

THE COURT ORDERED that no one shall publish or reveal the names or addresses of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any members of their families in connection with these proceedings.



Trinity Term

[2020] UKSC 26

On appeals from: [2018] CSIH 72 and

[2019] CSIH 19

JUDGMENT

ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland)
In the matter of XY (Appellant) (Scotland)

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Hodge

Lady Arden

JUDGMENT GIVEN ON

18 June 2020

Heard on 13 and 14 November 2019

Appellant (ABC)	Respondent
Lynda Brabender QC	(Principal Reporter)
Scott McAlpine	Gerry Moynihan QC
(Instructed by Clan Childlaw Ltd)	Jonathan Guy
	(Instructed by Anderson Strathern LLP)
Appellant (XY)	Respondent
Janys M Scott QC	(Lord Advocate)
Julian Aitken	Laura Dunlop QC
	Ruth Charteris

(Instructed by Balfour & Manson LLP as
agents for Gleeson McCafferty Law)

(Instructed by Scottish Government Legal
Directorate Litigation Division)

Respondent
Jonathan Mi
QC
Julie McKi
(Instructed b
& Sween
Litigation
Respondent (
SM)
Charlotte V
Coutts
(Instructed
McKenna's
Practice and
F MacDon
Solicitor
Respondent
Martin Richa
QC
Nicola Gilc
(Instructed
McKenzi
Solicitor
Responde
(the Safegua
Janet Mathe
Henry Setrig
Andrew Po
(Instructed
Penningto
Manches Co
LLP)
Intervener
(written
submissions
Kenneth Can
QC
Frank Bu
(Instructed
BCKM Solic
Intervener
(written
submissions
Alan Ingi

LADY HALE AND LORD HODGE: (with whom Lord Kerr, Lord Wilson and Lady Arden agree)

1.

Siblings can be as important as parents in the lives of those who have them. While parents have been likened to the doctors doing their ward rounds to see the bigger picture, siblings have been likened to the nurses: they are there every day. “These siblings are often ‘fellow travellers’ through adversity or significant life events; they can act as a source of support for some children and a source of conflict for others. For these reasons, siblings are a potentially powerful influence on development ...” (White & Hughes, *Why Siblings Matter: The Role of Brother and Sister Relationships in Development and Wellbeing* (2018)).

2.

These appeals concern the role of siblings in the procedures by which children’s hearings in Scotland make compulsory supervision orders (“CSOs”). The principal issue concerns the procedures required to make sure that public authorities comply with the obligation in article 8 of the European Convention on Human Rights (“ECHR”) to show respect for the private or family life established between a sibling and a child who might be the subject of a CSO. Although the procedures are very different in different parts of the United Kingdom, the applicable Convention rights are the same.

3.

The potential importance of sibling relationships to the welfare of children is not in dispute. What is in dispute is how that importance should be reflected in the children’s hearings procedure: specifically, should those siblings who want it be accorded the same status as parents as “relevant persons” in the proceedings? Or will something more flexible suffice? The proceedings which have led to these appeals have revealed that there has hitherto been a gap in the legislation and the guidance given on this matter.

4.

In this judgment when we refer to sections of an Act we are referring to the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”) unless we state otherwise.

The children’s hearings system

5.

There are no less than 17 grounds for referring a child to a children’s hearing (2011 Act, section 67(2)). Broadly speaking, they cover three different types of situation: 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. There are about 2,500 volunteer panel members who sit on children’s hearings. Children’s hearings are conducted by a panel of three members, one of whom is selected to be the chairing member. The hearings are designed to be child-friendly and to be conducted in a manner which prizes informality, minimises the numbers involved at a hearing and avoids legalistic procedures. The hearing is conducted as a discussion. It is not like a court of law; there is no cross-examination of witnesses. Panel members are not lawyers but are skilled and experienced in communicating with children and understanding their needs.

6.

The aim is to achieve what the UN Committee on the Rights of the Child, General Comment No 12 (2009) (para 34) describes as “child-appropriate” proceedings.

7.

The 2011 Act transferred the administration of children’s hearings from local authorities to national bodies. It established the role of National Convener, who appoints the members of the Children’s Panel and appoints the members of a children’s hearing, and the chairing member, from amongst the members of the Panel. The National Convener is empowered to provide advice to children’s hearings about any matter arising in relation to their functions, including legal advice and advice about procedural matters (section 8), but he cannot direct or guide a hearing in carrying out its functions (section 9). We refer to the guidance which is relevant to these appeals in para 35 below. The 2011 Act also established Children’s Hearings Scotland, a corporate body set up to assist and facilitate, but not to direct or guide, the National Convener in carrying out his or her functions (sections 11 and 12). This involves facilitating, in keeping with national standards set by the National Convener, the recruitment, training and quality assurance of the Children’s Panel.

