SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 64
P679/14

Lord Justice Clerk
Lord Bracadale
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK

in the reclaiming motion

(FIRST) THE CHRISTIAN INSTITUTE, (SECOND) FAMILY EDUCATION TRUST, (THIRD) THE YOUNG ME SUFFERERS ("TYMES") TRUST, (FOURTH) CARE (CHRISTIAN ACTION RESEARCH AND EDUCATION), (FIFTH) AND (SIXTH) JAMES AND RHIANWEN MCINTOSH, AND (SEVENTH) DEBORAH THOMAS

Petitioners and reclaimers;

against

THE SCOTTISH MINISTERS

Respondents;

Act: O'Neill QC, Van der Westhuizen; Balfour & Manson LLP
Alt: Clark QC; C O'Neill, Solicitor Advocate; Scottish Government Legal Directorate

3 September 2015

Introduction

[1] The Children and Young People (Scotland) Act 2014 received Royal Assent on 27 March 2014. On 11 July 2014, a petition was lodged for judicial review of the provisions contained in Part 4 of the Act, which introduce the "named person service". On 11 November and the three ensuing days, the Lord Ordinary heard argument at a First Hearing. On 22 January 2015, he refused the prayer of the petition ([2015] CSOH 7). The petitioners reclaimed. On 27 April, an application was made by the Community Law Advice Network (known as "Clan Childlaw") for leave to intervene in the public interest in terms of RCS 58.8A. The application was granted and, on 25 May, the interveners lodged a written submission. The reclaiming motion was heard on 3 and 4 June 2015.

[2] Parts 1 to 5 of the 2014 Act form a comprehensive scheme intended to promote and safeguard the rights and wellbeing of children and young people. Part 1 requires the respondents to consider and, if appropriate, to take steps to secure better or further implementation ("effect") of the requirements of the United Nations Convention on the Rights of the Child, reporting thereon to the Scottish Parliament triennially. Part 2 makes provision for the investigation, at the instance of the Commissioner for Children and Young People, of the extent to which any persons providing services for children and young people, excluding parents or guardians, ("service providers", Commissioner for Children and Young People (Scotland) Act 2003, s 16) have regard to the rights, interests and views of children and young people when making decisions, or taking action, that affect them. It remains the Commissioner's general function "to promote and safeguard the rights of children and young people" (2003 Act, s 4).

[3] Part 3 provides for the preparation of three year "children's services plans" for local authority areas designed to secure, *inter alia,* that children's services are provided in a way which: best safeguards, supports and promotes the wellbeing of children; ensures that any action to meet their needs is taken at the earliest appropriate time; is most integrated from the point of view of recipients; and constitutes the best use of available resources. Part 4 requires service providers to make available, in relation to each child or young person, an identified individual ("named person"), whose general function is to promote, support or safeguard the wellbeing of the child or young person, on behalf of the service provider concerned. Part 5 provides for the preparation of a "child's plan" in respect of any child whose wellbeing is being, or is at risk of being, adversely affected by any matter and requires a targeted intervention beyond the services provided to children generally.

[4] The "wellbeing" of the child or young person is to be assessed (2014 Act, s 96) by reference to the extent to which he or she is or would be "safe, healthy, achieving, nurtured, active, respected, responsible and included" (described by the acronym "SHANARRI"). The respondents must issue guidance on how the listed elements are to be used to assess wellbeing. The general principle, that functions should be exercised by local authorities in a way which is designed to safeguard, support and promote the wellbeing of children and young people, is extended (2014 Act, s 95) to functions provided by them in terms of the Children (Scotland) Act 1995.

