Michaelmas Term
[2010] UKSC 56
On appeal from: 2010 CSIH 5; 2009 CSOH 94

JUDGMENT

Principal Reporter (Respondent) *v* K (Appellant) and others (Scotland)

before

Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

15 December 2010

Heard on 20 and 21 October 2010

Appellant
Janys M Scott QC
Alison Stirling
(Instructed by Drummond Miller WS)

First Respondent
Morag Wise QC
Lynda Brabender
(Instructed by Biggart Baillie LLP)

Second Respondent
Rosemary Guinnane
David Sheldon
(Instructed by Aitken Nairn WS)

First Minuter
David Johnston QC
Roddy Dunlop QC
(Instructed by The Scottish Government Legal Directorate)

Second Minuter
Marie Helen Clark
(Instructed by HBM Sayers)

LORD HOPE AND LADY HALE

1. This is a case about the rights of unmarried fathers to take part in children's hearings under Part II of the Children (Scotland) Act 1995. It raises two distinct issues. The first concerns the kind of order made in the sheriff court which would be competent to give a father the right to take part in the children's hearing. The second concerns the compatibility of the present scheme with the rights of the father (and indeed the child) under the European Convention on Human Rights. As the reader will discern, Lord Hope has taken the primary responsibility for dealing with the first issue in paras 2-31, and Lady Hale has taken primary responsibility for the second in paras 32-69. But this is a judgment of the court with which all members agree.

The facts

2. The appellant K is an unmarried father. He is the father of a child, L, who was born on 6 May 2002. The child's mother is JR, with whom K formed a relationship in about April 2000. They cohabited, together with K's daughter and JR's son from previous relationships, and then with their own child L. They registered her birth together on 14 May 2002. Their relationship broke down in either 2003 or 2004, although there were short periods of separation before then. K continued to have contact with L after the separation. She had a medical condition which necessitated overnight stays in hospital, and he continued to be involved with her hospital appointments until at least September 2003. One might have hoped that it would have been possible for K to maintain contact with her thereafter without recourse to the court. But this proved not to be so. In about May 2004 he raised proceedings in the sheriff court at Glasgow under section 11 of the Children (Scotland) Act 1995 ("the 1995 Act") seeking full parental responsibilities and parental rights in relation to L and a contact order. The sheriff made an interim contact order on 11 May 2004. Residential contact took place every weekend in terms of that order until December 2005.

3. JR then alleged that L had been sexually abused by K, and L's contact with K was stopped. The allegation was investigated by the police, who concluded that there was insufficient evidence to support it. But it continued to cast a shadow over K's attempts to resume contact. K returned to the sheriff court on 21 March 2006 when he asked the sheriff to ordain JR to appear to explain her failure to obtemper the interim contact order. The sheriff declined to do so, and on 5 May 2006 he suspended interim contact and ordered a report from a local solicitor. By then steps had been taken by the local authority's social work services department to refer

L's case to the Principal Reporter under chapter 3 of Part II of the 1995 Act, on the ground that she was in need of compulsory measures of supervision. The referral was made on 9 March 2006. It was stated that the department were concerned both about L's welfare, given the level of conflict which had arisen between her parents which might have caused significant trauma to L, and about the fact that JR had made serious allegations about her ex-partner K and continued to do so without appearing to be willing to address these issues by engaging with social work services.

4. On 28 June 2006 a children's hearing was held, which was attended by L and JR. K had been notified and was in the building, but he was not allowed to attend the hearing or to participate in the discussion. This was because he was not regarded as a "relevant person" within the meaning of section 93(2)(b) of the 1995 Act: see also section 45(8) as to the right of a relevant person to attend all stages of the hearing. It was also noted that there was high level of conflict between him and JR. No decisions were taken and the panel continued the hearing to a later date. A further children's hearing was held on 20 July 2006. K was again notified, but he did not attend. It can be assumed that he would not have been allowed to attend or participate in this discussion, for the reasons that were given on 28 June 2006. The grounds for referral were read out to JR by the chairman, as required by section 65(4) of the 1995 Act. They included an allegation in terms of section 52(2)(d) of the 1995 Act that L was a child in respect of whom an offence of the kind mentioned in Schedule 1(2) to the Criminal Procedure (Scotland) Act 1995 had been committed by a person who had parental responsibilities in relation to her. This was because JR had stated to a general practitioner at Shettleston Health Centre that L had told her that K had "stuck his finger" in her and that L had had a vaginal discharge.

5. JR accepted the majority of the statements of facts but denied the grounds for the referral. Because she did not accept the grounds and also because L was too young to understand them, the Principal Reporter was directed to apply to the sheriff for a finding as to whether the grounds for referral were established: see section 65(7) and (9) of the 1995 Act. The matter came before the sheriff on 11 August 2006. The hearing was attended by a solicitor for the Principal Reporter and a solicitor for the curator ad litem to L. K was not entitled to be there as he was not a "relevant person" within the meaning of section 93(2)(b), and he did not attend. The sheriff was told that the grounds of referral and the facts contained therein, which had been amended following objections by JR, had been accepted by the relevant parties. So he deemed them to be established under section 68(8) and remitted the case as amended to the children's hearing for consideration and determination under section 68(10) of the 1995 Act.

6. Section 93(2)(b) of the 1995 Act, as amended, provides that, unless the context otherwise requires, the expression "relevant person" in relation to a child means:

> "(a) any parent enjoying parental responsibilities or parental rights under Part I of this Act;
>
> (b) any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act; and
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> (ba) any person in whom parental responsibilities or parental rights are vested by, under or by virtue of a permanence order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007 (asp 4); and
>
> (c) 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."

7. This brief narrative is sufficient to identify the issue that lies at the heart of the appeal which has brought the matter before the Supreme Court. Decisions of a children's hearing or a sheriff under Part II of the 1995 Act are not appealable to this court. Section 51(1) provides that a child or a relevant person may appeal to the sheriff against a decision of a children's hearing, and section 51(11) provides that an appeal shall lie by way of stated case either on a point of law or in respect of any irregularity in the conduct of the case from any decision of the sheriff to the sheriff principal or to the Court of Session and, with the leave of the sheriff principal, from any decision of the sheriff principal to the Court of Session. It also provides that the decision of the Court of Session in the matter shall be final. But the issue has come before this court by a different route, to which the provisions about appeals under section 40(1) of the Court of Session Act 1988 apply.