8.

The Principal Reporter and the Scottish Children’s Reporter Administration (“SCRA”) operate a national reporter service, give training to reporters, and provide the administration of the children’s hearings. A reporter decides whether to refer a child to a children’s hearing for it to determine whether to make a CSO, arranges the children’s hearings and issues notifications, invitations to attend and the papers for the hearings. The reporter also keeps a record of proceedings at the children’s hearing, supports the hearing to maintain a fair process and conducts court proceedings relating to the children’s hearing. The Principal Reporter and the SCRA provide guidance to the reporters in the exercise of their functions.

9.

Although called a supervision order, a CSO may contain any of the requirements listed in section 83(2). These include a requirement as to where the child is to reside, which can result in the child being removed from the family home and placed in foster care or some other residential setting identified by the children’s hearing. They also include a direction regulating contact between the child and a specified person or class of persons, a requirement that the child comply with any specified condition, and a requirement that the implementing local authority carry out specified duties in relation to the child. The relevant local authority (“the implementation authority”) is responsible for making sure that there is compliance with the CSO and that the child obtains such help as is needed. CSOs last for up to one year and can be continued on review for further periods of up to a year at a time until the child is 18 years old (section 83(1) and (7)).

10.

The procedure for the making of a CSO can be summarised briefly. The reporter compiles grounds of referral. There is then a “grounds hearing” before the children’s hearing (section 69) at which the grounds are explained to the child and to “relevant persons” (section 90). If the child and the relevant persons accept the grounds, a CSO may be made at the grounds hearing or else at a further children’s hearing. If the child or any of the relevant persons reject the grounds of referral, the reporter takes the case to the sheriff court to establish the grounds, and if the sheriff holds that the grounds are established, the case returns to a children’s hearing to decide whether to make a CSO. If the child or any relevant person is unable to understand any of the grounds, the case must be referred to the sheriff court or the referral discharged on that ground (section 94).

11.

In advance of any hearing relating to a CSO, the reporter is required to provide details of the date, time and place of the hearing to among others the referred child, any “relevant persons” (sections 81 and 200) and also any individual who has had significant involvement in the upbringing of the child (Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013, rule 22 (SSI 2013/194) (“the 2013 Rules”). In certain cases, the children’s hearing will appoint a safeguarder whose role is to prepare reports on matters relevant to the hearing and to make recommendations as to the referred child’s best interests. The reporter also notifies the safeguarder of such hearings.

12.

Central to the challenges which are the subject of these appeals are the definition of the “relevant person” and the concept of a “deemed relevant person” which we describe at paras 14 to 16 below.

13.

The focus of these appeals is on the article 8 rights of siblings of the referred child. But it is important to bear in mind that the referred child also has article 8 rights. And whenever they come to any decision about a child, the children’s hearing, a pre-hearing panel, and a court must regard the need to safeguard and promote the welfare of the child throughout the child’s childhood as the paramount consideration (section 25(2)). The primary focus of the children’s hearing must therefore be on the welfare of the child who is the subject of the proceedings, although it is, of course, the duty of the hearing to act compatibly with the Convention rights.

The “relevant person” and the “deemed relevant person”

14.

Section 78(1) names the people who have a right to attend a children’s hearing. Among those listed is “a relevant person in relation to the child”. Section 200 defines who is a relevant person in relation to a child. Those persons include “a parent or guardian having parental responsibilities or parental rights in relation to the child ...” (section 200(1)(a)) and others on whom parental responsibility is conferred by statute, including the Children Act 1989 (which applies in England and Wales). The Scottish Ministers are given a power under section 200(1)(g) to make an order specifying that another person is to be a relevant person, but that power has been exercised to date only in relation to a parent, or person with parental responsibilities under the law in Northern Ireland (Children’s Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 (SSI 2013/193), article 3). But sections 79 to 81 provide a mechanism by which a person may be deemed to be a relevant person in relation to a child. If the individual, the child or a relevant person in relation to the child requests, the Principal Reporter must refer the matter for determination by a pre-hearing panel of three members selected by the National Convener. By section 81(3) the pre-hearing panel is bound to deem the individual a relevant person “if it considers that the individual has (or has recently had) a significant involvement in the upbringing of the child”. When an individual, who has been deemed a relevant person, has ceased to have significant involvement in the child’s upbringing, there is a procedure by which a pre-hearing panel can determine that that person is no longer to be deemed to be a relevant person (sections 79(5A) and 81A).

15.

