SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 9
P122/24

Lord Justice Clerk
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in the reclaiming motion

by

"A"

Petitioner and Respondent

against

(FIRST) THE PRINCIPAL REPORTER;

Respondent

(SECOND) "B"; and (THIRD) CURATOR *AD LITEM* FOR THE CHILD "M"

Respondents and Reclaimers

and

THE LORD ADVOCATE

Interested Party

Petitioner & Respondent: Byrne KC, Blockley; Drummond Miller LLP
First Respondent: Moynihan KC, McGowan; Anderson Strathern LLP
Second Respondent & First Reclaimer: Scott KC; Balfour + Manson LLP
Third Respondent & Second Reclaimer: Brabender KC, J. Laing; Millard Law
Interested party: Crawford KC; Scottish Government Legal Directorate

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15 April 2025

Introduction

[1] The issue in this reclaiming motion (appeal) against reduction of the decision of a children's hearing, is whether the hearing acted lawfully in determining that the petitioner was not a "relevant person". A relevant person who is notified of a children's hearing, unless excused or excluded, is obliged by statute to attend it and gains certain rights in respect of such proceedings. The petitioner, A, is the biological father of M, now 15 years old and the subject of proceedings before the children's hearing. M lives with his mother B, who is a relevant person.

[2] The petitioner has been subject to an order for lifelong restriction since 2013. He completed the punishment part of this indeterminate sentence some years ago but remains in prison under it. The High Court of Justiciary imposed sentence on him for 13 offences against two women. One of those women was B. The petitioner was convicted of 9 charges including repeated acts of rape and the use of serious violence and threats against B. It is undisputed that there has been no contact between the petitioner and M since M was under a year old. The petitioner's principal objective in the proceedings is to try to persuade the hearing to allow him to make contact with M by letter. The child knows that his biological father was seeking contact with him. He also knows that his biological father hurt his mother. Neither M nor B wishes to have any contact with the petitioner.

[3] On 23 November 2023, a children's hearing determined that the petitioner was not a relevant person. It followed that the petitioner was excluded from the proceedings relative to M and was not entitled to continue to take part in the review of a compulsory supervision order he had instigated.

[4] The Children's Hearings (Scotland) Act 2011 in section 200 defines "relevant person" for the purpose of proceedings before children's hearings, but permits extension of that status to any other person specified by order made by Scottish Ministers (section 200(1)(g)). As enacted, the principal definition was a parent or guardian having parental responsibilities or parental rights. The Scottish Ministers used the section 200(1)(g) power to extend the definition so as to include all biological parents unless they have held but had removed by court order parental rights and responsibilities. As section 200(3) requires, the order was subject to affirmative procedure.

[5] The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 (SSI 2013/193), "the 2013 Order" provides:

> **"3 Meaning of 'relevant person'**
> (1) A person falling within paragraph (2) is specified for the purposes of section 200(1)(g) of the Children's Hearings (Scotland) Act 2011 (meaning of "relevant person").
> (2) A person falls within this paragraph if the person is—
> (a) a parent of the child other than—
> (i) a parent falling within paragraph (a) or (d) of section 200(1) of the Children's Hearings (Scotland) Act 2011;
> (ii) a parent who had parental responsibilities and rights (or in England and Wales or Northern Ireland, parental responsibility) in relation to the child but, by virtue of an order of court, no longer has them;
> (b) a person, having parental responsibilities for the child by virtue of article 12(2) of the Children (Northern Ireland) Order 1995."

The exclusions in article 3(2)(a)(i) relate to a parent/guardian who is already a relevant person under section 200(1) of the 2011 Act by virtue of having parental responsibilities or parental rights under Part 1 of the Children (Scotland) Act 1995 or the relative English legislation. Article 3(2)(a)(ii) excludes a parent who held parental responsibilities and rights that were removed by court order. The petitioner, who has never had parental responsibilities or rights and therefore cannot have them removed, qualifies as a biological parent.

[6] The petitioner contends that the hearing erred in excluding him as a relevant person. Meanwhile, B argues that inclusion of the petitioner as a relevant person constitutes an unlawful interference with her right to respect for her private and family life as protected by Article 8 of the European Convention on Human Rights. B, the curator *ad litem* appointed to represent M's interests in these proceedings and the Principal Reporter each resist the petition. B presented a devolution issue. Accordingly, the Lord Advocate has taken part in proceedings before the Lord Ordinary and this court as an interested party.

[7] The Lord Ordinary determined that the children's hearing was not entitled to exclude the petitioner as a relevant person. Whilst the petitioner did not enjoy any private or family life with M, statutory case management powers were capable of protecting the Article 8 rights of B and M without the necessity of depriving him of relevant person status. The hearing erred in omitting to consider the capacity of its case management powers to protect the Article 8 rights of M and B. B and the curator *ad litem* appeal against that decision to this court.

Background

[8] The imposition of an OLR means that the sentencing judge was satisfied that it was probable that:

> "… the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large"

Criminal Procedure (Scotland) Act 1995 sections 210E and 210F; *Ferguson* v *HM Advocate* 2014 SLT 431 at paras 93-98. The judge must also have concluded that the probability of

serious endangerment would continue at the time after release from prison and after any license conditions expired; *Ferguson* at paras 99-102.

[9] Having already completed his punishment part of 5 years and 219 days, the petitioner's liberty is dependent on a successful application to the Parole Board for Scotland. The petitioner's continued detention under the OLR demonstrates that the PBS has not been satisfied that it is "… no longer necessary for the protection of the public that [he] should be confined;" Prisoners and Criminal Proceedings (Scotland) Act section 2 (4) and (5); *Ferguson* at paras 96-102. The PBS will be aware of the petitioner's extensive record of serious criminal offending from 1998 onwards. It will note that he has been convicted of drug trafficking offences in 1998, 1999 (imprisonment 4 years), 2005 (6 years) and 2013. On the indictment leading to imposition of his OLR, the petitioner was also convicted of being concerned in supplying diamorphine. His record of previous convictions, also before the children's hearing, shows he has offended while on bail, driven dangerously, driven whilst disqualified, failed to comply with probation and failed to attend at court. Should he be released from prison, he will remain on licence for the remainder of his life.

[10] The court has an affidavit (sworn statement) provided by B. She explains the serious trauma that the petitioner's offending has caused her. It is said on B's behalf that the offending has left her with poor mental health affecting her capacity to parent M. The accepted grounds of referral to the children's hearing support that proposition. She is terrified of the petitioner and even more so at the prospect of coming into contact with him. B's repeated applications to the children's hearing to be excused from proceedings have been accepted on the basis that it is extremely difficult for her to attend hearings in the knowledge that the petitioner was to participate.

[11] The grounds of referral to the children's hearing disclose that M is a child in need of additional support and guidance. A report prepared by M's court-appointed safeguarder (now curator *ad litem*), reveals that M has refused opportunities to receive information about the petitioner. In the opinion of the curator, it would be detrimental to M for the petitioner to have any contact with him. Records of the children's hearing proceedings narrate that M is afraid of the petitioner and that the disclosure of any sensitive information would cause him additional distress. M has been excused from attending various children's hearings on the basis that attending had been emotionally distressing for him.

[12] The petitioner has also provided an affidavit. He explains that whilst he has not had any contact with M since he was 10 months old, he still wishes to be part of M's life and is concerned for M. The petitioner states that he only wanted to be in the hearings to make sure that his son is getting the support he needs, to try and set up some window of contact with him and to ensure he knows, "… his dad is here and cares for him". He hopes to be a part of his son's life and, "… to make sure there is a plan in place for him and that those who aren't doing this for him are held accountable".

The statutory scheme

[13] The present appeal concerns the interplay between four sets of provisions:

- the Children's Hearings (Scotland) Act 2011,
- the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 – "the 2013 Rules",
- the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 - "the 2013 Order," and
- the Children (Scotland) Act 1995.

The Children's Hearings (Scotland) Act 2011

[14] Two fundamental aspects of the welfare principle are set out in sections 25 and 27 as follows:

> **"25 Welfare of the child**
>
> (1) This section applies where by virtue of this Act a children's hearing, pre-hearing panel or court is coming to a decision about a matter relating to a child.
>
> (2) The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.
>
> **27 Views of the child**
>
> (1) This section applies where by virtue of this Act a children's hearing, pre-hearing panel or the sheriff is coming to a decision about a matter relating to a child.
>
> (2) This section does not apply where the sheriff is deciding whether to make a child protection order in relation to a child.
>
> (3) The children's hearing, pre-hearing panel or the sheriff must, so far as practicable and taking account of the age and maturity of the child—
>
> (a) give the child an opportunity to indicate whether the child wishes to express the child's views,
> (b) if the child wishes to do so, give the child an opportunity to express them, and
> (c) have regard to any views expressed by the child.
>
> (4) Without prejudice to the generality of subsection (3), a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of that subsection.
> …"

[15] Various agencies may refer the circumstances of a child at risk to the Principal Reporter who must determine whether a section 67 ground applies to the child and, if so, whether the Reporter considers it necessary for a compulsory supervision order to be made. The grounds on which the Reporter may refer a child are set out in section 67(2)(a) to (q) of the 2011 Act. They are conveniently summarised by the Supreme Court in *ABC* v *Principal*

Reporter 2020 SC (UKSC) 47 as comprising, in broad terms, three situations where the Reporter may refer a child to a children's hearing: where a child is at risk of harm from a lack of parental care or of physical or sexual abuse; where a child has committed a criminal offence; and where a child is misbehaving in some other way, such as abusing alcohol or drugs or not going to school.

[16] Once grounds of referral are accepted or established a children's hearing can make a compulsory supervision order if it is necessary to do so for the protection, guidance, treatment or control of the child (section 91(3)). A CSO may impose measures including requirements, directions and prohibitions regulating a child's place of residence, with whom they may reside and with whom they may have contact etc.

[17] Part 7 of the 2011 Act regulates attendance at a children's hearing. A relevant person has both the right (section 78(1)(c)) and the obligation (section 74) to attend and the child (section 73) must also attend any children's hearing notified to them unless excused. Where a relevant person is required to attend but fails to do so, a children's hearing may proceed in their absence (section 75). Excusal of a child is provided for in section 73(3) in three situations:

- if the grounds of referral are brought under section 67(2)(b), (c), (d) or (g);
- if attendance at the hearing or any part of it would place the child's physical, mental or moral welfare at risk;
- if on considering age and maturity the child could not understand what happens at a hearing or any part of it.

Excusal of a relevant person is permitted if it would be unreasonable to require attendance at the hearing, or part of it, or if attendance is unnecessary for the proper consideration of the matter before the hearing (section 74(3)). A relevant person may be excluded from a

children's hearing if the hearing is satisfied that their presence is preventing the hearing from obtaining the views of the child or is causing, or is likely to cause, significant distress to the child. After the exclusion has ended, the chair of the panel must explain to the relevant person what has taken place in their absence (section 76). Section 77 makes similar provision regarding a relevant person's representative.

[18] The chairing member of a children's hearing may allow a person (who is not a relevant person or another specified person) to attend the hearing if that person's attendance is necessary for a proper consideration of the matter or if, in the view of the chairing member, it is otherwise appropriate to grant permission (section 78(2)). The Scottish Children's Reporter Administration Practice Direction 3: Relevant Persons, 21 June 2013, contains advice for reporters on the operation of section 78(2) at para 9.2. The reporter is to invite:

> "… anyone who has (i) established family life and an ongoing relationship with the child, and (ii) sufficient age and maturity to participate in the hearing where:
> - the hearing is likely to consider including a contact direction about them in a CSO for the first time or to vary a contact direction about them in a CSO, or
> - the person has made clear that they want the hearing to consider their contact with the child."