[5] The petitioners object to the named person service provisions contained in Part 4 of the 2014 Act, on the basis that they are incompatible with the European Convention on Human Rights and hence beyond the legislative competence of the Scottish Parliament. The primary contention is that they interfere with the right to respect for a person's private and family life and for the integrity of the home (Art 8). They interfere with parents' rights to determine, in accordance with their conscience and religion, the welfare and upbringing of their children (Art 9; Art 2 of Protocol 1). The fundamental point advanced is that the automatic naming of a person to be allocated to each child, without the consent of the child or parent and without any assessment of need, contravenes the relevant Convention articles. The scheme is not "in accordance with law" since it lacks transparency, accessibility and predictability. It amounts to an arbitrary interference by the State.

[6] The second main aspect of the petitioners' challenge is that the sections of the 2014 Act which deal with the sharing of information are incompatible with the requirement of the European Parliament and Council Directive on Data Protection (95/46/EC), as read and applied in the light of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. For this reason also the provisions are *ultra vires* of the Scottish Parliament. They run contrary to the Data Protection Act 1998. The fact that data could be shared, when not strictly necessary, rendered the information sharing provisions (2014 Act, ss 26 and 27) incompatible with Article 7 of the Directive (criteria for legitimacy). There were insufficient safeguards against the unlawful sharing of data. There was no inbuilt "right to be forgotten".

[7] The third aspect of the challenge is that the information sharing provisions relate to reserved matters (ie data protection) in terms of the Scotland Act 1998 and thus, once again, are *ultra vires* of the Parliament.

[8] The interveners are concerned only with the extent to which the information sharing provisions are compatible with children's rights under Article 8 of the European Convention.

The legislative background

Named person services

[9] The precise nature of the impugned provisions requires a more detailed consideration *in limine*. In terms of section 19 of the 2014 Act, "named person service" means "the service of making available, in relation to a child or young person, an identified individual who is to exercise the functions in subsection (5)", namely:

> "(a) … doing such of the following where the named person considers it to be appropriate in order to promote, support or safeguard the wellbeing of the child or young person –
>
> (i) advising, informing or supporting the child or young person, or a parent of the child or young person,

(ii) helping the child or young person, or a parent of the child or young person, to access a service or support, or

(iii) discussing, or raising, a matter about the child or young person with a service provider or relevant authority, and

(b) such other functions as are specified by this Act or any other enactment as being functions of a named person in relation to a child or young person."

A named person is, therefore, not assigned to a child or young person as such (cf statement-of-fact 19 in the petition), but "made available, in relation to" him or her. Hence, the named person may carry out functions directed to assist not only the child or young person but also his or her parents and any relevant service providers and authorities. The named person is made available to all of those groups, in so far as may be appropriate to promote, support or safeguard the wellbeing of the child or young person.

[10] There is no single, state-operated named person service. Rather, health boards, local authorities, schools and the respondents are each to provide named person services, as appropriate. The service provider in each case is "the person which has the function of making arrangements for the provision of a named person service in relation to the child or young person" (s 32). In the case of pre-school children, the service provider is the local health board for the area where the child lives (s 20). In the case of children at school, the service provider is the local authority which manages the school (s 21). In the case of children in custody, the service provider is the respondents (s 21). In each case, the particular service provider must publish details of the operation of the named person service (s 24). It must inform the child or young person and his or her parents about named person contact arrangements (s 24(2)).

[11] The named person will be an employee of the service provider; a person who exercises functions on behalf of the service provider, or an employee of such a person. He or she must meet prescribed qualification, training and experience requirements (ss 19(2) and 19(3)). The functions of the named person are exercised on behalf of the service provider (s 19(7)). Responsibility for the exercise of those functions lies with the service provider rather than the individual (section 19(8)). In other words, the named person is simply a nominee of the service provider who, as an employee, perhaps in a pre-existing capacity, is tasked with the carrying out of particular functions on the service provider's behalf. Thus, the individual cannot be the child or young person's parent (section 19(4)).