These proceedings

8. On 4 October 2006 a children's hearing took place which K was permitted to attend, but not as a relevant person. He told the hearing that he wished to continue to have contact with L, which he had been permitted to do by the sheriff on 18 August 2006 at a contact centre each Saturday. The sheriff had also appointed a curator ad litem to L on 18 August 2006 and assigned 27 October 2006 as a child welfare hearing so that he could give more detailed consideration to the case. At a resumed hearing on 19 October 2006, which K also attended, the

children's hearing felt that it was appropriate to leave contact where it was in terms of the court's order. But it decided to place L on a supervision requirement. On 27 October 2006 the sheriff conducted the child welfare hearing for which the diet had been assigned on 18 August 2006. The hearing was attended by K and JR and their solicitors and by the curator ad litem – but not, of course, by the Principal Reporter. Having heard submissions from all parties, the sheriff (Sheriff Totten) pronounced the following interlocutor:

> "The sheriff, having heard the curator ad litem and agents for both parties, grants pursuers motion, no 7/2, in part, conjoined by the curator ad litem despite defenders opposition, and in terms thereof; grants the pursuer parental rights and responsibilities to the extent that he becomes a relevant person in the children's referral relating to the child [L], born 6 May 2002; continues interim contact previously granted; assigns 9 January 2007 at 11 am as a child welfare hearing to monitor contact."

This interlocutor survived unchallenged by the Principal Reporter until March 2009. K was permitted to attend a series of children's hearings and to participate in the discussion on the assumption that he was a relevant person in terms of the interlocutor. It was not until over two years later that the Principal Reporter questioned its competency.

9. This came about in the following way. It will be recalled that the children's hearing had originally been content to allow contact between father and child to continue in terms of the sheriff's interlocutor of 18 August 2006. However, on 13 August 2007, the hearing imposed a condition of no contact between them. Initially this was intended as a temporary measure while the social work department assessed the situation in the light of the allegations which had been made as long ago as December 2005. But matters dragged on for more than a year without any progress being made.

10. Eventually, on 19 January 2009 a children's hearing took place at which K asked the hearing to remove the condition of no contact, arguing that there was no substance in the allegations that had been made against him and that he had a right to see his daughter. The children's hearing decided to continue the supervision order and directed that K was not to have contact with L. K appealed against this decision to the sheriff under section 51(1) of the 1995 Act. He averred that he was a relevant person for the purposes of those proceedings in terms of section 93(2)(b). The Principal Reporter did not at first challenge this averment. But in her amended answers she averred that K did not fall into any of the categories listed in section 93(2)(b). Faced with the fact that K had obtained an interlocutor from the

sheriff which appeared to be inconsistent with that averment, she presented a petition to the Court of Session in March 2009 for suspension of the interlocutor of 27 October 2006 on the ground that it was incompetent.

11. On 27 March 2009 the Lord Ordinary, Lady Stacey, suspended the sheriff's interlocutor of 27 October 2006 ad interim. K then lodged answers to the Principal Reporter's petition in which, after averring that the interlocutor was competently made, he averred that it was not competent for the petitioner to seek suspension of it, as she had invited K to the children's hearings and had involved him in proceedings adverse to him which she was now seeking to prevent him from appealing and had delayed challenging it for several years. He then averred that, esto the interlocutor was incompetent and/or ambiguous as averred by the petitioner, it together with the provisions of the 1995 Act should be read and given effect in a way that was compatible with his rights under articles 6 and 8 of the Convention, read individually and when taken together with article 14.

12. On 14 May 2009 Lady Stacey gave leave to reclaim against her interlocutor of 27 March 2009. The case called before the First Division (the Lord President (Hamilton), Lady Paton and Lord Carloway) for a hearing on the summar roll on 17 and 18 November 2009. On 21 January 2010 the First Division refused K's reclaiming motion and his application for a declaration that section 93(2)(b) of the 1995 Act was incompatible with K's rights under articles 6, 8 and 14 of the European Convention on Human Rights. It granted decree for suspension of the interlocutor of 27 October 2006 in terms of the prayer of the petition. The opinion of the court was delivered by Lord Carloway. It is against that interlocutor that K now appeals to this court.

The issues

13. The parties are agreed that the issues arising in this appeal are as follows:

> (i) whether K was entitled to participate in children's hearings by virtue of the interlocutor of 27 October 2006, or whether that order was incompetently pronounced and was therefore appropriately suspended by the Court of Session;
> (ii) whether the operation of section 93(2)(b) of the 1995 Act in defining persons entitled to participate in a children's hearing is such as to be incompatible with K's rights under articles 6, 8 or 14 of the Convention; and
> (iii) if so, whether such incompatibility can be addressed by reading down section 93(2)(b) of the 1995 Act under section 3 of the Human Rights Act 1998 or whether there ought to be a declaration of incompatibility.

14. Underlying these three questions there is a fundamental issue about fairness. It is most clearly demonstrated by what happened on 20 July 2006 when, in K's absence, the children's hearing considered whether the grounds of referral were accepted and by what happened on 11 August 2006 when, again in K's absence, the sheriff held that the grounds of referral were established. Those grounds were based in part on allegations about K's conduct which, if found to be established, were bound to affect the way L's case was dealt with from then on, especially with regard to issues about whether there should be contact between her and K. Yet K was given no opportunity to be heard so that he could refute the allegations. This strikes us as quite contrary to one of fundamental rules of natural justice, the right to be heard.

15. The fundamental issue of fairness is also demonstrated by the decision of the children's hearing to deny all contact between father and child. That requirement effectively superseded any order for contact which had been made by the sheriff court. Yet if the Principal Reporter is correct, the father had no right to appear in the children's hearing to contest the requirement or to appeal against it to the sheriff court, unless and until he got an appropriate order in separate proceedings before the sheriff court. That too strikes us as quite contrary to one of the fundamental rules of natural justice.