The status of relevant person (or deemed relevant person) confers a right to be notified of and an obligation to attend a children’s hearing. It is a criminal offence to fail to attend if required to do so (section 74(4)). The status also gives access to the papers before the children’s hearing. A relevant

person can accept or not accept the grounds for referral at a grounds hearing. The status allows the person to have legal representation and to make submissions to the panel, and it gives the person a right of appeal from a decision of the children's hearing and a right to seek a review of a contact direction or a CSO.

16.

It is clear that the statutory scheme confers the right to be deemed a relevant person only on a person who has, or has recently had, a significant involvement in the child's upbringing. In most cases that would not include a sibling; and that is the gravamen of the appellants' complaint.

The factual background

i) The circumstances of ABC and XY

17.

ABC is a 16-year-old. He has a younger brother, DEF, aged nine and two older sisters. ABC and DEF were made the subjects of a CSO in 2016 and were accommodated by different foster carers. Until then both ABC and DEF had lived together in a family unit. DEF remains subject to a CSO but has remained in contact with ABC. On 7 September 2017 there was a children's hearing concerning DEF. ABC did not receive an invitation to the hearing and was not asked to provide his views in advance of the hearing. ABC attended the hearing without having given any prior indication of his wish to do so. He was not given an opportunity to speak at the hearing and was then made to leave the hearing. There is a dispute of fact, which we cannot, and have not been asked to, resolve, as to whether his exclusion was the result of a confrontation at the hearing. The children's hearing made contact directions allowing ABC direct contact with his brother for a minimum of once a fortnight for a minimum of two hours and prohibiting telephone contact. ABC then lodged an incompetent appeal against the decision of the children's hearing. At the request of his solicitors, the Principal Reporter invited ABC to produce written information for the next hearing to consider. ABC and his solicitor were permitted to attend the next children's hearing on 5 December 2017 and the chairperson of the hearing exercised discretion under section 78(2)(a) to allow ABC to express his views.

18.

XY is a 24-year-old. He has three sisters who are now aged 17, 16 and 14. He and his sisters were removed from the care of their parents under a child protection order in 2012 and were made subject to CSOs in 2013. At the date of the hearing of his appeal the circumstances were as follows. XY was allowed supervised contact with his siblings once a month. He and his parents wished to have the family reunited. The eldest sister did not wish XY to become a relevant person in her case. The second eldest sister did, and so did the youngest sister but her safeguarder remained of the view that it is not in her best interests that XY become a relevant person in her case.

19.

In August 2017 a pre-hearing panel, acting under section 81, refused XY's application to be a deemed relevant person in relation to his sisters. That decision was overturned by the sheriff but, on an appeal by the eldest sister to the Sheriff Appeal Court, the decision of the pre-hearing panel was restored in relation to her. In 2018 a children's hearing, acting under section 81A, determined that XY should not continue to be a deemed relevant person in relation to the two younger sisters. The hearing again refused to deem him a relevant person in respect of his eldest sister. XY appealed unsuccessfully to the sheriff and his appeal by stated case to the Inner House under section 164(1) was refused. As a result, XY is no longer a deemed relevant person in relation to any of his siblings.

ii) The claims by ABC and XY

20.

ABC has raised an application for judicial review claiming that the decisions of the children's hearings on 7 September and 5 December 2017 were unlawful. He seeks, among other remedies, a declarator that (a) the definition of a relevant person in section 200, (b) the mechanism by which a person can be deemed to be a relevant person in section 81 and (c) the provisions for the review of a contact direction in section 126 are all incompatible with his rights under article 8 of the ECHR, are outside the legislative competence of the Scottish Parliament and are therefore not law.

21.

ABC argues that his rights under article 8 of the ECHR mean that he should have the following procedural rights in the children's hearing proceedings. First, he is to be notified of a children's hearing and informed whether a CSO is being sought and if contact directions may be made. Secondly, he is to be provided with all of the papers which are to be considered at the children's hearing. Thirdly, he has a right to attend the children's hearing and be legally represented at it. Fourthly, he has the right to make representations. Fifthly, he has a right to appeal or seek a review of the decision of the children's hearing. Sixthly, he has a right to require the children's hearing to review its direction as to contact between siblings after three months. He also seeks a mandatory direction to the chairing member of a children's hearing to adjourn a hearing if a sibling of the child has not been notified of the hearing. In his written case he explained why he sought access to the written material before the hearings:

"The reports to which ABC was not given access will have greatly informed both children's hearings and will have been central to the decisions made. Matters such as DEF's health, development, welfare, educational development, his current care arrangements, the local authority view on his contact with others, including ABC, as well as formal recommendations as to the need for continued measures of supervision, whether DEF should remain accommodated in foster care and the nature and extent of his contact with all the members of his family including ABC."