That Direction would not apply to the petitioner as he does not meet the first criterion.

[19] Part 13 of the 2011 Act regulates the ongoing review of a CSO. Section 132 provides a relevant person with the right to require a review of the CSO by giving written notice to the Principal Reporter. A CSO may not be reviewed during the period of three months beginning with the day on which the order is made, continued or varied.

[20] Section 178 regulates the disclosure of information in children's hearing proceedings. Disclosure of information about the child to whom the hearing relates need not be made to a person if such disclosure would be likely to cause significant harm to the child.

[21] Section 177 provides that the Scottish Ministers may make rules about the procedure relating to children's hearings in connection with matters including notifying persons about children's hearings, the attendance of persons at children's hearings and specifying the circumstances in which persons might be excluded from children's hearings.

The Children's Hearings Scotland Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013

[22] The 2013 Rules further regulate the conduct and procedure of children's hearings. Part 5 of the Rules regulates attendance and exclusion from a children's hearing. Rule 20B requires the Reporter to take all reasonable steps to enable a person to attend a pre-hearing panel, or children's hearing, by electronic means. The person must have a right to attend under section 78 of the 2011 Act, have made a request to do so and the Reporter must be satisfied the person has a good reason for not attending physically and the person would be better able to participate by electronic means. Rule 20C provides that a pre-hearing panel may convene to consider whether a person should be permitted to attend a children's hearing by electronic means only. Rule 20D provides that the chair of the panel may exclude any person whose presence causes, or is likely to cause, significant distress to a relevant person attending a hearing. If a relevant person or their representative is excluded, the chairing member must explain to them what took place during their exclusion.

[23] Part 6 regulates the preparation for a children's hearing. Rule 22 requires that notification of the date, time and place of a hearing must be given to the child and to relevant persons. Rule 26 provides for the disclosure in advance of any children's hearing of any report, any other document or any other material information held by the Reporter to a relevant person.

[24] Part 19 regulates non-disclosure requests. Certain documents, or a part of them, may be the subject of a non-disclosure request but these do not extend to the statement of grounds. Rule 84 provides that a person may request that any document, any part of it or any information contained in it be withheld from, *inter alia,* a relevant person on the grounds that the document, a part of it, or any information held within it would be likely to cause significant harm to the child to whom the hearing relates. Such a request must specify the document, part of it or information for which non-disclosure is sought and the person in respect of whom the order is sought, giving reasons in each respect. The statement of grounds and any order or warrant to which the child is subject under the 2011 Act or the 2013 Rules may not be subject to a non-disclosure request. It must be decided by a panel of the children's hearing (Rule 85). Under Rule 86, a children's hearing must consider a non-disclosure request prior to the hearing at the beginning of the children's hearing. The panel may exclude the relevant person to whom the non-disclosure request relates during its consideration of the request (Rule 86(3)). The hearing must invite the person to return and advise of the decision on the non-disclosure request. If the request is refused the document etc must be given to the person when and how the hearing considers appropriate having regard to the best interest of the child concerned.

The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013

[25] As explained above, article 3(2)(a) extends the definition of a relevant person to all biological parents other than those from whom the court has removed parental rights or responsibilities.

[26] Since there is a challenge to the competency of article 3(2)(a) of the 2013 Order, it is necessary to consider its genesis together with any parliamentary scrutiny that it may have been subject to before being passed by affirmative procedure.

[27] The 2013 Order was developed following the Supreme Court's judgement in *Principal Reporter v K* 2011 SC (UKSC) 91. The court determined that a parent (or other person) whose family life with the child is at risk in children's hearing proceedings must be afforded a proper opportunity to take part in the decision-making process.

[28] The Scottish Minister for Children and Young People carried out a consultation on the 2013 Order between 31 October 2011 and 27 January 2012. In their Consultation Note: The Children's Hearings (Scotland) Act 2011: Various pieces of secondary legislation to support implementation of the 2011 Act, October 2011, the Scottish Ministers set out the following explanation for the requirement to widen the definition of "relevant persons":

> **"Principal Reporter v K**
>
> 1.2 During the Parliamentary passage of the 2011 Act, the Supreme Court considered the case of *Principal Reporter v K* which raised questions about the rights of unmarried fathers, holding no PRR [parental responsibilities and parental rights], to participate in children's hearings as relevant persons. The judgement of the Supreme Court was not issued until after the Act had been passed by the Scottish Parliament and amendments were lodged during Stage 3 of the parliamentary process passage to respond to the outcome of that decision
> …
>
> 1.4 In *Principal Reporter v K* the Court found that persons who have established family life with the child, with which the decision of a children's hearing may interfere, should be able to participate in the decision making process.
>
> 1.5 The Scottish Government is therefore bringing forward the *Children's Hearings (Review of Contact Directions and Definition of Relevant Persons) (Scotland) Order 2011* in response to the Supreme Court judgement. The draft order proposes to:
>
> …
>
> - amend the definition of 'relevant person' at section 200 to include all parents with the exception of those who have had their PRR removed; and

….

[29] In the Scottish Minister's Revised Policy Instructions dated 17 February 2012, the Scottish Ministers set out a summary of the responses received during the consultation process:

> "Interpretation of K case/Lady Hale reading down of 1995 Act
>
> 11. SCRA, SCCYP [the Children and Young People's Commissioner Scotland], clan childLaw think that the interpretation of Lady Hale's reading down is too broad and question why "with which the decision of a children's hearing may interfere" has not been included in the Order (and procedural rules). No alternative approaches have been suggested by these partners, nor have any particularly strong arguments been made which would persuade me that we need to change the Order.
>
> […]
>
> Definition of relevant persons
>
> 16. SCCYP made an additional point about respecting the child's right to privacy and raised concerns that we are interpreting the K judgement too broadly – they seem particularly concerned that our relevant persons approach undermines children's rights under the UNCRC. However, it seems to me that we are doing our best to strike a balance between the relevant person's ECHR rights and the child's UNCRC article 16 rights.
>
> 17. SCRA on the other hand are supportive of the policy approach we are taking with relevant persons. However, they have raised what they consider might be unintended consequences that could arise by adopting this approach.
>
> 18. They have questioned how disputed parentage will be dealt with which [*redacted*] and … I have had the opportunity to discuss. We don't think anything is needed here as we would expect the reporter to take the steps they can to identify parents and investigate but where information is not forthcoming there is not much more we can reasonably expect them to do.
>
> 19. However, SCRA have highlighted a slightly more problematic scenario where a rapist who fathered a child on his victim would be considered a relevant person and therefore receive papers. [*redacted*] and I have chatted this scenario through and we think it needs further exploration. SCRA acknowledge that this scenario would be few and far between but nonetheless I think they have a point. This person would be brought into the process biologically - I can't see that the mother (the victim) would go naming a rapist on a birth certificate for example. We think that the Hearing's place to make decisions on who is or isn't to be part of a hearing needs to be respected so we wondered if the powers to exclude would be enough to deal with

> this scenario. It would not address the father having received the papers in the first place though.
>
> 20. We explored whether it would be an option to address this by treating this father as a deemed relevant person who would have to demonstrate that family life was recent - however, this option would not have covered the circumstances arising in the K case. We need to therefore consider which is the greater need to satisfy- ensuring we don't miss parents who should genuinely qualify for relevant person status and allowing some parents to see papers but who could be excluded at a later point. I am of the view that we need those parents who genuinely qualify for relevant person status to be covered rather than attempting to legislate for the smallest of chances that one may turn out to have raped the mother of the child whose case is calling at a children's hearing."

[30] The 2013 Order was considered by the Education and Culture Committee of the Scottish Parliament on 14 May 2013. The Minister for Children and Young People stated an intention to amend "…the definition of 'relevant person' to include all parents, as long as they have not had their parental rights and responsibilities removed". The concerns raised by SCRA were not discussed during that Committee meeting. The 2013 Rules, 2013 Order and a third instrument were approved.

Children (Scotland) Act 1995

[31] Part 1 of the 1995 Act regulates, *inter alia*, the provision of parental rights and responsibilities. Section 3 provides that a mother of a child will have parental rights and responsibilities unless removed by the court. Biological fathers who were married to, or were in a civil partnership with, a child's mother either at or after the date of the child's conception also have parental rights and responsibilities unless removed by the court. Unmarried biological fathers who are registered on a child's birth certificate or are party to a registered agreement with a child's mother will also have parental rights and responsibilities unless removed by the court.

[32] Section 11 governs, *inter alia,* imposing and removing parental rights and responsibilities by the court. The court may remove parental rights and responsibilities from a person in whole or in part. Equally, the court may impose on a person parental rights and responsibilities. The court may also make an order regulating with whom a child is to live, a "residence order" (subsection 2(c)) and regulate arrangements for maintaining personal relations and direct contact between a child and a person with whom the child is not living, a "contact order" (subsection 2(d)). A person can apply for such an order despite not having and never having had parental responsibilities or rights by claiming an interest; (subsection 3(a)(i)).

The Children's Hearings Proceedings

[33] In light of the importance attached to case management powers by the Lord Ordinary in her opinion, and both the petitioner and the Lord Advocate before us, we consider it necessary to set out the procedural history before various children's hearings in some detail.

23 January 2023

[34] The first children's hearing was convened on 23 January 2023. The petitioner, B and M were in virtual attendance as permitted under the case management powers in the 2013 Rules (20B and 20C). As the Lord Ordinary explained (at paragraph [20]) the child's social worker reported that the plan had been that M and B were to leave the Microsoft Teams link when the petitioner was in the hearing. The plan failed and the petitioner was visible on the screen when B logged on causing her considerable distress. The Lord Ordinary also

explained that whilst remote attendance reduced much anxiety, the petitioner's ability to call for reviews continued to alarm B and M knew that his mother was terrified of the petitioner.

[35] Grounds of referral were accepted relating to lack of parental care (2011 Act section 67(2)(a)) and the child's conduct having or being likely to have a serious adverse effect on the health, safety or development of himself or another person (section 67(2)(m)). Supporting facts included B's poor health compromising her ability to provide consistent care for M who had not attended school since February 2022 with adverse effects on his social and educational development. The hearing made a CSO to provide additional social work support to M and B for the protection and guidance of M and to monitor his situation. The hearing included certain measures under section 83 of the 2011 Act:

> (i) a requirement for M to remain living with B because that is where M wanted to live and the panel agreed he needed to be there;
>
> (ii) a direction for M to have no contact with the petitioner, because M had had no contact with his father for a significant period of time and did not wish contact with him; and
>
> (iii) a prohibition of disclosure of M's place of residence to the petitioner.

The panel reasoned:

> "… that the disclosure of M's location would likely cause significant harm and distress to M. The panel also felt that it was in M's best interest for the address not to be disclosed to A as this would serve no benefit to M at this point in his life and there is a no contact order in place."

[36] The children's hearing accepted a non-disclosure request made under Rule 84, reasoning that;

> "M doesn't have a relationship with his father and this has been the case for many years. M is afraid of his father, therefore it is important that his personal and sensitive information is withheld from him as this would cause him emotional distress if shared."