Information sharing and disclosure

[12] A set of provisions, contained in sections 23 to 27 of the 2014 Act, regulates requests to, and giving assistance by, service providers and the associated sharing and disclosure of information. Distinct provisions apply according to whether: the named person functions are transferring from one service provider to another (s 23); a service provider is requesting help from another service provider (s 25); a service provider is required to provide information to the service provider (s 26(1)), and *vice versa* (s 26(3)). A distinction is drawn between information sharing (s 26) and disclosure (s 27), according to the incidence of confidentiality.

[13] A service provider must generally provide the service provider with information which is likely to be relevant to the exercise of named person functions (s 26(1) and (2)). An equivalent duty is placed upon the service provider in the reverse situation (s 26(3) and (4)). The views of the child require to be sought (s 26(5)). The information holder may decide that the information ought only to be provided if the likely benefit to wellbeing outweighs any adverse effect (s 26(7)). The holder may provide information if it is necessary or expedient for the purposes of named person functions. The sharing of information is not permitted or required where disclosure is otherwise prohibited or restricted, *other than in relation to a duty of confidentiality* (s 26(11)). Thus, disclosure may be permitted, notwithstanding a breach of confidentiality, if the criteria in section 26 are otherwise satisfied and there is no other legal bar to it taking place. It is between service providers, and not individual named persons, that the specified information may be shared. Where information is to be provided in breach of confidentiality, the recipient must be informed of the breach, and must not provide the information to any other person, unless otherwise permitted or required to do so by law (s 27).

[14] In combination, the provisions are calculated to integrate services in order to secure the wellbeing of children and young people.

The Lord Ordinary's decision

[15] The Lord Ordinary refused the prayer of the petition. The standing of the fifth to seventh (individual) petitioners to bring the proceedings was conceded. The Lord Ordinary held, however, that the first to fourth (institutional) petitioners did not have such standing. Part 4 of the 2014 Act did not contravene the Convention, EU law or fundamental common law rights. The subject matter was within the competence of the Scottish Parliament.

Standing

[16] Only those qualifying as "victims" for the purposes of Article 34 of the European Convention are entitled to challenge the *vires* of the legislation on Convention grounds (Scotland Act 1998, s 100). Having held that Part 4 of the 2014 Act did not infringe the Convention rights of the first to fourth petitioners, the Lord Ordinary reasoned that they had no standing to pursue such complaints in these proceedings.

[17] The first to fourth petitioners had not demonstrated "sufficient interest" to pursue the alleged contraventions of EU law or breaches of fundamental rights. Notwithstanding that the court should not adopt an unduly restrictive approach (*Walton* v *Scottish Ministers* 2012 SC (UKSC) 67), the first to fourth petitioners were not "in any realistic sense affected" by Part 4 of the Act. The first to third petitioners, in particular, had not shown any "genuine concern" about the legislation prior to raising proceedings. They had not participated in the parliamentary process. The general concerns expressed by the fourth petitioners, in response to the parliamentary call for evidence at Stage 1 of the Bill, had been "too insubstantial to engender a sufficient interest". In any event, the participation of the fifth to seventh petitioners ensured that the rule of law would be upheld.

[18] The first to fourth petitioners claimed to act in a representative capacity. The Lord Ordinary was not, however, satisfied that they possessed "sufficient levels of expertise and knowledge in matters concerning child welfare and children's services" to entitle them to bring proceedings on behalf of others who might potentially have the requisite standing to challenge Part 4 of the Act.

Named person services

[19] The Lord Ordinary considered that the "basic aim" of the legislation, and the policy to which it gave effect, was that:

> "the wellbeing of children will be promoted and safeguarded by providing for every child and his or her family a suitably qualified professional who can, if necessary, act as a single point of contact between the child and any public services from which the child could benefit."

The petitioners' argument was that the whole scheme for establishing a named person service was, in itself, unlawful as being in breach of Convention rights. It was not necessary to show that the actual exercise of named person functions would be incompatible with Convention rights in the circumstances of an individual case. The basic complaint was that:

> "a named person was to be automatically allocated to every child without the consent of the child or his or her parents and without there being any assessment as to whether there was a pressing social need sufficient to justify such appointment".