22.

In a judgment dated 31 July 2018 ([2018] CSOH 81) the Lord Ordinary (Lady Wise) relied on dicta in the judgment of this Court in *Principal Reporter v K* [2010] UKSC 56; 2011 SC (UKSC) 91; [2011] 1 WLR 18 to read down section 81(3) to extend the people to be deemed a relevant person to include "persons whose established family life with the child may be interfered with by the hearing and whose rights require the procedural protection of being a relevant person". On that basis she was not persuaded that the decisions of the children's hearings were unlawful and refused the orders which ABC sought. ABC appealed to the Inner House. The First Division of the Inner House (the Lord President, Lord Drummond Young and Lord Malcolm) in an opinion delivered by Lord Malcolm on 27 November 2018 ([2018] CSIH 72) refused the reclaiming motion but recalled the Lord Ordinary's interlocutor in so far as it declared that words were to be read in to section 81(3). The First Division held that the ECHR did not require that ABC be afforded the status of a relevant person or the opportunity to apply for such status. They held that decisions affecting the article 8 rights of a relative other than a parent would not generally require the same level of involvement as that of a parent. They held that fairness might require that a sibling be given the opportunity to provide written information to a children's hearing but that only exceptionally would a sibling's attendance at the children's hearing be required. They concluded that the provisions of the 2011 Act and the supporting regulations were sufficiently flexible to allow the legitimate interests of family members who were not relevant persons to be taken into account in the children's hearing and were sufficient to protect

ABC's article 8 rights. ABC, with the support of his parents, appeals to this Court with the permission of this Court granted on 27 June 2019.

23.

XY also appeals to this Court with the permission of this Court granted on 16 July 2019. XY's appeal is made under section 98 of and paragraph 13(b) of Schedule 6 to the Scotland Act 1998 against the determination of a devolution issue. He challenges the lawfulness of the provisions (sections 81(3) and 81A(3) of the 2011 Act) which govern the right to be a deemed relevant person. He argues that those provisions are not compatible with his rights under articles 6 and 8 of the ECHR and therefore not within the legislative competence of the Scottish Parliament under section 29(1) and (2)(d) of the Scotland Act 1998, unless one can read them down under section 3 of the Human Rights Act 1998 to render them compatible.

24.

XY has attended some children's hearings concerning his siblings and has made written representations to other hearings. There is a factual dispute as to whether he has been invited to all of the relevant children's hearings. But, again, that is not something that this Court can resolve. His appeal is supported by his parents and one of his siblings and is opposed by another sibling.

25.

His appeal to the Inner House against the sheriff's judgment to uphold the decision of the children's hearing that he should not be accorded the status of a relevant person in relation to any of his sisters was heard by the First Division comprising the same judges as those who heard ABC's reclaiming motion. In a short Opinion of the Court dated 27 March 2019 ([2019] CSIH 19) delivered by Lord Malcolm, the First Division founded on their opinion in ABC's appeal and the opinion of the same Bench in *DM v Locality Reporter* [2018] CSIH 73; 2018 SLT 1308 (again a judgment delivered by Lord Malcolm) to hold that there was no merit in XY's appeal. In a short postscript the First Division expressed their and the safeguarder's shared concern about the privacy rights of the children if XY were to be given the status of a relevant person, about the number of people who would attend the children's hearings, and about the disputatious nature of the hearings which had been held.

The problem which the challenges have identified

26.

The challenges which ABC and XY have mounted have revealed concerns about whether the children's hearing system has been and is operated in a way that gives adequate protection to the legitimate interests of siblings and other family members, such as aunts, uncles and grandparents, who do not have a significant involvement in the upbringing of the child, to preserve a family relationship with the child and indeed to the legitimate interest of the child in preserving a family relationship with siblings and other relatives. The respondents in these appeals accept that these are legitimate interests. But they do not accept that it is necessary to afford the status of relevant person in order to respect them.

What is the right and what is the test?

27.

In our view article 8 of the ECHR provides the appropriate framework for analysis in these cases. Article 8 includes procedural as well as substantive rights: the decision-making process leading to measures of interference must be fair: *McMichael v United Kingdom* (1995) 20 EHRR 205, para 87. We are not persuaded that the requirement of a fair hearing under article 6 of the ECHR adds anything to that right in these cases.

28.

Under article 8(1) everyone has the right to respect for his private and family life. Public authorities may only interfere with that right in the circumstances laid down in article 8(2). The first question, therefore, is whether siblings enjoy private or family life together. The general principles were summarised recently by the European Court of Human Rights in *Nazarenko v Russia* (2019) 69 EHRR 6, para 56:

“The Court reiterates that the notion of ‘family life’ under article 8 of the Convention is not confined to marriage-based relationships and may encompass other de facto ‘family’ ties. The existence or non-existence of ‘family life’ for the purposes of article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties [referring to *K v Finland* (2003) 36 EHRR 18, para 150].”