17 April 2023 - 23 November 2023

[37] Unless continued, the CSO had effect until 23 January 2024 (2011 Act section 83(7)). There was no necessity for any further hearing before then. Focus then shifted from the welfare of M to the concerns of the petitioner. By letter of 17 April 2023 his solicitors informed the Reporter of a request for review of the CSO at the earliest opportunity. As a relevant person he had an unqualified right to make such a request under the Children's Hearings (Scotland) Act 2011, section 132(3) and could do so three months after any decision to make, continue or vary a CSO (section 132(4)).

20 June 2023

[38] A children's hearing convened on 20 June 2023. The Lord Ordinary noted (para [10]), that the child's social worker had made a non-disclosure request for no more information concerning M or B other than was legally required to be distributed. The social worker founded on the crimes the petitioner committed against B having a massive impact on her life, she remained terrified of him and her trauma is such that she cannot live a normal life. This impacts on M and the social worker requested that information on Form 4 should be withheld.

[39] Whilst B attended on 20 June 2023, and the record suggests that M also attended in person, according to the Lord Ordinary M did not attend (opinion para [11]). The petitioner attended remotely as transport from prison had been cancelled at short notice. We note that under section 73(3)(b) of the 2011 Act, the attendance of the child at the hearing, or part of it, may be excused if it would place his physical, mental or moral welfare at risk. The hearing was deferred until 30 August 2023 because, on the petitioner's account, "one of the prison

officers knew" B, and he "did not feel comfortable with her listening in on the hearing about [M]".

16 August 2023

[40] At a pre-panel hearing on 16 August 2023, consideration was given to whether M and B ought to be excused from the deferred children's hearing. M could only be excused if it would place his physical, mental or moral welfare at risk (section 73(3)(b) of the 2011 Act). Under section 74(3) of the 2011 Act, B could be excused from attending if it would be unreasonable to require her attendance at the hearing or part of it, or where her attendance was unnecessary for the proper consideration of the matter before the hearing. The Lord Ordinary noted (para [12]) that the hearing reasoned that B would find it emotionally distressing, she could be represented by M's social worker and the criteria for excusal were met on account of emotional distress. It can be inferred that the hearing considered the otherwise mandatory attendance unreasonable. M was excused as an advocacy worker confirmed that he had requested not to attend as he found any attendance emotionally distressing. He had displayed emotional behaviour and was hitting his head after the last hearing. The advocacy worker would convey M's views to the hearing. The panel concluded that emotional distress met the criteria for excusal.

An accidental disclosure of sensitive information

[41] It is apparent from the petitioner's grounds of appeal to the sheriff following the hearing of 30 August 2023 that, in advance of it, the petitioner had, "already received papers which included at least some of the information covered by the non-disclosure request (in particular, the child's GP practice.)". The Lord Ordinary narrates (para [21]) that the

petitioner had received a social work report that should not have been disclosed to him containing details of M's school and other personal information about M and B. His solicitor's notes from the children's hearing on 23 November 2023, lodged by the petitioner in these proceedings, disclose that the petitioner stated he had got a "full extensive updated social work report concerning his son which he didn't ask for and he has done nothing with since receiving it other than keeping it safe." As the Lord Ordinary also noted (para [21]), when the safeguarder asked the petitioner about this after the hearing of 30 August, he said he would not be returning it. The petitioner told the safeguarder that he knew that M liked animals, a detail outlined in the social work report.

30 August 2023

[42] The deferred children's hearing convened on 30 August 2023. Neither M nor his mother B attended, as authorised by the panel on 16 August. The petitioner and his solicitor were excluded from part of the hearing to allow the views of social workers to be heard. A further non-disclosure request was accepted by the panel under Rule 84 due to "serious concerns from Social Work, that they believed there may be an ulterior motive [to the petitioner] seeking information about M and B, and their whereabouts". Whilst the hearing informed the petitioner of the decision to continue the CSO, they did not give him reasons for the decision.

13 October 2023 appeal before the sheriff

[43] The petitioner appealed to the sheriff on the basis that there had been procedural irregularities during the deferred children's hearing, contending: they had not formally considered the exclusion of the petitioner and his solicitor, gave no reasons for his excusal

and there was no justification for excluding his solicitor. The Reporter conceded the appeal. The sheriff recorded in a note to his interlocutor he had been reluctant to grant the appeal when he saw no prospect of a different outcome being achieved but acceded to parties' joint motion given the extensive breaches of the rules. He remitted the matter back to the children's hearing.

[44] In advance of the hearing fixed for 23 November 2023, B's solicitors wrote to the panel requesting that the petitioner be excluded from the proceedings as he was not a relevant person. The Lord Ordinary set out the terms of the letter in her opinion at paragraph [15]. In essence, they acknowledged that on a simple reading of the provision the petitioner was a relevant person, but contended that his status as such was incompatible with B's Article 8 ECHR rights; that the children's hearing, as a public authority, could not act in a way which was incompatible with Convention rights; to do so would be to act unlawfully under the Human Rights Act 1998 section 6(1). The appropriate course of action was to "read down" the statutory definition of "relevant person" and remove that status and the consequential rights accruing to the petitioner. If the hearing was not prepared to do so, then it should refer a devolution issue to this court. B posed questions, in a draft reference: whether article 3(2)(a) of the 2013 Order violated family life under Article 8; was outside devolved competence; and should be read down by inserting provision to exclude a parent who had no established family life with the child and whose involvement as a relevant person would be incompatible with Convention rights of the child or other relevant person.

The hearing of 23 November 2023

[45] The children's hearing exercised its case management powers to excuse M from attendance on the basis that, "… it would be highly likely that [the] proceedings would be

detrimental to M's best interests and would likely put his welfare at risk". They heard his views through his advocacy worker, his safeguarder, his lawyer and a social worker, to protect him from trauma. They exercised case management powers to proceed in the absence of B. The children's hearing also accepted two further non-disclosure requests under Rule 84 made by M and B. By a majority, the hearing determined that the petitioner was not a relevant person and was not entitled to participate further in the proceedings. Although M's biological father, he had no parental rights and responsibilities and had no family life with M. M had previously been asked whether he wanted to know anything about A and he had declined. The petitioner's continued attendance was impacting on B and M actively participating in the hearing.

[46] As set out in the record of the hearing, the reasons given for the various decisions were:

> "1. *To determine that A is not a Relevant Person for M (majority decision), and so not entitled to participate further in the children's hearing.*
>
> As the Hearing progressed, (after the two non-disclosure requests had been accepted by the Panel) the Panel were required to make a decision relating to Mr A's relevant person status. This had been requested by M's mum's solicitor as their view is that Mr A continuing to be regarded as a relevant person potentially conflicts with the family's rights of a private life as afforded to them under the ECHR (a Devolution Issue).
>
> The Panel, by a majority, felt that Mr A should not be considered a relevant person on the following basis: Whilst being M's biological father, he has no parental rights and responsibilities, he has no family life with M, he has never had any involvement since M was an infant, and that M has been previously asked if he wanted to know anything about his father and had declined, and that his continued attendance is impacting on B and M, actively participating in M's hearing.
>
> This meant that Mr A was excluded from the remainder of the hearing. The minority Panel Member view was that this appeared to be legally complex and felt that they wanted to deal with relevant person status in terms of the current act, and felt that this needed to be tested in the Inner House of the Court of Session.

2. To excuse the child from attending

M was previously excused for earlier panels at a pre-hearing panel, but there was a bit of confusion as to whether this excusal continued to today's hearing. To remove the confusion, the Panel excused M from attending his hearing today on the basis that it would be highly likely that today's proceedings would be detrimental to M's best interests and would likely put his welfare at risk. To protect M from trauma, his views were relayed to the panel through his advocacy worker, his safeguarder, his mum's legal rep and social work.

3. To proceed in the absence of B, mother

It is clear that it continues to be extremely difficult for B to attend M's hearings knowing that Mr A is aware of them, has been invited to them, and will exercise his rights to attend as a relevant person. The Panel heard that previous hearings had been extremely traumatic for B, however the Panel felt that a decision needed to be made for M as this was in his best interests and proceeded in her absence. B's views were relayed to us through her legal representative as well as through social work updates.

4. To accept a non-disclosure request

The Panel had two-non disclosure requests, one from M's mum's solicitor to not disclose to Mr A M's address, his mum's address, his school or his GP. This was extended during the hearing to all paperwork going forward. The second request was from the Reporter relating to redacting certain details from the reports being sent to M.

As far as the one from B's solicitor is concerned, the panel accepted this on the basis that:

Whilst being M's named biological father, he has no parental rights and responsibilities, he has no family life with M, he has not had any involvement with M since he was an infant, and that M has been previously asked if he wanted to know anything about his father and had declined. This also impacts B and M's participation. The Panel felt that Mr A knowing this information would continue to be detrimental and traumatic to B and by extension to M also. Whilst the legal test relates to significant harm to M, this by extension relates to his mum as the person responsible for his day to day care, placing risk of significant harm to both.

5. To accept a non-disclosure request

…

As far as the non-disclosure request from the reporter is concerned the panel accepted this on the basis that M should be protected from full knowledge of his parents' history, all the details written about his life, this could be extremely distressing to know about what happened to him personally but also what has happened to his mum. Withholding these details meets the [need?] to minimise harm to M.

6. To request panel member continuity

Due to the complex nature of M's case, and the fact that most of the allotted time spent today was on legal and procedural issues, care needs to be [taken] to ensure that M's needs are paramount during his hearings.

With this in mind, and to minimise procedural issues dominating the next hearing, continuity would be beneficial.

7. To continue and vary the compulsory supervision order dated 30/08/2023. […] is the implementation authority and the order has effect until and including 22/11/2024

M continues to need the care and protection of his compulsory supervision order. This view was also supported by M's safeguarder. The grounds are serious and remain relevant. The CSO is required to support the progress M is making. Although it is early days, and the pace of change needs to be at the family's pace, things are starting to look more positive with increased engagement to the support being offered. The order will also support future forward plans for M. The Panel and the professionals involved felt that there was a risk of things stalling should this be on a voluntary basis.

8. The child must reside with his mother, B

It is clear, from social work, his advocacy worker, and his safeguarder that M is best placed in the care of his mother. He would really struggle being placed elsewhere. Whilst there are still issues, and progress is perhaps slow, there is a trend of improvement and this will be built on with M being in the care of his mother. It was noted that there is a clear bond, and close loving relationship between B and M.

9. The child is to have no contact with Mr A

Whilst being M's named biological father, he has no parental rights and responsibilities, he has no family life with M, Mr A has had no contact with him since he was an infant, and that M has been previously asked if he wanted to know anything about his father and had declined. It is clear that contact (direct or indirect) with his father will be of no benefit to M whatsoever, and would not be in his best

> interests. Mr A's relevant person status was removed earlier in the Hearing, and this measure will protect M from any future attempts by Mr A to contact M."

[47] It is the first decision of the children's hearing set out above that the petitioner challenges by judicial review. In doing so, he has provided notes kept by his solicitor at the hearing. It is apparent that the petitioner stated that B has serious mental health issues and lied throughout his trial causing him to be convicted and sentenced. He wanted to know about M's progress and proposed that a successful appeal against his conviction would mean he lost out on his child's life. The petitioner said he had been given a full extensive updated social work report concerning his son he did not ask for and had only kept it safe since receiving it. He wanted to scrutinise the appropriate people for not assisting him and wanted to make sure M was following the correct path. The Advocacy worker for M confirmed that M did not want a relationship with his father and that whilst social work had offered M more information on his father, he did not want this at the moment. Social work observed that the petitioner and M had no relationship and did not consider the petitioner now to have any appropriate link to M.

