

**THE SCOTTISH CHILD LAW CENTRE  
CONFERENCE 22 FEBRUARY 2013**

**THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011  
"THE CHANGES AND THE CHALLENGES"**

**HAVING A SAY – WHO IS A RELEVANT PERSON?**

**Introduction**

[1] The words we use matter. They reflect what we think is important and how things should be viewed. When it comes to parents for nearly twenty years we, in Scotland, have held to the view that the most important thing about parents is that they have responsibilities for their children. We put parental rights in their proper place, as there to support the exercise of parental responsibility. We got rid of the language of "custody" of children as we do not confine our children, we make appropriate arrangements for their care. The most important responsibility of a parent is to safeguard and promote the health, development and welfare of his or her child. That is all set out in the first few sections of the Children (Scotland) Act of 1995 and is the basis for the law relating to parents and children.

[2] Why then do we call parents in the children's hearing "relevant persons"? It is a dry, dehumanising term. It does not reflect the importance of parents in the lives of their children. It does not accord them the value they carry as persons with important responsibilities. It reflects to some degree a movement away from the guiding principles that led to the establishment of the children's hearing.

**The Kilbrandon Report (1964)**

[3] The children's hearing was founded following the Kilbrandon Report, published in 1964. The Report was commissioned to consider the treatment of "juvenile delinquents and juveniles in need of care and protection or beyond parental control". Much can be said about its radical and humane proposals. Suffice to say that they led to the foundation of the children's hearing, primarily as an instrument of social education, that is of the child, and where appropriate the parents.

[4] The report speaks of assisting the individual parent and child towards a fuller insight and understanding of their situation and problems. The active commitment of parents is to be enlisted. They are participants in a process taking place in the interests of their children. The decisions of the panel are therefor to be arrived at after extensive consideration and, importantly, discussion with the parents.

## **The Right to Respect for Family Life**

[5] The focus of law has moved since Kilbrandon and the first children's hearings. We are now much more conscious of "rights" in the sense of human rights. The Human Rights Act 1988 has made the European Convention on Human Rights a part of domestic law. Every court and every children's hearing must act in a way that is compatible with rights in terms of the Convention.

[6] Article 8 of the Convention provides that everyone has the right to respect for his private and family life. A public authority cannot interfere, save in accordance with the law and to the extent that is necessary for a purpose such as the protection of another. Any order which regulates or restricts the mutual enjoyment of parent and child of each other's company will amount to an interference with family life. There are also positive obligations inherent in article 8. Parents must be enabled to play a proper part in the decision-making process before authorities interfere in their family life with their children. They also have a right to a fair hearing in terms of article 6. None of this is inconsistent with the fundamental aims and objectives of the children's hearing.

## **Principal Reporter v K, Authority Reporter v S**

[7] Families have, of course, become more complex since Kilbrandon. Back in the 1960s most children were born to married parents. In 2010 more than half of the children born in Scotland were born to unmarried parents. As families have fragmented, and mothers become more economically active, grandparents have assumed a more important role in safeguarding the welfare of children. The children's hearing has been somewhat slow in responding to these changes. The courts have required to intervene. In 2010 there were two seminal cases.

[8] In *Principal Reporter v K* [2010] UKSC 56, the Supreme Court looked at the position of an unmarried father. He did not have parental responsibilities for his child, but had been involved with her medical treatment and had contact with her. The mother made allegations that he abused her and she was referred to the hearing. The case looked at whether the father should have been involved in the hearing. The problem was the definition of "relevant person" in the current legislation (Children (Scotland) Act 1995, section 93) excluded the father unless he had parental responsibilities or parental rights or was a person with charge or control over the child.

[9] There were proceedings in the sheriff court about contact that came to a halt when the child was referred to the hearing. The sheriff then made an order designed to give the father responsibilities and rights to the extent necessary for him to attend the hearing. He was admitted to the hearing, until he appealed the decision of the hearing, when the Principal Reporter took steps to have the sheriff's order suspended by the Court of Session. That deprived the father of the right to pursue his appeal and the right to attend any more children's hearings. The Supreme Court held that it was wrong to have suspended the

sheriff's order, but went further than that and held that the definition of "relevant person" that cut out the father because he did not have parental responsibilities and rights breached his right to respect for family life.

[10] The Human Rights Act 1998, section 3, allows the court to read Acts of Parliament as if they were compliant with Convention rights, where at all possible. The Supreme Court held that the definition of "relevant person" had to include a person "who appears to have established family life with which the decision of a children's hearing may interfere". The words are not printed in the Children (Scotland) Act 1995, but the Act has to be read as if they were there. They cover the father in the *K* case, but the Supreme Court were keen to include others who may be part of the child's family life. Thus, for example, a grandparent, could be a relevant person if he or she appeared to have established family life with the child with which the decision of a children's hearing might interfere.

[11] In *Authority Reporter v S* [2010] CSIH 45, decided slightly earlier in the year than the *K* case, unmarried fathers who had contact orders were not given "relevant person" status at the children's hearing. One was not notified of the hearing and not invited to attend. The other was allowed into parts of the hearing, but not given papers and not allowed full participation. In these cases the Inner House of the Court of Session held that what had happened breached the father's right to a fair hearing under article 6 of the European Convention on Human Rights. They held that the definition of "relevant person" in the 1995 Act must be read as if it included a parent who had "a right of contact in terms of a contact order".