That case concerned the mother’s husband, who had thought himself the father of the child until the couple divorced. There are not many cases concerning other relatives. In *Lazoriva v Ukraine* (Application No 6878/14) (unreported) 17 April 2018, which concerned an aunt who wished to become the child’s guardian, the court pointed out that:

“Close relationships short of ‘family life’ would generally fall within the scope of ‘private life’ (see *Znamenskaya v Russia*, no 77785/01, para 27, 2 June 2005).”

Cases concerning siblings are few and far between, but an instructive example is *Akin v Turkey* (Application No 4694/03) (unreported) 6 April 2010. A married couple had two children, a boy and a girl, aged 11 and 6 when the couple divorced. The court awarded custody of the boy to the father and of the girl to the mother and ordered that the children should swap places for a few weeks each year. The father and son complained that this meant that the children were never together under the same roof. The court considered that family life existed between the siblings (and in any event this was not disputed). The original court order constituted an interference but the failure of later court hearings to put this right, during which they did not have due regard to the best interests of the family, constituted a violation of the State’s positive obligation to maintain and develop family ties.

29.

The *Akin* case reminds us that article 8 imposes both negative and positive obligations - not to interfere in family life without justification and to take positive steps to maintain and develop family ties. In both cases, the case law under article 8 emphasises the authorities’ obligation to have regard to the best interests of the child (see *Maslov v Austria* [GC] [2009] INLR 47 (Application No 1638/03) 23 June 2008, para 82). And the decision-making process must be such as to show that the authorities had a sufficient evidentiary basis for their decisions and that the interested parties, including the children themselves, were able to express their views (see, eg, *Havelka v Czech Republic* (Application No 23499/06) (unreported) 21 June 2007). However, the role of a parent, involving, in the absence of intervention by public authorities, the right to decide how a child is to be brought up, is qualitatively different from the role of most siblings. As noted above, a sibling’s role can be very important to the well-being and development of a child. But where a child is being cared for away from the family, what matters is the maintenance and development of the relationship between the siblings, whether through placing them together or through staying in regular contact with one another.

30.

In the context of a children’s hearing respect is shown to that interest if, in the particular circumstances of the case, the sibling is enabled to have an involvement in the decision-making process, seen as a whole, to a degree sufficient to protect his or her interest: *W v United Kingdom*

(1988) 10 EHRR 29, para 64; *McMichael v United Kingdom* (above) para 87; *Lazoriva v Ukraine* (above) para 63; *SJP and ES v Sweden* (Application No 8610/11) (unreported) 28 August 2018, para 92. The required degree of involvement in the decision-making process depends upon the relationship or bond between the applicant and the referred child and the applicant's role, if any, in the child's life. In *Boyle v United Kingdom* (1995) 19 EHRR 179, para 46, the European Commission of Human Rights recognised that a denial of contact with a child would generally be an interference with a parent's right to respect for family life but that that would not necessarily be the case where other close relatives were concerned so long as a restriction of access does not deny a reasonable opportunity to maintain the relationship.

31.

The central question in these appeals is therefore whether the 2011 Act and related subordinate legislation, if operated sensibly, afford the appellants a sufficient opportunity to take part in the decision-making process, without their being given the status of a relevant person, or whether only the conferral of that status will suffice.

Measures taken to respect a family member's family life

32.

In response to the appellants' contention that their interest in maintaining family life will be properly respected only if they are given the status of a relevant person, Mr Moynihan for the Principal Reporter and Ms Dunlop for the Lord Advocate submit that the legislation is compatible with article 8 of the ECHR if it is operated sensibly. Mr Moynihan and Ms Dunlop submit, correctly in our view, that the Court when assessing the operation of the children's hearing system should look not only to the regime set out in the 2011 Act and related subordinate legislation but also to the requirements of the common law and the procedural rights under article 8 of the ECHR which govern the behaviour of the relevant public officials. They accept that these challenges have resulted in changes of practice in relation to children's hearings. It is now the practice for notice of hearings to be given to the siblings of a child if they are sufficiently mature, for invitations to attend a hearing to be sent to a sibling and for the chairing member of the hearing to exercise her or his discretion to allow the sibling to attend the hearing. Under section 78(2)(a) the chairing member can allow a person to attend the hearing if that person's attendance is necessary for a proper consideration of the matter and under section 78(2)(b) and (3) the chairing member also has a discretion to allow such attendance unless the child or a relevant person in relation to the child objects. The SCRA's Practice Direction 3 concerning relevant persons advises reporters when arranging a hearing to consider whether there is anyone other than a relevant person and a person who may be deemed to be a relevant person whose attendance is likely to be necessary under section 78(2)(a) (para 9.1). Since 2019, para 9.2 of the Practice Direction has also stated as follows:

"In particular, 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."