The Lord Ordinary's Decision

[48] The Lord Ordinary did not consider there was an *ab ante* challenge of the kind in *Christian Institute* v *Lord Advocate* 2016 SC (UKSC) 29 and so did not need to consider how the provisions operates in all, or almost all cases. As to the challenge to the competency of article 3(2)(a) of the 2013 Order, a legislator is, in principle, entitled to take a bright line approach; *Animal Defenders International* v *United Kingdom* (2013) 57 EHRR 21. With reference to *R (P)* v *Justice Secretary* [2020] AC 185, a provision conferring no discretion but imposing a duty to take action in every case will not always fail the test of "foreseeability" as

a necessary ingredient of law simply because the categories to which it applies are too broad or insufficiently filtered. It was not necessarily disproportionate to legislate by reference to pre-defined categories even if there could be cases, viewed individually, where the line drawn might appear disproportionate. The proportionality of a bright line approach was to be determined against the legislative choices underlying that approach. Article 3(2)(a) is clear and appears to confer no discretion.

[49] The review of case-law examined in *R (P)* on the importance of underlying legislative choices and the quality of Parliamentary and judicial review of the necessity of a measure having particular importance to the relevant margin of appreciation was noted (para [89]). There was no justification or explanatory material proffered for a bright line approach weakening the Lord Advocate's proposal that the Lord Ordinary should view article 3(2)(a) as a bright line measure. As Counsel for the Lord Advocate had identified, in some cases preserving Convention compatibility would require public authorities to mitigate the consequences of the enlarged scope of relevant person status by using case management powers in the 2011 Act and the 2013 Rules (opinion at para [90]). It demonstrated that simply applying the criteria in article 3(2)(a) will not necessarily be sufficient to avoid incompatibility with the Convention rights of others involved in a children's hearing. (We note that the further information at paragraphs [28] to [30] above appears not to have been made available at first instance.)

[50] Although the inclusion of parents who have no established family life with a child increased the risk of a disproportionate interference with the Article 8 rights of a referred child and his other parent to privacy and maintenance of confidentiality of personal information (para [130]), "[i]t was not necessary for the children's hearing to read down or ignore (article 3(2)(a)), and its decision was unlawful (para [142])."

[51] Article 3(2)(a) was capable of being operated in a Convention compliant manner because of the case management powers available to the children's hearing (para [131]). There was ample provision in the 2011 Act and in the 2013 Rules for the exclusion of the petitioner where that was necessary to allow M or B to provide views to the hearing, or to prevent distress. He need not be in the same physical location as M and B. Whilst the hearing could also excuse M and B, little weight was attached to this consideration given the undesirability of excluding a child on whose welfare the hearing is supposed to place primary focus. The absence of the child's main carer was also undesirable. Whilst decisions on how to exercise case management powers would need to be taken before each hearing, such uncertainty and anxiety as this might cause did not mean that the system could not operate compatibly with the Convention rights of M and B (para [132]). Section 178 gave the children's hearing extensive power to refrain from disclosing material if it would be likely to cause significant harm to the child and the interests of the child would take precedence over that of a parent such as the petitioner, particularly where he did not have an established family life with the child (para [133]).

[52] There were potentially unpalatable consequences of a person such as A acquiring procedural rights. These included: requiring procedure in the sheriff court concerning disputed grounds; the right to appeal to the sheriff court; and, especially, the right to require a review three months after a children's hearing makes, continues or varies an order, even where there is no real prospect of the review succeeding. Accordingly state intervention in the life of the child and other relevant person could occur which was of no benefit to the child. However, the potential arose not from article 3(2)(a) but from the provisions of the 2011 Act (para [135]).

[53] Where the Convention rights of M and B could be adequately protected by a sensible operation of the statutory scheme as a whole, it was not necessary to read down the offending provisions; *ABC* v *Principal Reporter*. The reading down proposed would place a duty on the reporter to exclude an individual. Such a function properly belonged to someone acting in a judicial capacity (paras [137] and [138]). The children's hearing erred on 23 November 2023 in failing to consider how to exercise its extensive case management powers to avoid the petitioner's attendance having an adverse impact on the participation of M and B. In doing so, it erred in law at common law (para [140]).

Submissions

B, mother

[54] The Lord Ordinary had erred in her determination that the case management powers available to the children's hearing were sufficient to operate the proceedings in a Convention compliant manner. Article 3(2)(a) of the 2013 Order, or at least its operation in this case, was incompatible with the Article 8 Convention rights of B and M together with Articles 3 and 16 of the United Nations Convention on the Rights of the Child. Referral to a children's hearing was state interference with B and M's right to respect for a private and family life. Such interference pursued a legitimate aim: the protection of the welfare of a child. The question was, however, whether it was necessary and justifiable for a father to be introduced to the system of state intervention where he had no right or interest to be so introduced.

[55] The Lord Ordinary had erred in failing to take into account the irrationality of the 2013 Order. A parent with parental rights and responsibilities could have their status as a relevant person removed by a successful application under section 11 of the 1995 Act. That

was a fundamental protection built into the statutory scheme. However, a person who had never had such parental rights and responsibilities but was simply entitled to relevant person status by virtue of parenthood, could not have their relevant person status removed. The Order under scrutiny (and the statutory scheme generally) provided no mechanism to protect against fathers who had never held parental rights and responsibilities who posed a risk to the welfare of a child. Such a provision was wholly irrational. The effect of the 2013 Order was to admit to a children's hearing persons who had no right or interest to be there, and whose presence was adverse to the rights of the child and of other relevant persons.

[56] A parent would be rightly admitted to a children's hearing as a relevant person where he has a right to family life with which the hearing may interfere; *Principal Reporter* v *K.* Genetic parenthood did not, of itself, give rise to family "life". Mere biology was not enough; *Principal Reporter* v *K* at para 36. The Lord Ordinary correctly identified that the petitioner had no private or family life with respect to M. The petitioner had no interest to protect and no personal justification for participating in a children's hearing.

[57] Conversely, B and M's Article 8 rights to respect for family and private life were engaged. Referral to the children's hearing was a significant compulsory intervention in family life. The intervention involved the provision and discussion of confidential information about their family and private life. It included details of M and B's health together with M's education, behaviour and other personal matters. That information was protected by Article 8 of the Convention; *Christian Institute* paras 75 and 76. The participation of the petitioner in such private and confidential proceedings was incompatible with B and M's Article 8 Convention rights. The petitioner's participation in children's hearing proceedings was a disproportionate interference with B and M's Article 8 Convention rights. Such interference was not justified by the pursuit of a legitimate aim.

Any aim sought to be achieved by including the petitioner as a relevant person was illegitimate and irrational.

[58] The Lord Ordinary erred in determining that any interference with B and M's Article 8 rights could be addressed by the case management procedures available to a children's hearing. The potential harm of introducing a person such as the petitioner to the proceedings was obvious. A vulnerable child and a vulnerable parent were liable to be constantly on edge. The potential for re-traumatisation of B was exacerbated by uncertainty and loss of control. Those potential consequences would defeat the object of the hearing. Whilst B and M could be excused from attending a hearing, it was mandatory for each to attend a children's hearing without such excusal. The case management powers were inadequate, wholly discretionary and injected a great deal of uncertainty into the proceedings. Whilst there could be cases where the case management powers could resolve Convention incompatibility, this was not such a case. The petitioner was a complete stranger to M. The commencement of children's hearing proceedings was the sole reason for the sudden injection of the petitioner into M's life. The violence and trauma suffered by B was extreme. The petitioner was the cause of that violence and trauma. Case management powers could not overcome the grave distress caused by the petitioner's involvement in the children's hearing process.

[59] A relevant person possessed "irreducible minimum" rights which could not be fettered or removed by case management powers. The petitioner was entitled to request a review of a CSO made by a children's hearing every three months. The petitioner had done so, at the earliest possible opportunity.

[60] The control exercised by a relevant person was not confined to the exercise of the "irreducible minimum" rights. The inclusion of the petitioner had the potential to turn

every hearing into an argument about procedure and a relevant person's rights rather than addressing the child's welfare. A myriad of procedure would require to be followed every time a hearing is to be convened. Every panel on each occasion could be composed of different members as they had been in this case to date. There had been no continuity of decision-making and it may not occur in future. The children's hearing system could make errors such as the erroneous disclosure to the petitioner of sensitive information about M and his mother in advance of the hearing of August 2023. Decisions about exclusion and excusal had to be made in advance of each children's hearing. A relevant person could not be excluded prospectively, nor could an exclusion order subsist into future hearings. The potential use of all of these disruptive and harmful procedural interruptions by the petitioner had become a reality between January 2023 and November 2023.

[61] The Lord Ordinary had erred in determining that the "irreducible minimum" rights flowed only from the 2011 Act. It was the 2013 Order that gave the petitioner access to them. Absent the 2013 Order, the statutory scheme could operate in a Convention compliant manner because there would not be a category of relevant person whose status was unchallengeable.

[62] Accordingly, the decision of the children's hearing to remove the petitioner's status as a relevant person was both well founded and lawful. The hearing had an obligation to act compatibly with the Convention; Human Rights Act 1998, section 6(1). There was no requirement on the panel to issue a "judgment" in the same manner as a court or tribunal might. It was sufficient to read the panel's reasons in the context of the issues and documents before them; *JM* v *Taylor* 2015 SC 71. That context included the history of the case (including the convictions for extremely serious offending against B), M's solicitors' letter, the views of the reporter and the safeguarder and the discussion at the hearing.

Whilst the CSO had been of considerable benefit to M, the curator *ad litem* had given serious consideration as to whether it should be terminated because of the petitioner's participation in the proceedings and the harm caused thereby. Such termination would mean the removal of support that was proving beneficial for M together with the withdrawal of certain services. The decision of the children's hearing fell squarely within the ambit of section 6(1) of the 1998 Act. It followed that to act compatibly with the Convention, the children's hearing was required to remove the petitioner's status as a relevant person. The approach of the children's hearing was entirely consistent with the statutory scheme as a whole; *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557.

[63] Further, the 2013 Order was beyond the legislative competence of the Scottish Parliament. It was a bright line measure interfering with the Convention rights of children and relevant persons; *R(P) v Justice Secretary*. Such a measure required to be necessary, proportionate and in pursuance of a legitimate aim. The measure adopted by the 2013 Order did not satisfy these requirements. It went well beyond the guidance given by the Supreme Court in *Principal Reporter* v *K* by materially extending the scope of who could be a relevant person on the basis of "mere biology". Its objectives and justification are unknown. Whilst the Lord Ordinary had given speculative reasons why the legislature may have wished for biological fathers not captured by section 200 of the 2011 Act, to have a say in children's hearing proceedings, section 78(2) of the 2011 Act provided such a mechanism. It did so without the blanket conferral of relevant person status on fathers such as the petitioner; *ABC* v *Principal Reporter* at paras [29] and [41]. The 2013 Order went entirely against the grain of the statutory scheme as a whole. The children's hearing system was designed to ensure the welfare of the child and not to litigate parental disputes. The 2013 Order did not engender public confidence in the children's hearing system.

