specified in any order.

The test to be applied to measures included in a compulsory supervision order

[24] The reporter submitted that the hearing was justified in finding that the requirement to arrange for DNA sampling and testing was not necessary. The correct test was set out in section 138(4). This test was not unique to variation or continuation. It applied when an order was first made in a variety of circumstances: section 119(3)(a). It also applied to interim orders both before and after the establishment of grounds. She referred to section 83(1)(a) and submitted that one or more of the measures in section 83(2) would be attached to a compulsory supervision order. The question of whether a compulsory supervision order should be made was inextricably linked to what measures, if any, required to be in place. The reporter submitted that the necessity test in section 138(4) applied both to an original order and to a variation of it. If a child were on an order with a requirement to live at home and then a decision was taken to vary the order to remove the child to foster care,

the test should not be lower than the test for the order when it was first put in place. The hearing required to apply the test in section 138(4) as well as the tests in sections 25 to 28. The tests were high, but proportionate. The hearing were aware of all the facts, including the difficulties with court proceedings, and were justified in reaching their decision. She made a floodgates argument as further support for why the hearing was justified in not requiring a DNA sample.

[25] The reporter accepted that the advice of the National Convener was wrong in law in parts. In particular the National Convener had erred on competence when advising that "Any decision taken by the hearing to attach measures to a Compulsory Supervision Order should relate to the concerns which gave rise to the grounds for referral", although she submitted that the second part of that sentence was correct. The National Convener had also erred in advising that the hearing could not exercise powers which would not be exercisable by the court under the Law Reform (Parent and Child)(Scotland) Act 1986.

Article 8 right to respect for private life

[26] The reporter adopted her written submissions. The Article 8 rights of the appellant and the child did not require the children's hearing to take any positive steps to ascertain her parentage. *Mikulic* v *Croatia* related to the inefficiency of the domestic courts in dealing with her action and the failure to prevent the putative father from frustrating the process. The inefficiency in that case could not be equated with the hearing's decision not to order testing. While it might be quicker for the hearing to make an order for testing than proceeding with an action of declarator, the latter was a more appropriate remedy. *Mikulic* v *Croatia* only required that people should be able to establish details of their identity, states might offer different means by which this could be done and that was the extent of the

positive duty of the state. The fact that the hearing, making a decision about the need for compulsory measures, did not consider it necessary to determine paternity did not prevent the appellant from taking other steps to do so. *Mifsud* v *Malta* only decided that it was not a violation of Article 8 for an individual to be required to provide a sample for DNA testing where there was a provision in domestic law allowing that. It was not authority for the proposition that such an order was always necessary for compliance with Article 8 where paternity was uncertain, or that it was necessary in the current appeal.

[27] As regards the United Convention on the Rights of the Child, the hearing had not interfered with her identity and she had not been illegally deprived of elements of her identity.

Disposal

[28] The reporter submitted that if the appeal were allowed, the reporter should be directed to arrange a hearing to review the child's compulsory supervision order. The overall intention of the legislation was for the hearing to remain the principal decision-making forum for children subject to such orders, although she accepted that this was an unusual case as the issues were issues of law. She invited me to prepare a note setting out the basis on which the appeal was allowed. The arrangement of a further hearing would not constitute an unreasonable delay. Under section 78(2) of the 2011 Act the appellant and his solicitor could be permitted to attend the remit hearing in whole or in part, albeit not as a relevant person.

Reasoning and decision

Competency

[29] It is clearly competent to include a measure on a child's compulsory supervision order requiring a sample to be taken from a child for the purposes of DNA paternity testing and ordering that the implementation authority arrange such an appointment and facilitate the taking of the sample and the DNA test. Taking a cheek swab for the purposes of obtaining a DNA sample is a "medical or other examination of a child" and is a measure which can be included in a compulsory supervision order: section 83(1)(a) and (2)(f)(i). Even if it were not a "medical or other examination of a child" it could competently be included in an order as "a requirement that the child comply with any other specified condition": section 83(2)(h). Competence does not depend on enforceability. Section 131(2)(b) envisages that some orders may not be complied with, and provides a remedy in terms of a review. Whether such a measure should be included in a compulsory supervision order is a different question from competency.