The paragraph goes on to recognise that it will be for the chairing member of the hearing to decide whether and when the individual is allowed to attend the hearing. Para 9.3 deals with situations where it was not foreseen that a hearing would consider a contact direction or where a person was not of sufficient age and maturity to be invited. In those circumstances the reporter is directed to invite the hearing to satisfy itself that it has the views of the person in relation to their contact or, if not, that the person has been given an opportunity to provide their views. The direction states that the hearing can defer the decision to allow the person to give their views directly or indirectly.

33.

Mrs Scott drew the Court's attention to sections 8 and 9 of the 2011 Act (see para 7 above). Section 8 empowers the National Convener to provide advice to children's hearings including legal advice and advice about procedural matters. This has the aim that the hearing should not have to rely on the Principal Reporter or the legal representative appearing before it for such advice. Section 9, which protects the independence of children's hearings, confirms that it is for the members of the children's hearing to make the relevant decisions in carrying out their functions. But, as the respondents submitted, a reporter would advise a children's hearing against refusing to hear or otherwise obtain the views of a sibling of sufficient age and maturity.

34.

These measures do not give a sibling access to the papers which have been given to the members of the children's hearing and the relevant persons. But at a hearing after the grounds of referral have been accepted, the chairing member is required to inform every person present at the hearing of the substance of any relevant document: sections 91, 119 and 138 and rule 60(2)(a) of the 2013 Rules.

35.

To allow these procedures to work effectively, it is necessary that the decision-makers have adequate information about the family members and the history of their involvement or contact with the child. Children's Hearings Scotland has updated its Children's Hearing Practice and Procedure Manual in September 2019. The Manual has in Part 2 a chapter 8 entitled "Maintaining important relationships". At para 8.26 it states:

"There is no statutory requirement for a children's hearing to think about sibling contact in the same way as they must consider contact with those with parental responsibilities who are relevant persons for the purposes of children's hearings. Panel members should have information about a child's relationships with their brothers and sisters and give careful consideration to how these relationships can be maintained and protected."

Para 8.27 states:

"The key considerations of the hearing will be:

Identifying all the child's brothers and sisters, including those who have had a similar role in the child's life, such as children brought up in the same placement;

The views of the children about their relationships and existing contact provisions;

Promoting face-to-face contact where possible;

The practical and emotional capacity of carers to facilitate contact;

How contact can be achieved in as relaxed and natural manner as possible.”

36.

Under section 17(6) of the Children (Scotland) Act 1995 (“the 1995 Act”), a child who is subject to a CSO or an interim CSO in respect of which the local authority is the implementation authority is a “looked after child”. Under section 17(1) it is the duty of the authority to safeguard and promote the welfare (which is to be their paramount concern) of any child whom they are looking after in a manner prescribed by the Secretary of State (now the Scottish Ministers). Section 17(3) requires the authority, before making any decision about a child they are looking after or proposing to look after, so far as reasonably practicable to ascertain the views of the child, as well as of the parents and others with parental responsibility and any other person whose views the authority consider relevant. The Looked After Children (Scotland) Regulations 2009 (SSI 2009/210) require the local authority to carry out an assessment of a child whom they look after or whom they are about to look after and, in so doing, to obtain details of a child’s siblings and their contact with the child (regulations 3 and 4 and Schedule 1, paragraphs 7 and 8). The result of that assessment is a “child’s plan” which must include arrangements for contact between the child and others, including any person whose views the local authority consider relevant to the matter to be decided (regulation 5 and Schedule 2, paragraph 7).

37.

Section 66(4) of the 2011 Act empowers the Principal Reporter, when investigating whether a child needs protection, guidance, treatment or control, to require the local authority to provide a report on a child, which could include relevant information about his or her siblings or other matter relating to the child which the Principal Reporter specifies. On reaching the view that it is necessary for a CSO to be made in respect of a child, the Principal Reporter has power to request further information from the local authority (section 69(4) and (5)). The Principal Reporter has a further opportunity to obtain a report from the implementation authority when arranging a children’s hearing to review a CSO (section 137(4) and (5)).

38.

Since 2013 it has been a statutory requirement that when making, varying or continuing a CSO in relation to a child, the children’s hearing must consider whether to include in the CSO a contact direction (section 29A). The Principal Reporter’s Practice Direction, Children’s Hearings Scotland’s Practice and Procedure Manual and the statutory provisions to which we have referred provide mechanisms by which the children’s hearings can show respect for the family life of family members who are not entitled to the status of relevant person.