[64] There were many ways the petitioner could participate in the proceedings without conferral of full relevant person status. A determination could be made by the Reporter to allow the petitioner access to certain hearings in part or in full; *Practice Direction 33: Participation Rights and Legislative Changes in July 2021; 23 July 2021*, Scottish Children's Reporter Administration. A limited application to the sheriff under section 11 of the 1995 Act could be made; *Principal Reporter* v *K* at para 26. The court could follow the system in England whereby a parent without parental responsibility is given notice of the proceedings unless an order is granted to the contrary; *In re X (A Child) (Care Proceedings: Notice to Father without Parental Responsibility)* [2017] 4 WLR 110.

[65] The Scottish Government, having passed subordinate legislation materially interfering with Convention rights in a manner that was not necessary, proportionate or justified had acted outwith legislative competence; Scotland Act 1998, section 54(2). The 2013 Order must either be "read down" in accordance with section 3(1) of the Human Rights Act 1998 or a declaration made that the 2013 Order was "not law;" Scotland Act 1998, section 29(1).

Curator Ad Litem

[66] Senior Counsel did not propose a declaration of incompatibility. Where the 2013 Order could not be operated in a manner compliant with M's Convention rights, it must be read down or ignored. Such a reading down should exclude a parent who did not have parental rights and responsibilities and would be unlikely to obtain them by virtue of an order of the court. This would sustain the rationale of ensuring that the majority of parents qualified as relevant persons whilst maintaining the qualitative assessment inherent in an

order of court depriving a person of parental rights and responsibilities. In the alternative, the 2013 Order should be ignored.

[67] The Lord Ordinary had erred in failing to give primary consideration to M's welfare in her decision as required under Article 3 of UNCRC together with the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, legislation in force at the time of her decision.

The Principal Reporter

[68] The Principal Reporter supported the reclaiming motion. The Lord Ordinary was correct to find that the petitioner did not enjoy private or family life with M protected by Article 8. Conversely, the petitioner's involvement in the proceedings plainly infringed the Article 8 rights of M and B. That being so, article 3(2)(a) of the 2013 Order was incompatible with Convention rights as applied to M and B. The Lord Ordinary erred in determining that such incompatibility could be allayed by the case management provisions available. There were "irreducible minimum" rights afforded to a person in the petitioner's position that could not be resolved by use of case management powers. The petitioner had exercised some of his irreducible rights already. None of that procedure was for the benefit or the welfare of M. The practical effect of the procedure to date was that no person was effectively participating in the children's hearing process. The hearing itself had become an empty vessel, albeit that the safeguarder had ensured compliance with the CSO.

[69] There was no suggestion that the 2013 Order did not work in the majority of cases. On the bright line test this was simply a "hard case"; *R(P)* v *Justice Secretary*. It followed that the present case was not one where a declaration of incompatibility ought to follow.

[70] That did not mean, however, that those children falling within the "hard case" category should be left behind. The children's hearing had provided the appropriate remedy. It was entitled to deny the petitioner relevant person status. It was obliged to act in a way that was compatible with Convention rights: Human Rights Act 1998, section 6(1). If subordinate legislation was incompatible with a Convention right of even a limited number of persons, the children's hearing was duty bound to disapply it when determining a case involving the rights of any of those persons: *R (W)* v *Secretary of State for the Home Department* [2020] 1 WLR 4420; *RR* v *Work and Pensions Secretary* [2019] 1 WLR 6430.

The Petitioner

[71] The Lord Ordinary was correct in her determination that the petitioner's attendance could be controlled by the children's hearing's ample case management powers. The statutory scheme as a whole could operate in a manner compliant with B's Convention rights. The children's hearing erred in law by removing the petitioner's status as a relevant person. The hearing had misunderstood the law it had to apply and had acted improperly; *SS* v *Secretary of State for the Home Department* 2010 CSIH 72; *Council of Civil Service Unions* v *Minister for the Civil Service* 1985 AC 374.

[72] Public authorities, such as the children's hearing, were required to be Convention compliant in their acts or omissions. Conferral of relevant person status upon the petitioner was neither an act nor an omission by a public authority but was a statutory right conferred by the legislature. Such conferral did not fall within the ambit of section 6 of the Human Rights Act 1998. It followed that the children's hearing misapplied section 6(1).

[73] In this judicial review, the court was being invited to exercise its equitable jurisdiction and determine that the decision of the children's hearing was erroneous in law

et separatim unlawful at common law. In doing so, the court must remain within the four corners of the decision made by the children's hearing. The reasons for the decision given by the children's hearing were limited only to the impact of the petitioner's attendance upon the ability of B and M effectively to participate in the hearing. Nowhere did they suggest that anything further influenced their reasoning. Whilst it was accepted that the panel would have had knowledge of the wider context of the proceedings, including what had gone before in earlier hearings in which case management powers had been exercised, the only reason given for arriving at the decision was concern for the ability of B and M to participate in the hearing. The reclaimers were wrong to introduce additional factors not given as reasons for the decision. The question of the petitioner's relevant person status was one of *locus standi* and was not qualified by any welfare test; *MT* v *Gerry* 2015 SC 359 a decision not superseded by the incorporation of the UNCRC into Scots law.

[74] The Lord Ordinary had identified the "irreducible minimum" rights of a relevant person. Those were to participate at a hearing on an application to establish grounds of referral, to seek a review of a CSO no earlier than 3 months from the date of the order; and to seek a review of the grounds of referral in limited circumstances. There was nothing irresponsible about the petitioner's use of his rights, he sought the review in good faith and was not malicious. The errors that elongated subsequent procedure were not of his making. There was no basis on the material before the Lord Ordinary to suggest the petitioner would use or misuse his power to seek review. These irreducible minimum rights could be managed by the children's hearing compatibly with B's Convention rights. The children's hearing could exclude the petitioner and his representative from a hearing and a pre-hearing panel for as long as necessary; exclude the petitioner from attending in person; and split a hearing so that B, M and the petitioner could attend the hearing at different times. In the

event that any appeal to a sheriff by the petitioner was frivolous or vexatious, the sheriff could make an order that no further appeal be brought within 12 months without leave. The power to exclude a relevant person from proceedings under section 76 of the 2011 Act could be applied prospectively. There was no reason for why an order under section 76 could not apply to all hearings in proceedings.

[75] The removal of the petitioner's status as a relevant person was procedurally unfair and thus unlawful at common law. A CSO was made on 23 January 2023 prohibiting M having any contact with the petitioner. At the CSO review hearing on 23 November 2023, the panel removed the petitioner's status as a relevant person. The decision to refuse the petitioner's application for "letter-box" contact was made whilst he was excluded from the hearing. In consequence, he was unable to participate in a hearing that determined, and refused, any contact with his son. That was procedurally improper and unlawful at common law; *R (Osborn)* v *Parole Board* 2014 AC 1115. A's application for contact with M required an oral hearing. Whilst there was a hearing, the petitioner was excluded from participating. One could infer that any representations made on behalf of B were vociferous. It was elementary that where only one party, and not the other, is entitled to address the decision maker the proceedings are unfair; *Kanda* v *Government of the Federation of Malaya* [1962] AC 322. Excluding a father from proceedings was contrary to natural justice. The decision of the children's hearing had material consequences. Any application by the petitioner to have contact with M under Part 1 of the 1995 Act would be "inappropriate and in that sense incompetent" because of the panel's decision to remove relevant person status from him: *P* v *P* 2000 SLT 781. There was no other remedy by which the petitioner could ventilate a claim for contact. In any event, had the petitioner raised proceedings in the

Sheriff Court he would likely have been criticised for doing so. The children's hearing was the appropriate forum for the petitioner to obtain some degree of contact with his son.

[76] The *ab ante* devolution issue raised by B to the 2013 Order was unjustifiable. The 2013 Order did not give rise to an unjustified interference in most or in all cases; *Christian Institute*; *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505.

[77] Reading down of, and the insertion of words and phrases into, the 2013 Order was not required and would exceed the interpretive rule in section 3 of the Human Rights Act 1998. Parliament was entitled to bestow statutory rights on parents who do not have parental rights and responsibilities. That legislative choice arising out of a democratic parliamentary process was to be given considerable weight. The reading down proposed by B would constitute amendment, not interpretation of the Order on the very issue before the draftsperson. It was the clear intention of Parliament to widen the category of "relevant person" to include "all parents". A delicate balance of rights was struck by the legislature with which the court should be slow to interfere; *R (Wright)* v *Secretary of State for Health* [2009] 1 AC 739. The effect of reading down the provision would be to exclude fathers without parental rights and responsibilities and would require the creation of a substantial body of procedure to support it, a forum to determine the issue and an appeal process. The reading down would create discrimination against fathers. That was the opposite of Parliament's intention when it passed the 2013 Order. It was a legitimate aim for Parliament to facilitate the participation of parents without parental rights and responsibilities in children's hearing proceedings.

[78] In any event, the proposed "reading down" was entirely unworkable. The assessment of whether a person ought to have relevant person status removed would require a fair procedure to resolve disputed facts. That procedure ought not to be through

the children's hearing. It is a forum for determining the child's welfare, not one for the re-litigation of parental grievances. Such a procedure would be complex, contentious and out of step with the benefits and purpose of the children's hearing system.

[79] It was not necessary for the petitioner to enjoy a family life with M for him to be bestowed relevant person status. That was the stated intention of Parliament. The petitioner's status as a relevant person was a right, whether or not it fell within the ambit of rights protected by the Convention.

[80] Nevertheless, the petitioner did have Article 8 Convention rights that the court was bound to recognise and protect. The petitioner's relationship with his son and his continued commitment to his welfare constituted family life; *Principal Reporter* v *K* at paras 36-38. The threshold for engaging Article 8 was low. The refusal to allow the petitioner to send a letter or card to his son, in the whole circumstances, engaged Article 8. It could not be said that the petitioner did not know of, or care about, M; *C* v *XYZ County Council* [2008] Fam 54 Even if the threshold of family life was not established, the petitioner's strong desire to participate in his son's life fell within private life; *Lazoriva* v *Ukraine* 6878/14 [2018] ECHR 328. The decision to exclude the petitioner from children's hearing proceedings was a disproportionate interference with his Article 8 Convention rights. The removal of relevant person status went further than necessary to address the mischief said to arise. That mischief was in the petitioner's attendance.

[81] The proposed "reading down" created unlawful discrimination between mothers and fathers. Any qualification to article 3(2)(a) of the 2013 Order would leave a mother's status as a relevant person intact under section 200(1)(a) of the 2011 Act but would restrict the rights of unmarried fathers. That was precisely the discrimination removed by the Supreme Court in *Principal Reporter* v *K*

The Lord Advocate

[82] The Lord Ordinary was correct to find that article 3(2)(a) of the 2013 Order was capable of being applied in a Convention compliant manner. The case management powers available to children's hearings ensured Convention compliance. If the view was taken that the exceptional circumstances of the present case were such that case management powers were not sufficient to avoid an unjustified interference with the Convention rights of others, the children's hearing was correct to disapply article 3(2)(a) of the 2013 Order.

[83] The introduction of the 2013 Order was a legitimate policy decision on the part of the Scottish Ministers. The automatic conferral of relevant person status ensured that Article 8 Convention rights of all parents would not be unjustifiably interfered with. The conferral of automatic relevant person status was, deliberately, broader than that in *Principal Reporter* v *K* so as not to close off potential positive relationships. The 2013 Order was Convention compatible in all or almost all cases; *Christian Institute; Abortion Services*. That a bright line had been drawn by the legislation was not, of itself, a disproportionate interference with Convention rights. The task of the court was to assess the proportionality of the categorisation and not its impact on individual cases; *R (P)* v *Justice Secretary*.

