



15 December 2010

PRESS SUMMARY

Principal Reporter (Respondent) v K (Appellant) and others (Scotland) [2010] UKSC 56

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lady Hale, Lord Kerr, Sir John Dyson SCJ

BACKGROUND TO THE APPEAL

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 effective to give a father the right to take part in the children's hearing. The second concerns the compatibility of the statutory scheme for participation in the children's hearing with the rights of the father (and indeed the child) under the European Convention on Human Rights.

The appellant K is an unmarried father. He formed a relationship with JR. They cohabited and had a child, L, born in May 2002, whose birth they registered together. Their relationship subsequently broke down. After the separation, K continued to have contact with L, and was involved with her hospital appointments until at least September 2003.

In about May 2004, K raised proceedings in the sheriff court seeking full parental responsibilities and parental rights and a contact order. An interim order for weekly overnight stays was made. In December 2005, JR alleged that K had abused L. In March 2006, the local authority's social work services department referred the case to the Principal Reporter on the ground that L was in need of compulsory measures of supervision. There were children's hearings in June and July and in August the sheriff deemed the grounds of referral proved and remitted the case to the children's hearing. K was not entitled to attend any of these hearings as he was not a 'relevant person' within the meaning of section 93(2)(b) of the 1995 Act. At a child welfare hearing on 27 October 2006, the sheriff made an order granting K "parental rights and responsibilities to the extent that he becomes a relevant person in the children's referral". Thereafter K attended the children's hearings. In August 2007, the hearing imposed a condition of no contact between K and L. In January 2009 K appealed against the continuation of this condition. The Principal Reporter then challenged the sheriff's order in the Court of Session on the ground that it was incompetent.

On 27 March 2009, the Lord Ordinary suspended the sheriff's order of 27 October 2006. On 21 January 2010 the First Division refused K's appeal and his application for a declaration of incompatibility with the European Convention on Human Rights.

Section 11(1) of the 1995 Act provides that the sheriff court may make an order in relation to parental responsibilities and parental rights. Subsection (7) provides that in considering whether to make an order under subsection (1), the court shall regard the welfare of the child as its paramount consideration, shall not make an order unless it would be better for the child to do so, and, where practicable, shall ascertain the child's views. These considerations are referred to as the 'overarching principles'. Section 93(2)(b) defines 'relevant person' as a person (including a parent) with parental responsibilities or parental rights or who appears to be a person who ordinarily has charge of, or control over, the child.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Hope and Lady Hale give the judgment of the Court. The Court holds that the sheriff's order of 27 October 2006 was not incompetent and so recalls the First Division's interlocutor and dismisses the petition. The Court declares 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". The Court makes a finding that K is a "relevant person" within the meaning of section 93(2)(b)(c) as so read.

REASONS FOR THE JUDGMENT

The Court notes that the case raises a fundamental issue about fairness. Neither in July nor in August 2006 did K have the opportunity to refute the allegations in the grounds of referral. This is contrary to one of the fundamental rules of natural justice, the right to be heard. [14]

The order of 27 October 2006 was competently pronounced. The order was one which the sheriff had power to grant under section 11(1) of the 1995 Act. The defect in the order is one of specification, not of substance. While it would have been better if the sheriff had expressly referred to the relevant provisions of the 1995 Act and to the relevant parental responsibilities and rights, and to the fact that participation in the children's hearing set the limits for the exercise of those responsibilities and rights, the order was not incompetent because he did not do so. [24] – [28]

There was not a sound basis for the First Division's view that the sheriff failed to apply the overarching principles. Such evidence as there is suggests that the very experienced sheriff had these principles in mind throughout the hearing. In any event, failure to apply the correct principles when making an order, while it may be a ground of appeal, would not normally render the order incompetent. [31]

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 K (and indeed of L) and risks violating the rights of others in the same situation. 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. The only justification advanced for excluding a father unless and until he secures a parental responsibilities and parental rights order from the sheriff court is to ensure that only persons who can make a meaningful contribution to the hearing are present. However, it is difficult to see how excluding a father such as K can possibly be proportionate to that aim. All fathers registered since 4 May 2006 are entitled to be present. Further, when the alleged grounds for referring the child consist almost entirely of allegations against the father, it cannot possibly be legitimate to exclude him for the purpose of restricting the numbers. [39] - [48]

The incompatibility with Article 8 can 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" into section 93(2)(b)(c) of the 1995 Act. [69]

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html