16. A child's mother has parental responsibilities and parental rights in relation to her child, whether or not she is or has been married to the child's father: section 3(1)(a) of the 1995 Act. As such, she will always be a "relevant person" within the meaning of section 93(2)(b)(a) (unless and until she is deprived of all the parental responsibilities and parental rights by order of a court). By section 23 of the Family Law (Scotland) Act 2006 it was provided that section 3(1) of the 1995 Act be amended to the effect that unmarried fathers who are registered as the child's father under section 18 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 or the equivalent enactments in England and Wales or Northern Ireland were automatically to have parental responsibilities and parental rights in relation to the child. So they too will always be a "relevant person" within the meaning of section 93(2)(b)(a). But by section 23(4) of the 2006 Act it was provided that the amendment to section 3(1) of the 1995 Act was not to confer parental responsibilities or parental rights on a man who was registered as the child's father jointly with the mother before the coming into force of the amendment. K was registered as L's father on 14 May 2002, shortly after she was born. But, as the amendment is not retrospective, it does not apply to him. An unmarried father can acquire parental responsibilities and parental rights by agreement with the child's mother under section 4 of the 1995 Act. In K's case, once his relationship with JR had broken down, this was unlikely to be possible. The only way he could acquire them was by applying to the court for a grant of those rights under section 11 of the 1995 Act, which is what he did in May 2004, as we pointed out in para 2.

17. The right to be heard is not, of course, an absolute right that must be made available in all circumstances. In *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 Tucker LJ said:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth."

These observations were approved in *Ceylon University v Fernando* [1960] 1 WLR 223 and in *In re K (Infants)* [1965] AC 201. The point was made in the latter case that the requirement had to yield to the paramount consideration, which was the welfare of the children. No doubt there will be circumstances where a children's hearing may think it necessary, in the interests of the child, to exclude a relevant person from the hearing under section 46 of the 1995 Act: see further in para 46 below. In this case however, where the issue is whether allegations which profoundly affect the relationship between parent and child have been established, the inequality of treatment between the mother and unmarried fathers who were registered after 4 May 2006 on the one hand and unmarried fathers in K's position on the other is striking.

18. The question whether the amendment should apply to fathers who had already registered was considered by the Scottish Executive prior to its enactment. It preferred to give the benefit of it only to unmarried fathers who registered the birth after the legislation came into force, on the ground that the law should be clear, precise and predictable: see Parents and Children (Scottish Executive, 2000), paras 2.16-2.18. The majority of those who responded to the consultation shared this view: Family Matters, Improving Family Life in Scotland (Scottish Executive, 2004), p 15. It is understandable that the Scottish Parliament would not wish retrospectively to confer all the parental responsibilities and parental rights upon all registered unmarried fathers irrespective of their actual relationship with the child. But in the present context it is very hard to see how the difference in treatment under Part II of the 1995 Act can be justified.

Issue (i): the sheriff's interlocutor

19. The operative part of the interlocutor of 27 October 2006 falls into three parts: (i) the granting to K of "parental rights and responsibilities to the extent that he becomes a relevant person in the children's referral relating to the child [L]"; (ii) the continuation of the interim contact previously granted; and (iii) the

assigning of a further diet as a child welfare hearing to monitor contact. It is the first part only that is said by the Principal Reporter to be incompetent.

20. The First Division's discussion of this issue begins by making the point, with which no-one would disagree, that interlocutors should be unambiguous and that they must mean what they say: para 58. It is then said that there is no principle of reading interlocutors down in a way which would make them compatible with Convention rights. It is true that the direction in section 3 of the Human Rights Act 1998 deals only with the way primary and subordinate legislation should be read and given effect. But a court is a public authority, and if an interlocutor is capable of being read and given effect in a way which is compatible with Convention rights that way of construing it is to be preferred to one that does not do so. As the discussion proceeds, however, this apparently rather uncompromising approach gives way to a recognition that if the problem was just a lack of specification that might not, in itself, render the interlocutor incompetent: para 60.

21. The question to which the discussion then turns is whether it was open to the sheriff to make an order under section 11(1) of the 1995 Act which did no more than grant to the father a right to be heard at a children's hearing: para 65. It is pointed out that such a right is not a defined responsibility or right in terms of the statute. Reference is made to the reasoning of Sheriff Principal Dunlop QC in *T v A* 2001 SCLR 647, 2001 GWD 15-567 in which he said that the court should not grant an order under section 11 simply because the father would thereby become entitled to appear at a children's hearing, and to observations to the same effect by Sheriff BA Kerr QC in *Greenhorn v Hamilton*, unreported, 2 March 1999. This part of the discussion concludes at the end of para 66 with these words:

> "The scheme of the Act is that a father must first persuade the court on the merits, applying the overarching principles, of imposing upon him the defined parental responsibilities, or one or more of them. Success in such an application will make the father a relevant person."

We see no reason to disagree with this observation, although we would include the possibility of the father being given the parental rights, or one or more of them, as well: see section 11(2)(b).

22. The point that the sheriff would have misdirected himself if he thought that it was open to him simply to grant a right to be heard at a children's hearing was not, in the end, the reason why the First Division held that the interlocutor was incompetent. There are indications in paras 68-70 that it might have considered altering the interlocutor by suspending it in part or substituting different words,

had it not been for the fact that a proof had been set down in the sheriff court to take place in less than two months time. The basis of the decision that the interlocutor is incompetent is to be found in para 67, where it is said that, when he restricted himself to the limited question of whether the father's presence would be of assistance to the hearing in determining the appropriate order to make in the interests of the child's welfare, the sheriff did not address the three overarching principles: see section 11(7) of the 1995 Act. This point is summarised at the end of para 67 in these words:

> "In failing to form a view, by applying the overarching principles, the sheriff erred in law. He acted otherwise than within the powers conferred by the Act (section 11(7)) and thus in an incompetent manner."

23. If there had been some evidence to show that the sheriff failed to address his mind to the overarching principles, there would have been something to be said for the view that he had misdirected himself in law. This would have provided a ground for the parties to appeal, but of course the Principal Reporter was not a party to the proceedings in the sheriff court. Her only method of challenge was by the proceedings which are now before us, but she did not bring these timeously. Instead, K attended children's hearings and was involved in the discussion on the basis of the interlocutor in the reporter's presence without objection for more than two years. In *McDougall v Galt* (1863) 1 M 1012, 1014 Lord Ardmillan said that if there is any point settled in the court's practice, it is that when a judgment has been implemented it cannot be reviewed by suspension: see also *Mackay, Practice of the Court of Session* (1877-1879), vol ii, p 483; *Maclaren, Court of Session Practice* (1916), p 153. We very much doubt whether suspension was an appropriate remedy in the events that happened in this case. But, as this point was not developed in argument and there are more fundamental objections to the First Division's decision, we shall not say any more about it.