[84] The case management powers available to the children's hearing ensured that the 2013 Order could operate in a Convention compliant manner. A relevant person could be excluded from a hearing for as long as necessary. There was no reason why such exclusion could not be applied prospectively and continued across multiple hearings. The statutory scheme provided for non-disclosure orders for documents and information likely to cause the child or other significant harm. The case management powers could be applied in a practical and sensible manner in order to ensure compatibility with Convention rights; *ABC*

v *Principal Reporter*. There was no requirement for the 2013 Order to be read down or declared incompatible.

[85] In the event that the 2013 Order was declared incompatible with Convention rights and therefore outside the devolved competence of the Scottish Government, an order under section 102 of the Scotland Act 1998 ought to be made to allow the legislature time to address the incompatibility.

Decision

Article 8 rights

[86] Article 8 states:

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

[87] M is a child of 15 living with his mother B and they plainly have family life together. B's mental health and general functioning has suffered as a result of what the petitioner did to her. Her condition has already impacted on her ability to parent and care for her son M whose manifest difficulties could result in harm to himself or others. This has led to compulsory state involvement. Social workers have investigated the circumstances of their family and home life and have acquired medical and other personal information about them and reported on it. M and B are subject to proceedings before the children's hearing. It made a CSO. A number of separate hearings have examined the circumstances of the family. Social work reports are available to and considered by the members of the children's

hearing. They could also be available to the petitioner as a relevant person in those proceedings. Any attendance at a children's hearing relating to B allows the petitioner access to information about B and M that he would not otherwise have. All of this is an interference with both the family and private life of M and B, albeit for legitimate welfare reasons. The petitioner's status as a relevant person has required and allowed him to participate in the children's hearings, albeit some limitations could be, and were, placed on his participation by children's hearings exercising their case management powers. He exercised his power under the 2011 Act to seek a review of M's CSO, triggering a series of hearings through the course of 2023 that would not otherwise have taken place. In doing so he caused further state interference in the family and private life of M and B in which he was entitled to participate by virtue of the 2013 Order.

[88] We agree with the Lord Ordinary's reasons and conclusion (paras [81] to [84]) that at the time of the proceedings before the children's hearing the petitioner had no Article 8 rights relating to M with whom he had had no contact, and in whom he had showed no interest in having contact, for more than 12 years. The Lord Ordinary did not err in reaching that conclusion. Her reason for leaving the petitioner's assertions in his affidavit about some involvement with M in the early months of his life out of account was because they were not before the children's hearing. In any event, she proceeded on the undisputed basis that he had had no involvement in M's life since M was under a year old. The circumstances are far removed from those of the father in *Principal Reporter* v *K* and the private life of the aunt in *Lazoriva,* already the guardian of the child's sister, who had communicated to the relevant authorities her intention and willingness to care for the second child. The petitioner does not come within the scope of potential for a relationship as discussed in *C* v *XYZ County Council* given the passage of time since he had any contact with M and the absence of any

attempt to develop a relationship until notification of the current proceedings more than 12 years after the petitioner last interacted with M. In any event, even if the Lord Ordinary was wrong and Article 8 is engaged, at best that would give the petitioner a qualified right that, in the circumstances of this case, would be in direct conflict with the Article 8 rights of M and B.

The challenge to article 3(2)(a)

[89] B contends that the bright line rule of the unchallengeable inclusion of all parents, not already captured by section 200 of the 2011 Act, as relevant persons constitutes an unjustified interference with her and M's Article 8 rights. Accordingly article 3(2)(a) of the 2013 Order requires to be read down failing which a declarator should be issued that the provision is beyond the competence of the Scottish Parliament as incompatible with the Convention rights of persons such as B and M.

[90] M contends that, for the same reasons, article 3(2)(a) should be read down but using different wording, failing which we should conclude that the children's hearing was required to ignore article 3(2)(a) in the particular circumstances of this case. The Reporter did not reclaim but had proposed throughout that the correct solution was to disapply the provision in the particular circumstances of this case as justified by the Human Rights Act 1998 section 6(1).

[91] It is not clear to us that the Lord Ordinary considered that there was an *ab ante* challenge to the order, indeed she suggests otherwise at paragraph [79] of her opinion and saw no need to consider how the provision may operate in all or nearly all cases. Nor did the Lord Ordinary consider the order to constitute a bright line provision as explained at paragraph [90]. She recognised that if it were necessary to do so in order to avoid acting

incompatibly with a Convention right, the hearing could have either read down the provision to exclude the petitioner from the status of relevant person, or ignored the provision (para [142]).

[92] As a matter of principle, it is not disproportionate to legislate by reference to pre-defined categories, or bright lines even though this might result in difficult cases: *R (P)* v *Justice Secretary*. There, issues arose from the statutory scheme for disclosure of convictions, cautions and reprimands. The claimants had convictions or reprimands that were "spent" under the Rehabilitation of Offenders Act 1974 together with equivalent legislation in Northern Ireland. Nevertheless, they either had been, or would be, obliged to disclose them when applying for jobs involving contact with children or vulnerable adults. Further, any criminal record or enhanced criminal record certificate that they would generally need in applying for such jobs would reveal their convictions or reprimands. Each challenged the provisions on Article 8 grounds. Appellate courts in Northern Ireland and England had found the provisions to interfere incompatibly with Article 8 as they were "not in accordance with the law" and were disproportionate. The Supreme Court considered there was state interference with the Article 8 rights of the claimants and for such interference to be justified, it must be (i) in accordance with the law and (ii) a proportionate means of achieving a legitimate aim. One of the government's challenges succeeded but three did not, due to a lack of foreseeability meaning the provision was not "according to law."

[93] Delivering the leading (majority) judgment, Lord Sumption confirmed, at paragraph 50, that, "… the task of the court in [bright line cases] is to assess the proportionality of the categorisation and not of its impact on individual cases". Legislating by reference to pre-defined categories was justifiable. The legislature required to balance, on one hand the public interest against those whose past record suggests that there may be

unacceptable risks in appointing them to sensitive occupations, and the Article 8 rights of previous offenders on the other. The schemes were carefully devised to balance those competing interests. The scale of each scheme was illustrated by Lady Hale, at paragraph 76; in England and Wales there would be four million inquiries in a year and approaching 300,000 positive responses. In this context, an individualised consideration of the circumstances of each case was not practical. The only practicable and proportionate solution was to legislate by reference to pre-defined categories or bright line rules. Given the need for a practicable and proportionate scheme, bright line rules were necessary. It followed that there will be hard cases that would be regarded as disproportionate in a system based on a case by case examination and that the court's task was to assess the proportionality of the categorisation and not of its impact on individual cases which do no more than illustrate the impact of the scheme as a whole.

[94] Under reference to *Animal Defenders International* v *United Kingdom* Lord Sumption noted also the importance of justification and parliamentary and judicial review of the necessity of the measure as an important consideration.

[95] There was certainly some consultation, consideration of responses in the form of discussion between civil servants prior to the introduction of the 2013 Order by the Scottish Ministers, followed by brief Parliamentary consideration and its adoption via the Scottish Parliament's affirmative procedure. Not all of this was made known to the Lord Ordinary. Nevertheless, the level of consideration and scrutiny is slender compared to that noted by the Supreme Court in *R(P)*; Lord Sumption at paras 57-60 and Lord Kerr at paras 117-137. That said, the court was there considering a much more complicated and elaborate scheme.

[96] Article 3(2)(a) has some characteristics of a bright line rule in adopting a category-based approach to the conferral of relevant person status without any room for

discretion. Having found that article 3(2)(a) does permit interference with the Article 8 rights of M and B, it follows that the task for this court is to determine whether the provision is in accordance with the law and is a proportionate means of achieving a legitimate aim.

[97] None of the parties contended that article 3(2)(a) is not in accordance with the law. We are satisfied that the statutory scheme, and the impact article 3(2)(a) has upon it, is accessible and foreseeable as to its effects; *Christian Institute* at paras 79-81.

[98] Senior Counsel for the Principal Reporter explained that the current arrangements following the introduction of the 2013 Order and Rules generally work well enough. The SCRA and its reporters have substantial experience to allow them to offer that view. We are unable to conclude that article 3(2)(a) is not a proportionate means of achieving a legitimate aim. We recognise that its promulgation was in substantial part a response to the decision of the Supreme Court in *Principal Reporter* v *K.* Whilst the provision goes further than necessary to give effect to that judgment, it does not follow that it constitutes a disproportionate interference with Convention rights. The Scottish Parliament's intention was a legitimate one. It was both to widen relevant person status to give effect to the Supreme Court's judgment and to recognise contemporary social conditions where blended families are common and many children are born to parents who will not both live in family with them throughout their childhood. Senior Counsel for the Lord Advocate submitted that the policy to widen relevant person status to all parents was "so as not to close off potential positive relationships". Whilst the material produced by the Lord Advocate demonstrative of parliamentary scrutiny was limited, the 2013 Order was subject to the affirmative procedure. The provision does not exist in a vacuum, it sits alongside the terms of the 2011 Act as a whole and the 2013 Rules introduced at the same time as the 2013 Order. In light of the extensive case management powers available to a children's hearing, to which

we will return, we consider that the terms of article 3(2)(a) was a legitimate policy choice for Parliament to determine.

[99] Accordingly we do not find it necessary to read down article 3(2)(a) in either of the ways proposed by B and the curator. Such a reading down would affect all cases, even if their circumstances were such there would be no breach of another person's Convention rights, (*RR* at para 20). We consider that it would go against the grain of a provision Parliament deemed necessary both to address the decision of the Supreme Court in *Principal Reporter* v *K* and accommodate the implications of current social arrangements.

[100] We adopt Lady Hale's explanation in *Christian Institute* at paragraph 88 that:

> "…an *ab ante* challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with Art 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights…"

Accordingly, we do not find article 3(2)(a) to constitute an unjustifiable interference with Convention rights and *ultra vires* of the Scottish Parliament. It is a legislative expression of the will of Parliament. Children's hearings, and courts, are generally bound to apply it. We note *dicta* from Lord Sumption and Lord Reed in a dissenting judgment in *(R (Tigere)* v *Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at paragraph 93, cited with approval by Lord Hodge in *AB* v *HM Advocate* 2017 SC (UKSC) 101 at paragraph 41:

> "[I]t will almost always be possible for the courts to conclude that a more precisely tailored bright line rule might have been devised than the one selected by the body to which the choice has been democratically entrusted and which, unlike the courts, is politically accountable for that choice. . . . [T]he courts are not called on to substitute judicial opinions for legislative or executive ones as to the place at which to draw a precise line."

[101] We were informed by Senior Counsel for the Lord Advocate that there is an ongoing process of review of the children's hearing system generally that will consider the provision

and its implications including the circumstances of this case, potentially prompting reform. In its Consultation Paper, "Children's Hearings Redesign" of July 2024 the Scottish Government sets out at paragraph 5.2 the definition of relevant person, referring to article 3 of the 2013 Order, and continues:

> "This definition means that a biological parent qualifies as a relevant person, regardless of the level of their involvement in the child's life. The Scottish Government would welcome respondents' views on this existing definition, and whether it would be appropriate for a hearing to have the power to remove automatic relevant person status where the involvement of an individual in hearings proceedings may not be compatible with the rights of the child or others."