The test to be applied to measures included in a compulsory supervision order

[30] Section 83 of the 2011 Act defines a compulsory supervision order as follows:

> "83(1) In this Act, "compulsory supervision order", in relation to a child, means an order—
>
> (a) including any of the measures mentioned in subsection (2),
> (b) specifying a local authority which is to be responsible for giving effect to the measures included in the order (the "implementation authority"), and
> (c) having effect for the relevant period.
> (2) The measures are—
> (a) a requirement that the child reside at a specified place,
> (b) a direction authorising the person who is in charge of a place specified under paragraph (a) to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order,
> (c) a prohibition on the disclosure (whether directly or indirectly) of a place specified under paragraph (a),

> (d) a movement restriction condition,
> (e) a secure accommodation authorisation,
> (f) subject to section 186, a requirement that the implementation authority arrange—
> (i) a specified medical or other examination of the child, or
> (ii) specified medical or other treatment for the child,
> (g) a direction regulating contact between the child and a specified person or class of person,
> (h) a requirement that the child comply with any other specified condition,
> (i) a requirement that the implementation authority carry out specified duties in relation to the child."

[31] It is clear that a compulsory supervision order must have three elements: any of the measures set out in section 83(2), the specification of a local authority responsible for implementing those measures and a time limit. The measures which may be attached are varied, but what is critical is the compulsory supervision of a child by the state. It is this state intervention into family life which results in the requirement that the order "is necessary… for the protection, guidance, treatment or control of the child". This is the test which is applied when the child enters the children's hearing system, whether by acceptance of the grounds or by establishment of them at court, or whether the child remains in the system either by variation or continuation of the order: sections 91, 119 and 138.

[32] Of the measures listed in section 83(2), movement restriction conditions and secure accommodation authorisation are subject to additional requirements:

> "83(4) A compulsory supervision order may include a movement restriction condition only if—
> (a) one or more of the conditions mentioned in subsection (6) applies, and
> (b) the children's hearing or, as the case may be, the sheriff is satisfied that it is necessary to include a movement restriction condition in the order.
> (5) A compulsory supervision order may include a secure accommodation authorisation only if—
> (a) the order contains a requirement of the type mentioned in subsection (2)(a) which requires the child to reside at—
> (i) a residential establishment which contains both secure accommodation and accommodation which is not secure accommodation, or

(ii) two or more residential establishments, one of which contains accommodation which is not secure accommodation,

(b) one or more of the conditions mentioned in subsection (6) applies, and

(c) having considered the other options available (including a movement restriction condition) the children's hearing or, as the case may be, the sheriff is satisfied that it is necessary to include a secure accommodation authorisation in the order.

(6) The conditions are—

(a) that the child has previously absconded and is likely to abscond again and, if the child were to abscond, it is likely that the child's physical, mental or moral welfare would be at risk,

(b) that the child is likely to engage in self-harming conduct,

(c) that the child is likely to cause injury to another person." (my emphasis)

[33] Parliament has explicitly required that in the case of the two most restrictive measures, there is a requirement that these measures are necessary. Had the intention been that the test of necessity for the protection, guidance, treatment or control of the child set out in sections 91, 119 and 138 was to apply to the individual measures in the order, then there would have been no need to specify necessity for those two measures. It follows that the test of being "necessary… for the protection, guidance, treatment or control" only applies to the part of the compulsory supervision order which relates to the specification of the implementation authority in section 83(1)(b), bringing state control into the life of a family. It does not apply to the measures to be attached (section 83(1)(a)), and it is difficult to see how it would apply to a time limit (section 83(1)(c)).

[34] The test for the addition of any of the measures is the test set out in sections 25 to 28, namely the welfare of the child is paramount, the child is to be given the opportunity of expressing her views so far as practicable and regard has to be had to them, and the "no order" principle. Additional tests are required for certain measures. A measure specifying a medical examination is subject to the consent of a capacitous child (section 186). Section 26 also provides that a decision may be made contrary to the paramountcy principle of welfare

if it is necessary to protect the public from serious harm. In this appeal, the only real tests to be applied by the hearing were those set out in sections 25 and 28, standing her age.