24. First there are the questions that have been raised about the terms of the interlocutor and whether it was one which the sheriff had power to grant under section 11(1) of the 1995 Act. The critical phrase in the interlocutor is that part of it which is introduced by the words "to the extent that": viz: "grants the pursuer parental rights and responsibilities *to the extent that* he becomes a relevant person in the children's referral relating to [L]". Section 11(1) provides that an order may be made under that subsection "in relation to parental responsibilities and parental rights". Section 11(2) provides that the court may make such order under subsection (1) as it thinks fit and that, without prejudice to the generality of that subsection, it may in particular make any of the orders that it then lists. These include:

"(b) an order –

(i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and

(ii) giving that person such rights;"

An order giving a person the right to participate in a children's referral is not one of those listed in section 11(2).

25. It is not all that difficult, however, to understand what the sheriff was seeking to achieve. One of the parental responsibilities listed in section 1(1) of the 1995 Act is the responsibility "to safeguard and promote the child's health, development and welfare". Among the parental rights that are listed in section 2(1) to enable the parent to fulfil his parental responsibilities is the right "if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis." The effect of the referral was to subject the exercise of parental responsibilities and parental rights to the control and supervision of the children's hearing: see sections 69 and 70 of the 1995 Act. But the participation of those listed in section 93(2)(b) as relevant persons is an essential part of the exercise. That is why such a person has the right, and indeed the duty unless the hearing are satisfied that it would be unreasonable to require his attendance, to attend. K was a person with whom L was to continue to have interim contact, as the sheriff ordered in part (ii) of his interlocutor (see para 19, above). The effect of the referral was that continuation of this contact was subject to the views of the children's hearing. K needed to be given the parental right to maintain personal relations with L so that he could participate in the discussions which were to take place there. He also needed to be made subject to the parental responsibility to safeguard and promote L's health, development and welfare so that the hearing could be confident that he would contribute to a discussion of those aspects of L's well-being responsibly.

26. The problem therefore lies in the wording of the interlocutor rather than what, on a sensible reading of it, the sheriff was seeking to achieve. Miss Wise, very helpfully, provided some suggestions as to how the interlocutor might be re-worded so as to bring it within the scope of section 11(1). The first of these suggestions was as follows:

"makes an order ad interim in terms of section 11(2)(b) of the Children (Scotland) Act 1995 imposing upon the pursuer the parental responsibility in respect of the child, X, to safeguard and promote the

> said child's health, development and welfare but restricts the exercise of said parental responsibility to participation in proceedings before the children's hearing in respect of said child."

Another suggestion would have imposed upon the pursuer the parental responsibilities and given him the parental rights too, but would have limited their exercise in the same way.

27. The point that these suggestions illustrate is that the defect in the sheriff's interlocutor is one of specification, not one of substance. He did not refer to section 1(1) or 2(1) or to section 11(2), and he did not spell out in terms those parental rights and parental responsibilities that were relevant in K's case. Nor did he refer in terms to participation in the children's hearing as setting the limits within which the parental responsibilities and parental rights could be exercised. It would have been better if he had. But it would be going too far to hold that his interlocutor was incompetent because he did not do so. His wording appears not to have given rise to any misunderstanding or difficulty until the Principal Reporter sought to challenge the interlocutor in these proceedings. It is true, as the First Division said in para 58 of its opinion, that interlocutors should be unambiguous and not capable of alternative constructions. But it has not been suggested that this interlocutor, less than perfect though it may be, suffers from an ambiguity which rendered its application in K's case uncertain or impracticable.

28. We would therefore reject this ground, which was the one relied on by the Principal Reporter, for holding that the interlocutor of 27 October 2006 was incompetent.

29. What basis is there, then, for the conclusion that the sheriff did not address his mind to the overarching principles when he pronounced his interlocutor? There is nothing in the wording of the interlocutor itself which suggests this. If anything, the second and third parts of it (see para 19, above) suggest the contrary. He decided to continue the interim contact previously granted and to assign a further diet as a child welfare hearing to monitor contact. The first of these orders was an order of the kind contemplated by section 11(2)(d) of the 1995 Act. So when the sheriff was considering whether or not to make it under section 11(1), he was required by section 11(7) to have regard to the overarching principles. The same applied to his decision to appoint a hearing to monitor contact, as this was to assist him in deciding whether or not to make any further orders about contact. The fact that he made these further orders, to the competency of which no objection has been taken, indicates that the sheriff had the overarching principles in mind during the hearing on 27 October 2006. This would not be at all surprising, as Sheriff

Totten had been designated for dealing with cases of this kind and was well equipped for doing so by training and experience.

30. Counsel for the curator ad litem, Miss Clark, informed the court that the sheriff was invited at the hearing to address the section 11(7) principles when he was considering whether to make any order under section 11(1) of the 1995 Act. He was asked to consider the child's best interests as paramount and to consider whether it would better that an order be made than that no order be made. She submitted that it was to be inferred that the sheriff, who had heard these submissions, determined that it was in L's best interests that K should participate in the decision-making process and, applying the section 11(7) principles, that it was better for the child that an order be made. Miss Wise QC for the Principal Reporter said that she did not support the reasoning in para 67 of the First Division's judgment. Her point was that the right which the sheriff appeared to have granted was one which he had no power to grant under section 11(1). It was the nature of the order he made that she objected to, not any defect in the process of reasoning that led up to it.

31. We do not think that there was a sound basis for the First Division's view that the sheriff failed to apply the overarching principles. All the indications are to the contrary. If suspension was an appropriate remedy, which we doubt, we think that there were no grounds for suspending this interlocutor because this very experienced sheriff did not apply his mind to the overarching principles. It would require clear evidence to justify the conclusion that he failed to address his mind to them. Evidence of that kind is completely lacking. Indeed, such evidence as there is suggests that he had these principles in mind throughout the hearing. In any event, failure to apply the correct principles when making an order, while it may well be a ground of appeal, would not normally render the order incompetent. We would therefore reject this ground also for holding that the interlocutor was incompetent.