[20] It was clearly a legitimate aim to promote and safeguard the wellbeing of all children and young people, at a general level, and more specifically by establishing a system for the appointment of a named person for almost every child. A wide degree of latitude was appropriate in the formulation of social policy, including measures for child welfare and protection (*Salvesen* v *Riddell* 2013 SC (UKSC) 236, at para 36; *Dynamic Medien Vertriebs* v *Avides Media* [2008] ECR I-505, at para 44). It was pre-eminently a matter for the legislature to decide whether the wellbeing of children was likely to be promoted by having a near-universal system for the appointment of named persons. Whether such a system was the right course was:

> "quintessentially a judgment based on considerations of social policy and one that, for this reason, fell squarely within the margin of discretionary decision-making entrusted to the Scottish Parliament".

It was not the type of judgment which was appropriate for review by a court (*R (Sinclair Collis Ltd)* v *Secretary of State for Health* [2012] QB 394, at paras 232-233; *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, at para 93).

[21] The petitioners' complaints were, the Lord Ordinary continued, necessarily presented "on an abstract and theoretical level". The named person scheme was as yet incomplete. In assessing its impact, it was relevant to consider the anticipated statutory guidance and directions, since these may provide safeguards against undue interference with Convention rights (*Silver* v *United Kingdom* (1983) 5 EHRR 347; *Gillan* v *United Kingdom* (2010) 50 EHRR 45; *MM* v *United Kingdom* (Application no. 24029/07). The most that could be said, at this stage, was that the provisions created the potential for an infringement of Convention rights. That was not sufficient for a successful challenge (*In re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, at para 56). The petitioners had not succeeded in demonstrating that the scheme would inevitably breach these rights, particularly as service providers would themselves have to respect Convention rights in the exercise of their public functions (cf *YL* v *Birmingham City Council* [2008] 1 AC 95). The mere conferral of statutory functions was insufficient, of itself, to constitute an interference. In the absence of any actual or inevitable interference, the petitioners' complaints were speculative.

[22] It was not possible to carry out any meaningful assessment of proportionality. Whilst tentative conclusions could be drawn, whereby the first three elements of the four-part test in *Bank Mellat* v *HM Treasury (No 2) (supra,* at paras 72 – 74) were met, the final balancing exercise could not be completed. Having regard to the existing safeguards contained in Part 4 of the Act, it could not be said that the provisions were necessarily disproportionate to the legislation's legitimate aim. The legislation provided a sufficiently transparent and predictable code of rules for the purpose of enabling individuals to understand the legal framework governing the new service (*Olsson* v *Sweden* (1989) 11 EHRR 259). However, the practical workings of the scheme could not be assessed until the related secondary legislation and guidance were in place.

[23] The named person scheme could not be said to interfere with the rights of the individual petitioners to freedom of thought, conscience or religion or to manifest religious or other beliefs (Art 9; Art 2, Pro 1). The petitioners had failed to identify any way in which the existence of the provisions in Part 4 constituted any such interference. Accordingly, the legislation was not beyond the competence of the Scottish Parliament on the basis of incompatibility with Convention rights. The petitioners had not advanced any stand-alone argument based on the terms and effect of the various international measures to which reference had been made. It had been conceded that these instruments merely informed the proper interpretation and application of the Convention rights. They formed part of the backdrop against which any alleged infringement should be evaluated.

[24] It was conceded that the arguments based on fundamental rights at common law had been included "for completeness". There was nothing that came anywhere close to the threshold of truly exceptional circumstances justifying such a challenge (*Axa General Insurance Ltd, Petrs* 2012 SC (UKSC) 122). The common law challenge was not insisted upon.