[35] The reporter suggested during the hearing that if the only tests for variation of conditions were those set out in sections 25 to 28 then a child who had entered the system with a home supervision requirement on the basis that it was necessary for her protection, guidance, treatment or control might be removed to foster care on a lower test. I do not accept that. The welfare and no order principles in particular provide a measure of proportionality when considering a variation. By contrast, if a variation requires to be necessary for the protection, guidance, treatment or control of a child, then it is difficult to see how moving a child from foster care to home supervision could be achieved. It is also hard to see how the imposition or variation of a measure regulating contact between the child and a parent from whose care the child has been removed would satisfy the test of necessity for the protection, guidance, treatment or control of the child.

[36] The appellant asked the hearing to add a measure to the compulsory supervision order to require the implementation authority to organise a DNA paternity test. This is the question they required to answer. The tests they required to apply are in sections 25, 27 and 28, and in particular the welfare and the no order principles. They should have asked themselves whether it was in the best interests of the child that an order was made requiring a cheek swab to be taken for the purposes of DNA testing and whether it was better for that order to be made than that it should not be made. They did not do so. They were wrongly advised by the National Convener and by the reporter that the test was one of necessity, and they applied a necessity test. They reached the decision that a DNA test was "not necessary for [her] best interests". Their decision to refuse the order for DNA testing is based on their conclusion that contact with the appellant would not be in her best interests. The appellant

was not seeking contact. They failed to consider the benefits to the child of knowing who her father is as early as possible, despite having been advised that the mother had been claiming for at least a year that the appellant was not the father. They knew that there was a live issue as to whether the appellant was a relevant person and that he might be excluded from future hearings while paternity remained in dispute. The decision is not justified because (i) it wrongly proceeds on the basis of a necessity test, which is an error in law; (ii) it treats the decision the hearing required to make as if it were simply a decision about whether contact was in the child's best interests and fails to give weight to the importance of the child knowing her identity as soon as possible, thereby placing undue weight on irrelevant considerations and failing to give sufficient weight to relevant considerations. Had the hearing properly directed themselves, they would have found that it was in the child's best interests to make the order and that it was better to make the order than not to make the order.

[37] Much of the hearing was taken up with criticising the advice of the National Convener. That criticism is well founded, but it is not necessary for me to go into that. The advice was wrong inter alia because it posed the wrong questions. The hearing explicitly followed that advice, misdirecting themselves and leading to a decision which was not justified.

Article 8 right to respect for private life

[38] It is clear from *Mikulic* v *Croatia* that Article 8 is engaged. Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (para 54). Persons born out of

wedlock seeking to establish who their father is have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity (para 64). The state has a positive obligation to ensure that there were adequate measures to resolve uncertainties in paternity disputes (paras 56, 57, 64 to 66). Counsel submitted that the hearing should have exercised the power immediately available to them, whereas the reporter submitted that the hearing did not require to take any positive steps to ascertain paternity.

[39] The facts in *Mikulic* v *Croatia* and the decision on whether Article 8 was breached are relevant.

[40] In *Mikulic* v *Croatia* the applicant alleged that the proceedings concerning her paternity claim had failed to meet the "reasonable time" requirement, that her right to respect for her private and family life had been violated owing to the excessive length of those proceedings and that she had no effective remedy for speeding them up or ensuring the appearance of the defendant in court, contrary to Articles 6 and 8 of the European Convention on Human Rights. The applicant was born on 25 November 1996. On 30 January 1997 her mother raised an action against her alleged father in order to establish paternity. On 17 June 1997 judgment by default was given, but the alleged father successfully appealed on the grounds that default judgments were prohibited in civil status matters. The alleged father then failed to comply with court orders to submit to DNA sampling on six occasions and delayed the proceedings in other ways. The court established the alleged father's paternity on the basis of the mother's evidence and the father's avoidance of DNA tests which, it held, corroborated the mother's evidence. The judgment was overturned on appeal and sent for a rehearing, and the first instance court was required to hear evidence from several witnesses who, according to the alleged father, had had

intimate relations with the mother during the critical period. The court of first instance reached the same decision again, and was again appealed. Other delays occurred, and the European Court held that there had been a breach of Article 6:1.