Issue (ii): articles 6, 8 and 14 of the Convention

32. In his answers to the petition K raised this issue on an esto basis only. It was put forward as an alternative argument, which would require to be addressed only if the court were to hold that the interlocutor of 27 October 2006 was incompetent. The First Division had to deal with the issue as it held that the interlocutor was incompetent. It held that there was no incompatibility with K's Convention rights: paras 78-81. As we disagree with its finding that the interlocutor was incompetent, it follows that the contingency to which K's averments were addressed has not arisen. But as a public authority the court has its own duty to act compatibly with the Convention rights. If we take the view that these have been infringed in the case before us, that duty requires us to say so. The

issue also raises a point of general public importance which is particularly relevant at the present time. The Scottish Parliament is currently examining the Children's Hearings (Scotland) Bill, which deals with the standing of unmarried fathers in clauses 80(3) and 185(1). The Parliament is obliged to legislate compatibly with the Convention rights.

33. Unless an unmarried father in K's position can qualify as a relevant person he is at a severe disadvantage from the outset because he has no right to be heard either by the children's hearing, or by the sheriff on a referral, if allegations are made against him. It was said that he could apply to the sheriff for an order under section 11(1) so that this obstacle could be overcome very quickly. However, both the appellant and his daughter's curator ad litem argue that obtaining an appropriate order from the sheriff court will not always be enough to comply with the Convention rights of either father or child and, indeed, it was not enough in this case. Children's hearings often have to act in an emergency. Vital decisions may be made which will determine how the child lives for the foreseeable future. It is in the interests of the child as well as the father that he should not be absent at this crucial stage. As this case clearly demonstrates, the grounds for referral may be found to be established, with or without a contest, without any involvement from one of the people most closely affected. Unpicking these actions and returning to the *status quo ante* may be well-nigh impossible. Furthermore, beginning formal proceedings in the sheriff court may be beyond the means and the resources of the father. In today's climate, legal aid cannot be guaranteed. Speedy decisions also cannot be guaranteed, especially if the claim is contested. As Lord Rodger vividly put it during the hearing, the train may have left the station while the father is still waiting at the barrier.

34. Requiring this initial filter is said to breach the Convention rights of both father and child under article 8; of the father under article 14 taken with article 8; and of the father under article 6.

Article 8

35. The relevant portions of article 8 read as follows:

> "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 . . . for the protection of

health or morals, or for the protection of the rights and freedoms of others."

36. First, therefore, it must be established that father and child have a family life together. The Strasbourg Court has consistently expressed the view that the natural connection between mother and child at birth amounts to family life, which subsequent events could only break in exceptional circumstances: see *Berrehab v The Netherlands* (1988) 11 EHRR 322; *Gül v Switzerland* (1996) 22 EHRR 93. Fathers will normally have family life with their children if they are married to or living with the mother and child: see, for example, *Johnston v Ireland* (1986) 9 EHRR 203, para 55; *Keegan v Ireland* (1994) 18 EHRR 342, para 44. But cohabitation is not essential; it will depend upon the relationship established and the degree of commitment shown. The principles were summed up like this in *Lebbink v The Netherlands* (2004) 40 EHRR 417, at para 35:

> "35. The Court recalls that the notion of 'family life' . . . is not confined to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso iure part of that 'family' unit from the moment and by the very fact of its birth. Thus there exists between the child and the parents a relationship amounting to family life [referring to *Keegan v Ireland* (1994) 18 EHRR 342, para 44; *Elsholz v Germany* [GC] (2000) 34 EHRR 1412, para 43; and *Yousef v The Netherlands* (2003) 36 EHRR 345, para 51].

> "36. Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* 'family ties' [referring to *Kroon v TheNetherlands* (1995) 19 EHRR 263, para 30]. 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 and T v Finland* (2000) 31 EHRR 484, para 150]. Where it concerns a *potential* relationship which *could* develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth [referring to *Nylund v Finland* , (Application No 27110/95), (unreported) decision of 29 December 1999] [emphasis supplied]."

However, mere biology is not enough:

> "37. . . . The court does not agree with the applicant that a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, should be regarded as sufficient to attract the protection of article 8."

37. Nevertheless, in that case, although the parents had never lived together and the father had not sought to recognise the child, there had been a real relationship between the parents, the father had been present at the child's birth, had visited regularly, even changed her nappy a few times and babysat once or twice, and was in touch with the mother about the child's impaired hearing. This was enough to establish family life between father and child and the Dutch courts should have entertained his application for contact.

38. Family members other than biological parents may also enjoy family life with a child. This dates back at least as far as the seminal case of *Marckz v Belgium* (1979) 2 EHRR 330, at para 45, where the Court stated its opinion that "'family life' within the meaning of article 8, includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives may play a considerable part in family life" (see also, for example, *Bronda v Italy* (1998) 33 EHRR 81, para 50; *GHB v United Kingdom* [2000] EHRLR 545; *L v Finland* (2000) 31 EHRR 737, para 101). In *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, the Court recognised that a female to male transsexual, his partner and their child conceived by donor insemination were a family. And in *Jucius and Juciuvienė v Lithuania* (2008) 49 EHRR 70, the Court held that there was family life between a maternal uncle and aunt and two orphaned children who had lived with them for three years. But, of course, whether family life has been established will depend upon the facts of each case. Furthermore, it may be harder to establish an interference with these wider family ties and such interferences may be easier to justify than interferences with the core family unit.

39. In this case, it is not in dispute that this father did enjoy family life with his child. He (and his daughter from a previous relationship) were living with her mother when she was born. The parents registered the birth together. They had lived as one household after the child's birth. The father was heavily involved with her medical treatment in hospital. It is not entirely clear when he separated from the mother but he had regular contact with his daughter after that. In May 2004 he applied to the sheriff court for parental responsibilities and parental rights and a contact order. An interim order for weekly overnight stays was made and contact took place in accordance with that order until December 2005. The father has been pursuing contact and a parental relationship with his daughter ever since.

40. Next, it must be shown that a public authority has interfered with the right to respect for this family life. This too is not in dispute. Any court order which regulates or restricts the "mutual enjoyment of each other's company" which "constitutes a fundamental element of family life" will amount to an interference: see, for example, *Johansen v Norway* (1996) 23 EHRR 33, para 52; *L v Finland*, above, para 101. The decision of a children's hearing to impose a supervision requirement empowering a public authority to intervene in the child's life will constitute an interference with the family life of the child and the parent with whom she lives and is likely also to interfere with the family life of the child and her other parent. Manifestly an order that they were not to have contact with one another did so.