### **"Relevant Person"**

[12] The Children's Hearings (Scotland) Act 2011 contains a new definition of "relevant person" in section 200. Read short a parent or guardian who has parental responsibilities or rights is a relevant person. A person who has parental responsibilities or rights by court order is also a relevant person. But a person who has parental responsibilities and parental rights "merely" by virtue of a contact order or a specific issues order is expressly excluded from being a relevant person.

[13] This will not do. Taken by itself this provision would be a breach of the right to a fair hearing for persons with contact orders. It is in direct conflict with *Authority Reporter v S*. It is probably a violation of the right to family life of these and other persons. People who appear to have established family life with which the decision of a children's hearing may interfere are "relevant persons" because the Supreme Court say so. That will apply under the new Children's Hearings (Scotland) Act 2011 as much as under the old 1995 Act.

[14] The Children's Hearings (Scotland) Act 2011 is an act of the Scottish Parliament. Under the Scotland Act 1998 the Parliament cannot pass legislation that is incompatible with rights under the European Convention on Human Rights. If this Act cannot be made to work in a

way that is consistent with the Convention, then this definition will have to be treated as beyond the powers of the Scottish Parliament and as such “not law” (Scotland Act 1998 section 29(2)(d)). The Human Rights Act 1998 section 3 applies to Acts of the Scottish Parliament, as they are classed as “subordinate legislation” (see section 21(1)). Words may therefore be deleted from or read into the definition of relevant person to save the new Act. The Scottish Ministers do have power to specify other persons as “relevant persons” and may be in a position to solve the problem by this route. It may however be possible to rescue the position by another route, namely under the “deeming” provisions. Whatever course is adopted, it is a pity that the Act was passed with this problem at its heart.

### **“Deemed Relevant Person”**

[15] The new Act will allow the hearing to “deem” someone to be a relevant person. This will usually be decided by a pre-hearing panel under section 79, or where it is not practicable to hold a pre-hearing panel, then at the beginning of the hearing under section 80. The Act contemplates a request by the individual in question, the child or a relevant person, or a request from the Principal Reporter. While there is no express provision for the hearing to deal with this of its own initiative, if they were to find out that there was someone who appeared to have established family life with the child, then they may be acting in breach of article 8 if they proceed without that person’s participation. This implies that the hearing must be able to raise the matter itself.

[16] An individual must be “deemed” a relevant person if he or she has (or has recently had) a significant involvement in the upbringing of the child. This is not quite the same as a person who appears to have established family life with the child. It is based on the present or recent past. A relationship amounting to family life may or may not result in current or recent significant involvement. There is an old case called *Keegan v Ireland* (1994) 18 EHRR 342 where parents separated before the child was born. The mother arranged for the child to be adopted without consulting the father. He had no direct “involvement” with the child at all but his rights under articles 6 and 8 were violated.

[17] The test for “deeming” a person to be relevant must be interpreted in a way that includes all those with article 6 and 8 rights if this is necessary to allow them the opportunity to participate in the hearing’s decision making. If it is not so interpreted then there will be real problems with the operation of the new Act. The Scottish Ministers could solve the problem by amending the test for deeming someone to be a relevant person. It would probably be wise for them to do so.

[18] It is possible to appeal in relation to a decision as to who is or is not to be deemed a relevant person (see sections 160 and 164). The appeal may be made to the sheriff, and from the sheriff to the sheriff principal or the Court of Session. With leave, the decision of the sheriff principal may be appealed to the Court of Session. Unless the problem is resolved then there are likely to be appeals.

### **How long deemed?**

[19] If a person is “deemed” to be a relevant person then he or she will be treated as such for the purposes of the hearing in question, subsequent hearings, pre-hearing panels, orders, warrants, reviews and court proceedings. The status goes on until it is in effect reversed by a hearing (section 81(4)). If the hearing is reviewing a compulsory supervision order and the individual no longer has, and has not recently had, significant involvement, the hearing must review whether deeming should continue (section 142).

[20] The difficulty here may be that if a person is seeking involvement with the child, and being repeatedly knocked back and refused involvement, there may be scope to withdraw his status. One would hope that this would not happen, but this was the situation in the *K* case. The father was asking for contact. The hearing was refusing contact pending an assessment which was not happening. The father’s relationship with the child was becoming more distant. If, under the new law, the hearing was to withdraw relevant person status from such a parent, that would probably breach the parent’s Convention rights.

### **Implications of being Relevant**

[21] A “relevant person” has a duty to attend the children’s hearing, unless attendance is excused (section 74), albeit the hearing may proceed without that person (section 75). There is also power to exclude a relevant person if he or she is preventing the hearing obtaining the child’s views or causing distress to child (section 76). A relevant person also has a right to attend the hearing, unless excluded (section 78). He or she may be represented before the sheriff (section 104) and has appeal rights (sections 160 and 164).

[22] The new Act is carefully drafted, as was the 1995 Act, to allow a relevant person an appropriate place in the deliberations of the hearing. The hard cases are about the boundaries of who should be a participant. The fundamental principle does however remain that people who are important in the life of the child should be able to participate in the decision-making. Persons are relevant because they are relevant to the child. Relevance is underpinned, not undermined by article 8 of the European Convention on Human Rights. It is not a good start that the panel members, reporter, social workers, parents and children should be presented with legislation that cannot be read and applied in its plain terms about such a central issue. The words matter.

*Janys M Scott QC*