[41] The court then examined whether Croatia, in handling the applicant's paternity claim, had been in breach of its positive obligation under Article 8. The only avenue for the applicant to establish whether or not the alleged father was her biological father was through judicial proceedings, as he denied paternity. There were no laws to compel him to comply with the court order for a DNA test. There was no direct provision governing the consequences of non-compliance. Croatian courts reached their decision after assessing all the evidence and were free to reach conclusions about a party who obstructed the establishment of certain facts. The first instance court concluded that paternity was established, but the appellate court found the evidence to be insufficient. The European Court observed that "a procedural provision of a general character, giving a discretionary power to courts to assess evidence, was not in itself a sufficient and adequate means for establishing paternity in cases where the putative father [was] avoiding the court's order that DNA tests be carried out" (para 62).

[42] The court held that a system which had no means of compelling the alleged father to comply with a court order for DNA tests to be carried out could be compatible with the Article 8 obligations, but under such a system the interests of the individual seeking the establishment of paternity had to be secured. The lack of any procedural measure to compel the father to comply with the court order was only in conformity with the principle of proportionality if there were alternative means enabling an independent authority to determine the paternity claim speedily, and there were none (para 64).

[43] The Croatian system for determining paternity in judicial proceedings is comparable to the way the Scottish courts will consider the appellant's action for declarator of parentage. The mother has not entered the process and is not consenting to the child's DNA being taken for testing. In terms of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 section 70(2), the court "may draw from the refusal or failure [to consent] such adverse inference, if any, in relation to the subject matter of the proceedings as seems to it to be appropriate". Any decision reached would be "discretionary" in the sense that one sheriff might grant declarator which another would have refused, and both would be reasonable decisions. This is not a sufficient and adequate means for establishing paternity (*Mikulic* v *Croatia* para 62). A DNA test will accurately determine paternity and its probative value substantially outweighs other evidence led to prove or disprove paternity (*Mifsud* v *Malta*, para 59). In *Mikulic* v *Croatia* there were no alternative means enabling an independent authority to determine the paternity claim speedily, which led to a finding of violation of Article 8.

[44] Scottish proceedings for declarator of parentage where a parent refuses to engage with the court process are unsatisfactory for the reasons given in *Mikulic* v *Croatia*. If this were the only remedy, the United Kingdom is likely to be held to have violated Article 8. However for families who are subject to the children's hearing system there is a remedy in section 83(2)(f) of the 2011 Act.

[45] In order to respect the private life of the appellant and the child the hearing required to consider varying the compulsory supervision order in line with Article 8 issues. They required to balance the rights of the appellant and the child to have the uncertainty as to the child's personal identity and the legal relationship (if any) between them eliminated without

unnecessary delay against the right of the absent mother to withhold her consent to testing. Had they done so, they would have varied the compulsory supervision order.

[46] The hearing failed to make the order and accordingly breached the Article 8 rights of the appellant and the child. That was an error of law. The decision was not justified.

Disposal

[47] There is no merit in requiring the reporter to arrange a hearing. Both parties accepted that the issues are legal issues, and that the relevant factual background is known. Having regard to the case law, it is undoubtedly in the child's best interests for the order to be made (section 25 of the 2011 Act). The child is too young for her views to be taken (section 27). It is better for the order to be made than no order made in terms of section 28 (hearing) and 29 (court), having regard to the mother's refusal to consent and the unsatisfactory nature of undefended proceedings for a declarator of parentage. The Article 8 balance between the rights of the appellant and the child to have paternity determined and the rights of the mother to withhold consent to testing falls inevitably in favour of the child and the appellant. In order to respect their private life the order requires to be granted.