41. But it goes further than this, because there are positive procedural obligations inherent in the right to respect for family life. Parents must be enabled to play a proper part in the decision-making process *before* the authorities interfere in their family life with their children. This has been established time and time again in the Strasbourg jurisprudence, dating back to *W v United Kingdom* (1987) 10 EHRR 29, at para 64:

> "64. . . . In the Court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of article 8."

42. That case was concerned with the local authority's decision-making processes, at a time when the English courts had no jurisdiction to make orders relating to contact between parents and their children in care. But the same obviously applies to judicial decisions such as those made by a children's hearing. In a whole series of cases involving unmarried fathers' claims for contact the Strasbourg Court has examined whether the procedural steps taken by the national court were enough to safeguard his interests. Thus in *Elsholz v Germany* (2000) 34 EHRR 1412, at para 52, the Court, sitting as a Grand Chamber, repeated the principle derived from *W v United Kingdom* and concluded, at para 53, that the refusal of the district court to order an independent psychological assessment of the child and the absence of an oral hearing before the regional court revealed "an insufficient involvement of the applicant in the decision-making process" and thus that his rights under article 8 had been violated.

43. Two further points are apparent from the Strasbourg jurisprudence, exemplified by *Elsholz*, at para 49. Thus, while the Court is prepared to allow the authorities a wide margin of appreciation in decisions about residence and taking a child into care,

> "a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life".

This reflects Strasbourg's understanding that it is one thing for parents to have to live separately from their children – after all, it is an inevitable result of parental separation that they cannot be together all the time – but another thing to restrict or bring to an end the contact between them. It also reflects Strasbourg's pre-occupation with ensuring that there are sufficient procedural safeguards where fundamental rights are in issue. In case after case, including for example, *McMichael v United Kingdom* (1995) 20 EHRR 205, and *Jucius and Juciuvienė v Lithuania*, above, the court has found violations of article 8, not because of the substance of the decision taken by the national authorities but because the family were not sufficiently involved in the decision-making process. The point of those procedural safeguards is to ensure that the interference is "necessary in a democratic society"; in other words, that it can be justified as a proportionate response to a legitimate aim; or, as the Court normally puts it when considering the substance of the interference, that the reasons for the interference are "relevant and sufficient": see, for example, *K and T v Finland* (2000) 31 EHRR 484, at para 135.

44. Next, therefore, it must be asked whether the interference in the procedural rights of father and child is "necessary in a democratic society". The justifications for interfering with family life need to be kept separate from the justifications for excluding the father from the decision-making process at a crucial stage. Such justification as there is will fall within the overall aim of protecting "health or morals" and the "rights and freedoms of others", in this case, the interests of the child concerned. But the child as well as her father has an interest in the full participation of her father in important decisions about her future. The children's hearing has to have the best and most accurate information that it can in order to make the best decisions about the child. Everyone is deprived of that information if findings of fact are made by agreement without the participation of the very person whose conduct is in question. If decisions are then made on an inaccurate factual basis the child is doubly let down. Not only is the everyday course of her life altered but she may be led to believe bad things about an important person in her life. No child should be brought up to believe that she has been abused if in fact

she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has.

45. So what are the reasons given for excluding a father from the children's hearings process unless and until he secures a parental responsibilities and parental rights order from the sheriff court? The only justification advanced is that these are meant to be informal round-table discussions with only the people present who can make a meaningful contribution to the debate. It is important to restrict the numbers involved to those whose participation is indeed necessary. But it is difficult to see how excluding a father such as this can possibly be proportionate to that aim. The 2006 Act (see para 16 above) provides that all fathers registered since 4 May 2006 are entitled to be present irrespective of the strength of their family life with the child, of whether the decisions of the children's hearing are likely to interfere with that family life, and of whether they have a relevant contribution to make to the issues in debate. Again, it is difficult to see why the exclusion of fathers registered before that date can possibly be justified. But registration is not always a reliable guide to whether or not the father has established family life with the child. For one thing, it depends upon the co-operation of the mother. Furthermore, when the alleged grounds for referring the child for compulsory measures of intervention consist almost entirely of allegations against the father, it cannot possibly be legitimate to exclude him for the purpose of restricting the numbers. He has to be there so that the grounds for interfering in the child's life, let alone in his, can be properly established. If they are established, he has to be there so that sensible and proportionate measures can be taken to protect the child.

46. Of course, the child herself has both the right and the duty to attend the hearing: 1995 Act, section 45(1). The hearing may release the child from that obligation if satisfied that it would be detrimental to the interests of the child for her to be present, but the child still has the right to be there if she wishes: 1995 Act, section 45(2); and see Children's Hearings (Scotland) Rules 1996, rule 6. In some cases, it could be suggested that the presence of the father would be detrimental to the child. But the same is true of any relevant person who has a right to be present. The Act provides that the hearing may exclude a relevant person, and/or his representative, but only for so long as it is necessary in the interests of the child where they are satisfied that they must do so in order to obtain the views of the child or that the presence of the person in question is causing or likely to cause significant distress to the child: see 1995 Act, section 46(1). It has not been suggested that the risk of silencing or causing distress to the child is a good reason for excluding a father such as this.

47. However, some importance was attached to the fact that the attendance of a relevant person is not only a right but also an obligation, backed up by a modest criminal sanction for failure to attend: see 1995 Act, section 45(8) and (9). It was

suggested that it would be wrong to impose such an obligation upon unmarried fathers who might have had nothing at all to do with the child. But the obligation only exists "unless the hearing are satisfied that it would be unreasonable to require his attendance or that his attendance is unnecessary for the proper consideration of the case": see section 45(8)(b). In those circumstances, he, like the child, must be informed of the hearing and of his right to attend it but that he is not obliged to do so: see 1996 Rules, rule 7(2). None of these very sensible provisions, therefore, can be any obstacle to the involvement of a parent who wishes to be there.

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

Article 14

49. Article 14 prohibits discrimination in the enjoyment of the Convention rights on any ground such as, inter alia, birth or other status. It is not necessary to show that one of the Convention rights has been violated as long as the facts fall within the ambit of one of those rights. In this case, it is not in dispute that the facts fall within the ambit of article 8. As there has been a violation of the rights of both father and child under article 8, it is not strictly necessary to consider article 14. However, the matter was fully canvassed before us and it may be helpful to offer some observations upon it and in particular upon the case of *McMichael v United Kingdom*, on which so much weight was placed by the respondent and the Lord Advocate.