39.

The parents and the referred child can also make representations on behalf of members of the wider family in order to protect their article 8 interests: *Principal Reporter v K* (above), para 68. Family members who have or have recently had a significant involvement in the upbringing of the child, whether siblings, aunts, uncles or grandparents have the right to be deemed a relevant person under section 81(3) and they also have the right to call for a review of a contact direction: section 126 and article 2 of the Children’s Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 (SSI 2013/193).

40.

Finally, when the grounds have been accepted by the child and each relevant person, the children's hearing can direct the release of documents under rule 61(1)(g) of 2013 Rules so far as is necessary to enable the hearing to decide whether to make a CSO and if so the measures to be included in that order.

41.

Therefore, there is a range of measures which can be used to ensure that the relevant public authorities - the children's hearings themselves, the reporters and the local authorities - comply with their duty to act compatibly with the article 8 rights of family members. We agree with the respondents that those measures should work if the children's hearings are conducted in a practical and sensible manner and in compliance with the guidance given by the Principal Reporter and Children's Hearings Scotland. It is, of course, a great help if there can be continuity of membership, or at least of the chairing member, between the pre-hearing panel where procedural decisions are often made and the hearing itself.

42.

But the appellants contend that their rights will be adequately protected only if they have the right to obtain the status of a relevant person. Mrs Scott criticises the measures which we have described as a hotchpotch.

Principal Reporter v K

43.

Both ABC and XY found on statements made by this Court in *Principal Reporter v K* (above) in support of their challenges. The case concerned the article 8 rights of an unmarried father of a child in respect of whom he did not have parental rights or responsibilities. The father claimed that the provisions of the 1995 Act, which then contained the definition of a relevant person, must be read compatibly with article 8 of the ECHR so as to include him and thereby afford him a proper opportunity to take part in the decision-making process concerning his child at children's hearings. In the judgment of the Supreme Court, delivered by Lord Hope and Lady Hale, his claim was upheld. The Court held (para 48):

"... a parent (or other person) whose family life with the child is at risk in the proceedings must be afforded a proper opportunity to take part in the decision-making process. As currently constituted the children's hearing system violated the article 8 right of this father (and indeed of his child) and risks violating the rights of others in the same situation."

From this it can be seen that the Court's focus was on the article 8 rights of the father and the child and extended to others only if they were "in the same situation". The Court went on in para 60ff to consider how to cure the violation of those rights. The solution set out in para 69 was to interpret section 93(2)(b)(c) of the 1995 Act, which set out a part of the definition of who was a relevant person, so that the words which we italicise below were included in the statutory definition:

"any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child or who appears to have established family life with the child with which the decision of a children's hearing may interfere."

44.

Giving a literal and non-contextual interpretation to the inserted words would mean that every person who had established family life with the child would be a relevant person. Mr Moynihan and Ms

Dunlop submit that the solution which this Court adopted in *Principal Reporter v K* requires to be read in its context of the article 8 rights of an unmarried father who did not have parental rights in domestic law and that the Court was addressing the rights of the parent and the child. In reading down the then current statutory provision the Court was not creating a statutory formula which could be applied across the board.

45.

We agree with this submission and with the First Division's analysis of this Court's approach in *Principal Reporter v K* in paras 14-17 of its clear and succinct opinion in ABC's case. We agree with the First Division's reading of the judgment that the reading down of the statutory provision which then governed was intended to be limited "to unmarried fathers and to a limited class of others with a significant involvement in the upbringing of the child" (para 17). As the First Division stated, this approach was later enacted in section 81(3).

46.

It is important to recognise that there are differences between the relationship of a parent and a child and the relationship between a sibling and a child. People who have parental responsibilities are treated as relevant persons because of those responsibilities and people who have a significant role in the upbringing of a child also have the right to be deemed a relevant person. As the European Court of Human Rights stated in *Haase v Germany* (2005) 40 EHRR 19, para 82, "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life". The parents and other people who have a significant involvement in the upbringing of the child are those who make decisions for the child. It is those decisions which are now being made by the public authorities through the CSO. The interference with the article 8 rights of such people is qualitatively different from the interference with the article 8 rights of siblings, which normally will be concerned with maintaining their relationship with the referred child, whether through contact or (if they are both the subject of CSOs) through being placed together. The conferment of the status of relevant person is an acknowledgement of the gravity of the interference with the family life of the child and the parents and others with that significant involvement in the child's upbringing.

47.