The case we are considering demonstrates the complexities that can arise in proceedings intended to serve the best interests of the child. Every hearing must consider the child and family specific personal and often sensitive information before it, generally have regard to the views of the child whose best interests are a primary consideration under UNCRC Article 3 and, in terms of section 25 of the 2011 Act, generally safeguard and promote the child's welfare throughout childhood as the paramount consideration. Ultimately, in a conflict between parents' rights and the child's welfare, the latter must prevail.

Challenge under the Human Rights Act 1998 section 6(1)

[102] Section 6, so far as relevant, provides:

> **"6 Acts of public authorities.**
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
> (2) Subsection (1) does not apply to an act if—
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
> (3) In this section "public authority" includes—
> (a) a court or tribunal, and

> (b) any person certain of whose functions are functions of a public nature,
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
> …
> (6) "An act" includes a failure to act …"

[103] Senior Counsel for the Reporter founded on the judgment of the Supreme Court pronounced by Lady Hale in *RR*. It concerned a reduction in a person's housing benefit by application of subordinate legislation in the form of the Housing Benefit Regulations 2006. Their effect was to reduce the claimant's receipt of a higher level of support for a two-bedroomed social sector property he shared with his severely disabled partner based on a regulation dictating entitlement to one bedroom only. He challenged the decision as unjustified discrimination on grounds of disability, founding on Article 14 of the Convention. The First-tier Tribunal had read down the Regulations under section 3(1) of the Human Rights Act 1998 but the Upper Tribunal held this to be impermissible. The claimant's appeal to the Supreme Court did not insist on a reading down, instead he founded on section 6(1), asserting that this rendered the decision to award the reduced payment a breach of Convention rights.

[104] Lady Hale noted the decision of the House of Lords *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 concerning discrimination against unmarried couples in breach of Articles 14 and 8 of the Convention arising from a provision of Adoption (Northern Ireland) Order 1987 (SI 1987/2203), subordinate legislation under the Human Rights Act 1998. Had this been enacted in primary legislation, the court would have been bound to give effect to it. Lady Hale explained, at paragraph 116:

> "The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed… this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so."

Lady Hale emphasised that subordinate legislation is subordinate to the requirements of an Act of Parliament. The Human Rights Act 1998 (primary legislation) was an Act of Parliament and its requirements were clear. Accordingly, there was nothing unconstitutional about a tribunal disapplying a provision of subordinate legislation where obedience to it would be incompatible with a Convention right. Her Ladyship noted the same distinction between primary and subordinate legislation in the interpretive provisions of subsections 3(1) and 3(2). Her Ladyship identified a clear line of authority supporting that, where it is possible to do so, a provision of subordinate legislation resulting in breach of a Convention right must be disregarded, citing Lord Bingham in in *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, at para 30:

> "I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declares to be unlawful."

[105] It was not ultimately in dispute that the effect of section 6 of the Human Rights Act 1998 was that the children's hearing could not act incompatibly with M and B's Convention rights. A children's hearing is a public authority, section 6(3). Section 6(1) provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. The exception in section 6(2) applies only to provisions of primary legislation where the authority could not have acted differently or was giving effect to or enforcing such a provision, or made under it, and the primary legislation cannot be read compatibly with Convention rights. The definition of primary legislation, in section 21(1), does not include an Act of the Scottish Parliament or a Scottish Statutory Instrument such as the 2013 Order. They come within the definition of "subordinate legislation."

[106] In his written and oral submissions, the petitioner did not contest that the children's hearing, as a public authority, was bound to ignore article 3(2)(a) if it gave rise to a violation

of Convention rights in the particular circumstances of this case. Rather, he maintained that there was no such violation and there was no basis to conclude that he would exercise his right to review maliciously or vexatiously. Even if he did, the exercise of case management powers would prevent any violation of Convention rights.

Case Management Powers

[107] The Lord Ordinary determined, at paragraph [131] of her Opinion, that:

> "Article 3(2)(a) is capable of being operated in a Convention compliant manner, at least so far as the conduct of a children's hearing is concerned, because of the case management powers available to the children's hearing. The children's hearing has ample powers to prevent a person such as the petitioner from being in the same physical location as a referred child and his mother. It can require remote attendance and exclude him from all or part of the hearing if that is necessary to allow the child or another relevant person to participate effectively, or to avoid significant distress to them. It can also excuse the child and the other relevant person, although that is not a matter to which I attach much weight. The hearing is supposed to centre on the child, and his absence is on the face of it undesirable, as is that of a relevant person who is his main carer."

It followed that reading down or disapplication of article (3)(2)(a) was unnecessary.

[108] It is correct to say that there are extensive case management powers at the disposal of the children's hearing. Ordinarily they should prove sufficient to protect the Convention rights of referred children and other relevant persons but their effectiveness in this case merits careful consideration. Counsel referred to the "irreducible minimum" rights of the petitioner. Those rights include, *inter alia*, a right to require procedure in the sheriff court where grounds of referral are disputed; a right to appeal decisions of the children's hearing to the sheriff; and the unfettered right to repeatedly require a review of a CSO three months after the hearing makes, continues or varies an order. The last of these "irreducible minimum" rights particularly concerned the Lord Ordinary given the background of the petitioner's "domestic abuse" of B as she explained at paragraph [135]. Her Ladyship

proposed that this derives not from the terms of article 3(2)(a) but from the provisions of the 2011 Act, a proposition on which we heard competing submissions. The Lord Ordinary concluded that hearings could be conducted compatibly with Convention rights through the exercise of case management powers.

[109] We note that there is nothing to prevent the petitioner seeking a review every three months for as long as the CSO is in place, even if there is no merit in his doing so and no prospect of success. Senior Counsel for the curator *ad litem* advised us that the CSO is likely to continue until M is 18.

[110] It follows that there could be repeated state interventions in the private and family life of M and B, over a number of years bringing no benefit to M, whose best interests must be the paramount consideration for the children's hearing. The petitioner's interventions have already caused considerable distress to B, impacting on her engagement, and M's engagement, in hearings whose fundamental objective is to serve the best interests of the child. The petitioner would not have access to these rights under the 2011 Act without the provision made in article 3(2)(a) that accords him status as a relevant person and we disagree with the Lord Ordinary's conclusion (para [135]) that the rights emanate from the Act rather than the order.

[111] The problem in this case is compounded by who the petitioner is. He remains in prison and is subject to an OLR because he was convicted of repeatedly inflicting serious violence on B, repeatedly raping her and issuing threats; both of abducting M and to B's life. His conduct has had a serious and enduring impact on B's mental health and general functioning in turn undermining her capacity to care for and raise her son. It has had a considerable impact on M's education and he is a long way behind his peers. This has led to state involvement intruding into the family and private life of M and B. The convictions

leading to the imposition of an OLR are far from the petitioner's first convictions as the children's hearing knew. Against this background, they also knew that his involvement as a relevant person was impeding the full attendance and engagement of the child M and his primary carer B.

[112] None of the hearings after 23 January 2023 would have taken place but for the petitioner's application for review. We note that he maintains that B gave perjured evidence in his trial, culminating in his conviction and leading to his potentially lifelong imprisonment. In his petition, he avers that he continues to deny his guilt. Given that his grave criminal conduct against B was established beyond reasonable doubt to have occurred, leading to his conviction, it can be taken that he is not well-disposed towards B. He has made his intentions clear; he wishes to be aware of what is happening in M's life, to have contact with him and to hold accountable those he considers responsible for M's situation. It is apparent he has in mind B as a person he wishes to hold to account. It can reasonably be concluded that he will exercise his statutory rights for as long as he has relevant person status. Submissions about his good faith sit uncomfortably with his retention of a confidential report that he knows he should not have received. It was hardly good faith when he told the children's hearing, on 23 November 2023, that denying him contact with his child because of his convictions was wrong as he might be exonerated on appeal when he knew his appeal was refused in 2015.

[113] As the petitioner does not enjoy any Article 8 Convention rights with M, in order for case management powers to prevent breach of M and B's Convention rights those powers would, in our view, require to constrain his "irreducible minimum" rights, notably to fetter his ability to request regular reviews of the CSO. There is currently no provision for that.

[114] Senior Counsel for the petitioner submitted that case management powers such as the excusal of attendance by B and/or M, exclusion of the petitioner from parts of a hearing and the use of remote attendance by him were decisions that need only be made once, prospectively, and would apply throughout proceedings thereafter. That was not the view of the Lord Ordinary who explained, at paragraph [132] of her opinion, that each hearing must decide whether and how to use case management powers. Senior Counsel for the Lord Advocate initially adopted the petitioner's submission before conceding, with commendable candour, that her doing so was not based on detailed scrutiny of the relevant provisions of the 2011 Act or 2013 Order.

[115] The terms of sections 5, 6 and 7 of the 2011 Act strongly support that each hearing or pre-hearing is a distinct hearing. The membership may vary. It is undisputed, and regrettable, that there was no continuity of membership whatsoever between the children's hearings held between January and November 2023. The terms of the following sections concerning case management powers make it plain that it is each individual hearing that will require to determine whether to exercise a case management power:

- section 73, the duty of a child to attend a children's hearing and the power of excusal;
- section 74, the duty of a relevant person to attend a children's hearing and the power of excusal;
- section 75, the power to proceed in absence of a relevant person;
- section 76, the power to exclude a relevant person from a children's hearing. Subsection 2 specifically refers to exclusion from "the" hearing for as long as necessary and subsection 3 requires the chair of the hearing to explain what took place in the relevant person's absence;
- section 77, the power to exclude a relevant person's representative from children's hearing;
- section 78, rights of certain persons to attend a children's hearing and power to exclude them.

We are fortified in our view on this by the contrast with, for example section 81 dealing with determination of a claim that a person be deemed a relevant person. It specifically provides in subsection (4) that a determination that a person is deemed a relevant person relates to that children's hearing and any subsequent children's hearing etc. Similarly, a determination under section 81A that a person is no longer to be deemed a relevant person also applies to any subsequent hearing.

[116] The 2013 Rules follow a similar pattern. Rule 20B concerns the reporter's role in facilitating attendance at a pre-hearing panel or children's hearing by electronic means. Rule 20C envisages a pre-panel hearing determining that a person should be allowed to attend a children's hearing only by electronic means in order not to inhibit the obtaining of views from a child or relevant person or causing significant distress to a child or relevant person. There is no provision suggesting this applies to more than one hearing. The terms of Rule 20D, exclusion from a children's hearing or pre-hearing panel, suggest that the power to exclude a person on account of violent, abusive or disruptive behaviour, or because that person's presence would prevent the panel or hearing from obtaining the views of a relevant person attending the hearing significant distress, is exercisable at a particular hearing and does not bind further hearings. Rules 84-87, non-disclosure requests, plainly relate to a particular hearing.

[117] Accordingly, on this point the petitioner has failed to satisfy us that an exercise of a case management power would have to occur only once and would then bind all future hearings. In this regard the Lord Ordinary was correct in her conclusion at paragraph [132].

[118] In the exceptional circumstances of this case, we disagree with the Lord Ordinary's conclusion that the children's hearing's case management powers were sufficient to prevent a breach of M and B's Article 8 rights.

The reasons for the decision of 23 November 2023

[119] Senior Counsel for the petitioner submitted that the decision of the children's hearing was not made in the context of case management powers, or the "irreducible minimum" rights of the petitioner, but was based on the petitioner's lack of parental responsibilities and rights together with the petitioner's impact on M and B's actual participation in the proceedings. It followed that the reasons given by the children's hearing in its decision to remove relevant person status from the petitioner were flawed in that it was clear that the panel had not considered the case management powers available to it. That was a view shared by the Lord Ordinary at paragraph [140] of her opinion.