50. As the Grand Chamber observed in *Sommerfeld v Germany* (2003) 38 EHRR 756, para 92, it is well established that

> "a difference in treatment is discriminatory for the purposes of article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The Grand Chamber continued, at para 93:

> "The court has already held that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the Convention (see *Mazurek v France,* 1 February 2000, at para 49; and *Camp v The Netherlands* (2000) 34 EHRR 1446, at paras 37-38). The same is true for a difference in the treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship."

See also *Sahin v Germany* [2003] 2 FLR 671, paras 93 and 94. However, the Court has consistently held that the wide variations in the circumstances of unmarried parents may justify an initial attribution of parental authority to the mother alone: see, for example, *Zaunegger v Germany* (2009) 50 EHRR 952, at paras 55-56. But when it comes to later disputes between the parents about residence or contact, the Court has also held that differences in treatment between married and unmarried fathers cannot be justified. This has been applied to matters of substance, such as requiring the mother's consent to joint custody (as in *Zaunegger v Germany*) or placing a heavier burden on a father seeking access (as in *Sahin v Germany*). Where matters of procedure are concerned, the court has not drawn any distinction between the procedural protection which must be afforded to married and unmarried fathers against interference with their family lives with their children (as in *Elsholz v Germany, Sahin v Germany; Sommerfeld v Germany*).

51. It is significant that in the case of *McMichael v United Kingdom* (1995) 20 EHRR 205, which concerned unmarried parents in the children's hearing system, the article 8 rights of each parent were held to have been violated by their inability to have sight of important documents before the children's hearing: see para 92. The father's complaint of a breach of article 14 was rejected. But it is clear that the main focus of that complaint was against his status as a natural father in Scots law and it is only that complaint which the Court addressed in holding that the initial allocation of parental authority was justified by the aim of distinguishing meritorious from unmeritorious unmarried fathers: see para 98. Although the father also complained that he had no legal rights to participate in the care proceedings (see para 94), the court did not address this; this is scarcely surprising as the father had in fact participated throughout the proceedings as representative of the mother.

52. The issue which we now face is the discrimination between married and unmarried fathers, and indeed between mothers and unmarried fathers, in their rights to participate in the children's hearing when the parents are in conflict. The series of German cases, upholding the right of any father who enjoys family life

with his child to participate in important decisions about that child's future, is therefore much more in point than *McMichael*.

53. We would not, therefore, be disposed to find that the automatic imposition of a burdensome procedural hurdle before some unmarried fathers can become involved in vital decisions about their children's lives could be justified under article 14. The case law suggests the opposite: that the initial allocation of parental rights and responsibilities to mothers alone can be justified because of the wide variations in the actual relationships between unmarried fathers and their children; but that if an unmarried father has in fact established family life with his child, it is no more justifiable to interfere in that relationship without proper procedural safeguards than it is justifiable to interfere in the relationship between a married father and his child. If this analysis be correct, a complaint under article 14 would succeed if a complaint under article 8 would succeed and would fail if a complaint under article 8 would fail.

54. It would be different, of course, if an unmarried father had been unable to establish family life with his child. Then it would be necessary to examine whether the obstacles which either the law or the mother had put in the way of his doing so were unjustifiably discriminatory. Elsewhere in the United Kingdom, it has not been thought either necessary or justifiable to place any obstacles in the way of an unmarried father who wishes to bring or participate in legal proceedings about his child. But that is not this case and we need not consider it further.

Article 6

55. The relevant portion of article 6(1) reads as follows:

> "In the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Is the children's hearing the determination of the father's civil rights and obligations? On the one hand, it may be said that he has no parental rights unless and until a court gives him some. However, it can scarcely be said that a person who does not currently have a civil right, but who is able to go to court to acquire one, is not entitled to a fair hearing of that claim under article 6(1). The court's decision will determine whether or not he has that right.

56. That must apply to the determination of a claim under section 11 of the 1995 Act. But does it also apply to the determination of a children's hearing which might for the time being override that claim? If it did, all would depend upon who amongst the people not currently holding any of the parental rights or parental responsibilities, or the benefit of a court order relating to the child, was entitled to bring a claim for an order under section 11 of the 1995 Act. The court has power to make such orders "in the relevant circumstances": see section 11(1). The "relevant circumstances" are either (a) that an application has been made by someone who is entitled to do so or (b) that the court thinks that it should make an order of its own motion. Those entitled to apply are (ii) someone who currently has parental responsibilities or parental rights in relation to the child; (iii) someone who has had parental responsibilities or parental rights but no longer does so; and (i) anyone else who "claims an interest".

57. It would be absurd to suggest that the children's hearing is the determination of the civil rights of any person who might at some future date claim an interest in the child for the purpose of making an application under section 11. The children's hearing is not standing in the way of their making a claim to the sheriff court. If the circumstances are right, and the over-arching principles permit, the sheriff court can make an order which would entitle that person to take part in the children's hearing.

58. It is different, however, if a person has established family life with the child with which the decision of the children's hearing may interfere. As Lord Nicholls of Birkenhead pointed out in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, at para 71, all the Convention rights are now "civil rights" in United Kingdom law as a result of the Human Rights Act 1998. The position now is therefore different from that in *McMichael*. Thus the question of whether the children's hearing is the determination of a civil right brings us back to the question of whether the decision may interfere with established family life between a person and the child.

59. Once again, therefore, if this analysis be correct, article 6 adds nothing to the established position under article 8. It is fair to say that Mrs Janys Scott QC, on behalf of the father, did not put article 6 at the forefront of her argument. Miss Clark, for the child's curator ad litem, concentrated solely on article 8.

Issue (iii): how can the incompatibility be cured?

60. If it be right that the present position violates the article 8 rights of some unmarried fathers – and indeed of some other people – and their children, how can it be cured? None of the parties before this court, and in particular the Lord

Advocate whose principal interest this was, wished us to make a declaration of incompatibility if this could be avoided. Under section 3(1) of the Human Rights Act 1998, all legislation must be read and given effect in a way which is compatible with the Convention rights. As Lord Steyn said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 50, interpretation under section 3(1) is the primary remedy and resort to making a declaration of incompatibility must always be an exceptional course. The question is whether we can be confident that the words that are needed are consistent with what the legislation was seeking to achieve.

