

Supreme Court judgment in a landmark case relating to public law children proceedings in Scotland.

18th June 2020

Henry Setright QC and Andrew Powell, instructed by Linzi Bull (Partner) and Tammy Knox (Senior Associate) of Penningtons Manches Cooper LLP, successfully represented the Safeguarder for the children in the matter of 'XY'.

Partner Linzi Bull and Senior Associate Tammy Knox, family solicitors at Penningtons Manches Cooper LLP, acting alongside Henry Setright QC and Andrew Powell of 4 Paper Buildings, successfully represented the Safeguarder for the children in the matter of 'XY' in the Supreme Court, a landmark case relating to public law children proceedings in Scotland.

In a judgment handed down this morning – one of the last by Lady Hale as former president of the Supreme Court – the court determined a brother's application to be deemed a 'relevant person' in respect of public law proceedings involving his younger siblings under Scottish Law.

The case is of considerable importance in terms of UK law and practice as it reviewed fundamental issues as to the importance of sibling relationships and how this is reflected in the children's hearings procedure in Scotland. The case has implications for siblings who seek to be afforded the status of 'relevant person', the same status that parents acquire automatically in the proceedings.

The principal issue concerned 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 compulsory supervision order (CSO). Although the procedures are very different in different parts of the United Kingdom, the applicable Convention rights are the same.

Henry Setright QC commented that this is a landmark case where *"The Court's views will be central to a considerable range of private and public law children's cases in England and Wales, and provide critical guidance on what is a matter of current controversy."*

Linzi Bull, Partner at Penningtons Manches Cooper LLP commented: *"The Supreme Court has highlighted the importance of listening to the child's own wishes and feelings, and the need to balance the child's right to privacy against the sibling's rights to family life. Our client is delighted with the result, as her primary consideration was to ensure that the child in question was heard and protected, and the Supreme Court's decision does just that"*

Overview of the case

XY is the adult brother of three younger sisters who are the subject of CSOs. XY's application to be deemed a 'relevant person' for the purposes of the CSO proceedings was refused by a pre-hearing panel.

He appealed to the Sheriff, arguing that the relevant legislation was incompatible with articles 6 and 8 of the ECHR. This appeal was dismissed, as was an appeal by way of case stated to the Inner House of the Court of Session which relied on the reasoning in two earlier cases (ABC v Principal Reporter 2018 SLT 1281 and DM v Locality Reported SLT 1308).

XY's case eventually came before the Supreme Court, alongside another case raising the same issues, but with different facts (ABC). The principal issue before the Supreme Court concerned the procedures required to ensure compliance with article 8 of the ECHR in the context of the relationship between a sibling and a child who might be the subject of a CSO, by a public authority.

Central to the challenges which were the subject of the appeals was the statutory definition of 'relevant person' and the concept of a 'deemed relevant person'. However, the Supreme Court emphasised that the primary focus of the children's hearing must be on the welfare of the child who is the subject of the proceedings, whilst also acting compatibly with the Convention rights. The Inner House of the Court of Session shared the concerns of the Safeguarder about the impact upon the privacy rights of the children if their sibling was awarded the status of a 'relevant person'.

The law draws a distinction between the rights of those family members, such as parents, who are directly involved with the upbringing of the subject child, and siblings who do not play a "significant role" in the upbringing. At paragraph 46 of the judgment, Lady Hale observed:

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,...

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 being taken over 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.

The judgment considers the views of the individual children, and their right to privacy at paragraphs 48 and 49 and concludes in paragraph 50 and 51 as follows:

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.

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.

The court emphasised that there needs 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, so that all those involved are aware of any siblings interests. Such an approach enables the system to operate compatibly with the article 8 rights of siblings and other family members.

The appeals were dismissed

Tammy Knox of Penningtons Manches Cooper LLP stated: *“this is an important judgment for all families involved in private and public law proceedings within the UK. It acknowledges the importance of the role of siblings in a child’s life, and sends a clear message to public authorities that they must consider carefully the significance of that relationship when considering the role that a sibling may play in family court proceedings”*.

Andrew Powell of 4 Paper Buildings, who appeared as junior counsel on behalf of the Safeguarder observed that it will be *“a welcome judgment among family practitioners in that it addresses the importance of sibling relationships to children and the proportionality of their inclusion in judicial consideration, including the need for them to be joined to proceedings”*.

Janet Matheson, the Safeguarder, said: “I’m glad that this case has brought about wider changes to the children’s hearing system to close the gap and protect the rights of all siblings.”

Alan Inglis, a door tenant at 4 Paper Buildings also filed written submissions on behalf of XL in the ABC case.

To read the Supreme Court press summary [click here](#).

To read the full Supreme Court judgment [click here](#).

To read The Times article, [click here](#).