[120] We note that in delivering the opinion of the court in *JM* v *Taylor,* Lord Brodie accepted, in light of the opinions of Lord Mayfield and the Lord President (Hope) in *H* v *Kennedy* 1999 SCLR 961, that a children's hearing's reasons should provide a clear and intelligible statement of the material considerations to which it had regard. Reasons should also be proper and adequate, but that depends on context and circumstances. As a generality:

> "…the context for a particular decision includes what has been decided and documented as decided at the previous hearings attended by the appellant and the children, and the contents of the various reports with which the children and relevant persons will have been provided. It is not as if the participants at the hearing on 23 July 2013 were coming to matters afresh. The hearing was part of what Lord Mayfield characterised as 'a continuous and ongoing process."

Lord Brodie noted that the reasons provided in that case were consistent with the information in the reports before the hearing and rejected the reasons challenge.

[121] Senior Counsel for the petitioner did not dispute these principles and accepted that the hearing was entitled to have regard to what had gone before, including the use of case management powers as recorded in previous decisions by earlier children's hearings in

these proceedings. He also accepted that the letter from B's solicitor before the hearing on 23 November 2023 was relevant context.

[122] We agree. The author of the letter plainly contended that the petitioner's enjoyment of relevant person status infringed B's Article 8 rights and those of her son M. Amongst the points made were that:

- the petitioner had no parental responsibilities and rights and no rights conferred by any court relating to M or order regulating his relationship with M;
- he had no established family life with M;
- there were no close ties between them;
- children's hearings proceedings were an interference in the Article 8 rights of both B and M;
- the petitioner's involvement in the hearings with all corresponding rights of attendance, participation and access to otherwise confidential papers and information was incompatible with the Article 8 rights of B and M.
- to avoid unlawfulness, the definition of relevant person must be read to exclude the petitioner, proposing wording to be read in to article 3(2)(a) of the 2013 Order, failing which the hearing should refer a devolution issue to the Inner House.

[123] What had gone before included an accidental disclosure of personal and sensitive information about M and B to the petitioner as he confirmed to the hearing on 23 November 2023. There had been an accidental display of the petitioner's face on the screen viewed from home by B by virtue of remote attendance on 23 January 2023 causing her considerable distress. The hearing had the record of previous hearings demonstrating the exercise of case management powers and they were plainly aware of their own case management powers. At the hearing on 23 November 2023 giving rise to this petition, they used those powers to accept two non-disclosure requests before addressing the relevant person issue. They also excused the attendance of M and resolved to proceed in the absence of B.

[124] We have narrated the reasons recorded by the hearing for all of its decisions. We have considered them in the context of the information before the panel, the solicitor's letter and what we know, albeit incomplete, of what those present related to the hearing. We have

gleaned some of the representations from the hearing's reasons and others from the petitioner's solicitor's notes. We do not read the reference in the reasons to, "parental rights and responsibilities" as a misconstruction of article 3 of the 2013 Order. In context, it is a response to the point advanced in B's solicitor's letter as part of a contention that the petitioner had no Article 8 rights relating to M. The panel also took into account that M had already been asked if he wanted to know anything about his father and had declined and that the petitioner's continued attendance was having an impact on B and M actively participating in M's hearing. That has heightened significance in light of the requirement under the 2011 Act section 121 that the chairing member of the hearing asks the child whether documents provided to the child accurately reflect his views. It adds colour to the hearing's record of reasons on relevant person status including the petitioner's continuing attendance impacting on M's active participation. Whilst the hearing can have been in no doubt of M's views, he was not there to be asked or to answer on 23 November 2023. As we have indicated, the panel members were plainly aware of and exercised their case management powers in this hearing.

[125] Viewing matters in this way, we first conclude that the reasons provided by the lay panel, when considered in context as they should be, are intelligible and are clear enough. They were proper and adequate. Viewed in context of what had gone before, and the representations made to them, we consider that what the hearing, in effect, did was to disregard article 3(2)(a) under section 6(1) of the Human Rights Act 1998 to avoid acting incompatibly with the Article 8 rights of M and B. Secondly, the Lord Ordinary erred in reaching the conclusion, as expressed in paragraph [140] of her opinion, that the hearing failed to consider its case management powers and how to exercise them to prevent unlawful interference with the Article 8 rights of M or B.

Procedural unfairness

[126] The proposition of procedural unfairness in the decision to refuse contact on 23 November 2023, taken when the petitioner and his solicitor were excluded from the hearing, merits consideration. Once again, it is important to have regard to all relevant information before the children's hearing including what had gone before in previous hearings and in the hearing itself.

[127] We note that the first hearing in January 2023, when the petitioner was present, imposed as a mandatory requirement of the CSO that M should have no contact with the petitioner because there had been no contact for a significant period and M did not wish contact. In reaching that decision, the children's hearing was bound to have regard to M's views (2011 Act section 27). The decision on contact was one where safeguarding and promoting M's welfare throughout his childhood was the paramount consideration (2011 Act section 25). The hearing took that decision in the knowledge of the petitioner's full criminal history including repeated serious drug dealing and sustained sexual and violent domestic abuse against B, and another woman, and the continuing impact of his crimes against B.

[128] A children's hearing made up of different members made the same decision on 30 August 2023 following review of the CSO. The hearing recorded that the petitioner invited them to consider letterbox contact but also that M had made it clear to his advocacy worker that he did not recognise or acknowledge the petitioner as his father and had no wish to have contact with him, directly or indirectly. The requirement of no contact was continued as to do otherwise would be contrary to M's wishes and would probably cause his mother considerable emotional distress. In due course the petitioner's unopposed appeal on procedural grounds, concerning the exclusion of him and his solicitor when a

non-disclosure order was granted and thereafter when a no-contact condition was made, was successful, the sheriff reluctantly sustaining the appeal despite considering that a hearing could reach no other result.

[129] His solicitor's notes of the final hearing reveal that the petitioner stated:

> "…that there is a 13 year old at the centre of this and there has been no progress reports for M and he is worried about the harm this will have on young M. Client noting with the panel that he wants to know about A's (*sic*) progress and notes that although the panel is seeking to safeguard young M, he is being completely lost in the centre of this. Client noting that if you were to have a successful appeal in his conviction, he has then consequently lost out on his child's life and his child's mind has been poisoned by B's view on him…
>
> Client noting that he only wants to ask questions about his son and wants to scrutinize the appropriate people for not assisting him and making sure that he is following the correct path. Client noting that he … [was] just wanting an update on how his son is doing and that he believes the non-disclosure should apply for any information going forward not for retrospective information."

[130] Once the hearing determined that the petitioner was not a relevant person he had no right to continue to attend the hearing.

[131] The hearing knew from their papers and the record of previous hearings that the petitioner was in prison subject to an OLR imposed for assaulting and raping B and that he was seeking contact with M by letterbox. They also knew of his previous convictions. They had already heard directly from the petitioner of his interest in his son's life during the November hearing. They knew that M did not want contact with the petitioner. They recorded that contact would not be in M's best interests.

[132] The importance and effect of any breach of procedural fairness varies according to what is at stake; *Osborn*. Whilst each appellant in *Osborn* succeeded on grounds of procedural unfairness at common law as well as Convention grounds, the context in that case was the liberty, an Article 5 right, of one prisoner released on licence, recalled and incarcerated of new seeking release. A second life prisoner incarcerated beyond the expiry

of the tariff imposed by the sentencing court, sought release failing which transfer to open conditions. A third prisoner had also sought post-tariff release from a life sentence. Each had his application refused on the papers by a single member of the Parole Board with the board refusing a request for an oral hearing.

[133] The circumstances in *Osborn* are different from the position of the petitioner who had attended a number of hearings, articulated his wish for letterbox contact, his reasons for wishing it and was present for part of the final hearing, again explaining his interest in his son; a son in relation to whom he had no Article 8 rights.

[134] Considering the examples of criteria the Supreme Court identified in *Osborn* as potentially relevant, we note that no facts material to the decision on contact were in dispute:

- the petitioner stands convicted of serious crimes, many of them against M's mother;
- his conduct has had a serious impact on B with implications for M's welfare;
- he had no contact with M since he was an infant;
- he was subject to an OLR and had not been allowed parole several years after expiry of his punishment part;
- the child did not wish to have contact with him.

In the same hearing, the board heard from the petitioner of his motivations towards M. Beyond that, he asserts no significant explanation that he was denied the opportunity of advancing. Given his circumstances as known to the final hearing, the petitioner had nothing useful to contribute orally.

[135] In these circumstances we are not persuaded that the decision on contact involved such procedural unfairness as to vitiate it at common law. If we had found such a breach, we would have had to consider whether to remit to the children's hearing to hear from the petitioner on his application for contact in a further children's hearing. We would be bound to consider M's best interests as a primary consideration; UNCRC Article 3. The ECtHR in

Strand Lobben v *Norway* (2020) 70 EHRR 14, at paragraph 204, reiterated a broad consensus that in all decisions concerning children their best interests are of paramount importance, adding: "…in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations". Even where a parent has Article 8 rights the best interests of a child may override those of parents (para 206).

[136] Since the hearing would also be bound to treat M's best interests as a primary consideration and, on a decision on contact the paramount consideration, to have regard to M not wishing contact with the petitioner, who remains in prison subject to an OLR, in the whole circumstances, we would not have remitted on the question of contact. To do so would merely create a further hearing at which the petitioner's opposition to there being a no-contact requirement would inevitably fail. To require a further hearing in these circumstances would be prejudicial to the Article 8 rights of both B and M and contrary to the latter's best interests when the petitioner has no Article 8 rights to balance. The situation is similar to that before Lord President (Rodger) in *King* v *East Ayrshire Council* 1998 SC 182. It would make no difference. The petitioner has no case of substance to make on the question of contact.

[137] For the reasons we have given, in the exceptional circumstances with which they were faced, we do not consider that the children's hearing acted unlawfully or materially erred in reaching their decisions on 23 November 2023. To the extent we have set out above and for the reasons we have given, we consider the Lord Ordinary erred in concluding otherwise. Accordingly, we allow the reclaiming motions, recall the Lord Ordinary's interlocutor of 26 November 2024, and refuse the petition seeking reduction of the decision of the children's hearing dated 23 November 2023. The effect of this is that the children's hearing determination that the petitioner is not a relevant person for M stands.

Postscript

[138] Following preparation of our opinion in draft on 9 March 2025, on 10 March parties contacted the Clerk of Court drawing our attention to the judgment of the Supreme Court issued on 6 March 2025, *In re JR 123* [2025] UKSC 8. Specifically, Senior Counsel for the reporter invited our attention to paragraphs 87 and 88, presumably as illustrating and supporting the approach he had invited us to take under the Human Rights Act 1998 section 6. Senior Counsel for the petitioner then invited our attention to paragraphs 41 (proportionality), 42 (the margin of appreciation at each stage), 49 (the legislator's wide margin of appreciation concerning social policy involving moral and political judgement), 56 (the value of a clear and simple scheme) and paragraphs 70 and 82 on the difficulties associated with individual case-by-case assessment. None of the parties objected to our considering the judgment and none wished to make further submissions on it.

[139] Whilst the Supreme Court's judgment is relevant, helpful and lucid, we did not consider it to change the law as we had applied it to the facts of this case. Having heard no submissions, we did not adjust our opinion in light of it.