61. There is, of course, an important distinction between interpretation and amendment. As Lord Rodger explained in *Ghaidan v Godin-Mendoza*, at para 121:

> "If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

62. The provision in question is the definition of a "relevant person" contained in section 93(2)(b). It is worth setting out once more the four different kinds of person listed:

> "(a) any parent enjoying parental responsibilities or parental rights under Part I of this Act;
>
> (b) any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act; and
>
> (ba) any person in whom parental responsibilities or parental rights are vested by, under or by virtue of a permanence order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007 (asp 4); and

(c) 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."

63. It will be seen, therefore, that (a) includes all mothers unless and until they are deprived of all parental rights and responsibilities by order of a court; all fathers who are married to the child's mother at conception or subsequently, again unless and until deprived of all parental rights and responsibilities by order of a court; all fathers who have been put in the same position as a married father by an agreement with the mother or (which amounts to much the same thing) by having been registered as the father of the child after 4 May 2006; and any other father for so long as he has been given any of the parental responsibilities or parental rights by order of a court (it is not suggested that paragraph (a) requires such a father to have been given *all* the parental responsibilities and parental rights). As a result of the decision of the Extra Division in *Authority Reporter v S* [2010] CSIH 45, 2010 SLT 765, it also includes "any parent enjoying a right of contact in terms of a contact order under Part I of this Act".

64. Paragraphs (b) and (ba) are clearly concerned with persons other than parents in whom parental responsibilities or parental rights are vested. This would include, for example, guardians appointed by the parents to act after their death: see 1995 Act, section 7; it would also include people enjoying any of the parental responsibilities or parental rights under a court order.

65. Paragraph (c) is different from the other two paragraphs in that it does not depend upon readily ascertainable matters of public record but upon a qualitative judgment. It recognises that there are people who should be involved in a children's hearing even though they do not have the benefit of registered parenthood or a court order. It would clearly include an unmarried father while he was living with the mother and the child. But in the course of the hearing before us it was acknowledged that it might also include an unmarried father who was sharing care with the mother – indeed, it might well include a father such as this one with whom the child was staying overnight once a week. That was a significant concession.

66. The reading down which would be necessary to render section 93(2)(b) compatible with the Convention rights depends upon the right with which it would otherwise be incompatible. Thus, if the present position violated the article 14 rights of *all* unmarried fathers, the obvious solution would be to delete the words "enjoying parental responsibilities or parental rights under Part I of this Act" from section 93(2)(b)(a). This is the solution preferred by Mrs Scott on behalf of the father. It could, however, be seen as going against the grain of the Act by breaking the link between automatic participation and parental responsibilities. In particular,

as Miss Wise pointed out, it would include parents who had been deliberately deprived of all parental responsibilities and parental rights by order of a court. In any event it would go further than is necessary to cure the incompatibility which we have identified, which is the failure to respect the procedural rights of fathers who have established family life with their children.

67. If the present position were held to violate the right to a fair hearing, under article 6 of the Convention, of those who currently enjoy neither parental rights and parental responsibilities nor family life with the child, then considerable violence would have to be done to the language of section 93(2)(b) in order to put it right. Fortunately, that is not the basis upon which we have held there to be a violation.

68. Mrs Scott's second solution was to insert the words "or appears to be a parent who has a de facto family tie with the child" into section 93(2)(b)(c). This comes much closer to addressing the incompatibility which this court has found. However, it may not go far enough. Persons other than parents may have article 8 procedural rights which require to be protected. This is not as dramatic an extension as it may seem. It is not every aspect of family life which attracts its procedural protection. The family succession rights which were in issue in *Marckz v Belgium* (1979) 2 EHRR 330, or more recently in *Pla v Andorra* (2004) 42 EHRR 522, are not affected by the children's hearing. The uncle and aunt in *Jucius and Juciuvienė v Finland* (2008) 49 EHRR 70 would be covered by the existing wording of section 93(2)(a)(c), as it appears would be the grandparents in *Bronda v Italy* (1998) 33 EHRR 81. If all that may be at risk is informal contact with the wider family, then the participation of each parent and the child will in most cases afford adequate procedural protection for any article 8 rights which the child and other family members may have. But there are cases in which the child's hope of reintegration in her natural family depends upon maintaining the close relationship established with a grandparent or other family member. There would then be a procedural obligation to involve that relative in the decision-making process.

69. The potential for violation could therefore be cured by inserting the words "or who appears to have established family life with the child with which the decision of a children's hearing may interfere". This goes very much with, rather than against, the grain of the legislation. The aim of the hearing is to enlist the family in trying to find solutions to the problems facing the child. This is simply widening the range of such people who have an established relationship with the child and thus something important to contribute to the hearing. Mostly, these will be unmarried fathers, but occasionally it might include others. It will, of course, involve the Reporter initially and then the children's hearing in making a judgment. But section 93(2)(b)(c) already does this. The discussion during the course of the hearing before this court as to whether a father who shared care with the mother might already be covered by this paragraph was ample demonstration

of this. The case law on whether unmarried fathers have established family life with their children is sufficiently clear and constant for Reporters to develop a checklist or rules of thumb to guide them. At the very least, it is likely that all unmarried fathers who were living with the mother when the child was born; or who were registered as the child's father; or who are having contact with the child whether by court order or arrangements with the mother will have established family life with the child. In a borderline case, it would be safer to include him and let others argue than to leave him out. The fact that the Extra Division in *Authority Reporter v S* [2010] CSIH 45, 2010 SLT 765, with the support of all the parties, felt able to read words into section 93(2)(b)(a) fortifies us in the belief that it is open to us to adopt this course in order to cure the incompatibility which we have found. It does not depart from a fundamental feature of the Act and is well within the overall purpose to which the definition in section 93(2)(b) is directed.

Conclusion

70. We would therefore allow the appeal. We would recall the First Division's interlocutor, sustain K's first, second and sixth pleas in law and dismiss the petition. We would also declare that section 93(2)(b)(c) of the Children (Scotland) Act 1995 should be read so as to include the words "or who appears to have established family life with the child with which the decision of a children's hearing may interfere". We would also make a finding that K is a "relevant person" within the meaning of section 93(2)(b)(c) of the 1995 Act as so read.