But there are several other reasons why it is not appropriate for a sibling, who has not taken on such responsibility for the upbringing of a child, to be given the status of a relevant person. As we have said, being a relevant person involves an obligation to attend a children's hearing which can be enforced through the criminal law (section 74). It would not be appropriate to impose that obligation on every sibling. Each relevant person has the power to agree or not to agree the grounds of a referral. Again, that power is not obviously appropriate to a sibling who has not had a significant involvement in the upbringing of the child; and it could result in unnecessary and disruptive referrals to the sheriff court if the status of relevant person were to be so extended.

48.

A relevant person has comprehensive access to the papers before the children's hearing. These may give a detailed account of the child's life, including confidential information about the child's education and health, any abuse that the child may have suffered, and possibly about the child's involvement in criminal activity or other anti-social behaviour. The information may include details of and adverse comments concerning the problems and behaviour of the parent or parents. A children's hearing may withhold information about the referred child from a person if its disclosure to that person would be likely to cause significant harm to that child: section 178. But the child's confidentiality is not otherwise protected. Nor is there such protection for the parents and others.

49.

Public authorities have to show respect for the article 8 rights, including the privacy rights, of everyone involved. Article 8(2) recognises that public authorities may legitimately interfere with a person's rights to family life for the protection of the rights and freedoms of others. The rights to privacy of the referred child, the parents and others must also be respected. The views of the child are an important consideration in the decision-making process (section 27). There are matters relating to a child, such as adverse school reports, health problems and involvement in criminal activity, about which a parent may need to know, but not every sibling. Indeed, in XY's case, one of his younger sisters has objected to his becoming a relevant person in order to preserve her privacy. While XY has abandoned his claim to be made a relevant person in relation to that sister, the point of principle remains. Similarly, there are matters concerning a parent or parents about which the panel need to know but which may not be suitable to be divulged to one of their children. In ABC's case, his father has expressed concern about ABC having access to confidential information concerning him.

50.

In our view, the requirement to respect the privacy of others, the concerns about the dissemination of sensitive information, and the statutory requirement on the chairing member to take all reasonable steps to keep to a minimum the number of persons present at a children's hearing at the same time (section 78(4)), all militate against reading down the statutory definition of a relevant person so as to confer the status of relevant person on anyone who appears to have established family life with the referred child with which a decision of the children's hearing may interfere.

51.

In our view, article 8 of the ECHR does not require the public authorities to give a sibling, who has not, and has not recently had, a significant involvement in the upbringing of the child, the status of a relevant person. Thus, for reasons which are essentially the same as those of the First Division, we are satisfied that the challenges to the legislative competence of the Scottish Parliament in enacting the relevant provisions of the 2011 Act must fail.

52.

We nonetheless acknowledge that the initiation of these challenges has served to uncover a gap in the children's hearings system which has had to be adapted to meet the requirements of article 8 in relation to siblings and other family members. There is now a clear recognition of the interest of both the child and the sibling in maintaining a sibling relationship through contact (or through placement if both are subject to CSOs) in most cases. The nature of the sibling relationship will vary from family to family and there needs to be a nuanced approach which addresses the extent of family life in that relationship, the home circumstances, how far the interests of the parents, the sibling and the child coincide and the possibility that the child, the parents and other siblings may have article 8 rights which are in conflict with those of the sibling. There needs, in short, to be a bespoke enquiry about the child's relationship with his or her siblings when the children's hearing is addressing the possibility of making a CSO.

53.

To make effective the rights of the sibling and other family members with a similar interest in maintaining contact with a child, it is necessary both that the relevant public authorities are aware of those interests and that the siblings and family members are informed of the nature of the proceedings concerning the child and of their rights in relation to the proceedings. Each person involved in the process - the Principal Reporter, the Children's Panel members, the local authority, the social worker preparing a care plan, and the safeguarder - need to be aware of those interests if the

system is to operate compatibly with the article 8 rights of siblings and other family members. We have described in paras 32 to 40 above the arrangements now in place by which this may be achieved. It is for the public authorities involved to address whether further steps are desirable to protect the relevant article 8 interests. But we are persuaded that the legislative scheme of the 2011 Act can be operated in accordance with those rights.

The orders sought

54.

It follows that a declarator as to legislative incompetence should not be made, for there is no such incompetence. Nor is it necessary to make any other order in ABC's case. It may be that the children's hearing on 7 September 2017 did not adequately respect his article 8 procedural rights to have his views taken into account, but the matter was rectified in December 2017 and the contact directions have been the subject of later review decisions to which he has been able to contribute by written submission or by attendance at the children's hearing. On each occasion, his contact with his younger brother has been preserved.

Conclusion

55.

We would dismiss these appeals.