Information sharing and disclosure

[25] For the same reasons as applied to named person services generally, the Lord Ordinary considered that the information sharing provisions could not be said to be incompatible with Convention rights. No information sharing decisions had yet been made. Article 7 of the Directive (95/46/EC) contained an exhaustive list of cases in which the processing of personal data could be regarded as lawful (*Asociacion Nacional de Establecimentos Financieras de Credito Administracion del Estado* [2011] ECR 1-12181). The Directive had been transposed into the Data Protection Act 1998, which required (s 4(4)) data controllers to comply with the data protection principles, which reflected those set out in the Directive. There was no justification for the assertion that processing was lawful in terms of Article 7 of the Directive only where it could be shown to be strictly necessary (cf *Digital Rights Ireland* v *Minister for Communications, Marine and Natural*

Resources [2014] 3 CMLR 44). Any processing of personal data under and in terms of sections 26 and 27 of the 2014 Act would have to comply with the requirements of the 2008 Act and hence the Directive. The 2014 Act did not lower the threshold for the sharing of personal data. The petitioners' case was not advanced by reliance on the so-called "right to be forgotten"; *Google Spain* v *Agencia Espanola de Proteccion de Datos* [2014] 3 WLR 659). There was no basis for the proposition that the future sharing of information under section 26 would inevitably breach EU law.

[26] The clear and obvious purpose of the information sharing provisions was to enable named persons to share information where to do so would promote and safeguard the wellbeing of children and young persons. That purpose was incidental to and consequential upon the main purpose of the Act; the latter unquestionably being within the devolved competence of the Parliament. Accordingly, the provisions did not relate to data protection as a reserved matter (*Martin* v *Most* 2010 SC (UKSC) 40, at para 49). They did not modify Scots private law as it applied to reserved matters.

Grounds of Appeal

[27] The petitioners advanced three grounds of appeal; or rather grouped a number of grounds of appeal together under three broad headings. Under the first (fundamental rights incompatibility), the petitioners made five discernible points. First, the Lord Ordinary had "mischaracterised" the proceedings as concerning the operation of the named person service in practice, rather than as a challenge to "a basic principle", *viz*. the compulsory and universal appointment of named persons to children, with "the avowed intent…to allow the State's vision of 'wellbeing' for every child to be fostered and promoted". Secondly, the Lord Ordinary had misdirected himself in holding that such appointments constituted a "mere" conferral of statutory functions, which did not, of itself, constitute an actionable interference with Convention rights. Thirdly, the Lord Ordinary had erred in his assessment of proportionality, insofar as he failed to ascertain whether the legitimate aim of the provisions was the promotion of wellbeing or protection of children from harm. Fourthly, the Lord Ordinary had misdirected himself in law on the margin of appreciation afforded to the state in the sphere of social policy and child welfare. The state was held more strictly to account in relation to measures impacting directly upon issues of family life. Fifthly, the Lord Ordinary had failed to deal with the petitioners' challenge to the proposition that it is for the state, rather than parents, to determine what constitutes or promotes a child's "wellbeing". The Lord Ordinary had considered only whether the scheme was likely to improve or promote wellbeing. That was not the basis of the petitioners' challenge.

[28] Under the second heading (data sharing), four distinct points were made. First, the Lord Ordinary had again "mischaracterised" the nature of the petitioners' challenge. Although he had identified certain safeguards against the indiscriminate disclosure of personal data, the absence of an express requirement for consent, or a threshold lower than necessity, breached the requirements of the Data Protection Directive and Article 8(1) of the Charter. Secondly, the Lord Ordinary had erred in confusing the promotion of wellbeing with protection from harm. In the absence of harm, the state's promotion of wellbeing did not constitute a pressing social need justifying the appointment of a named person and related information sharing. Thirdly, the Lord Ordinary had erred in concluding that the information sharing provisions were to be read subject to the 1998 Act. The general principle encapsulated in the maxim *lex posterior derogate legi priori* meant that the 2014 Act impliedly repealed the 1998 Act insofar as inconsistent with it. Sections 26(1) and (3) of the 2014 Act provided for situations where information had to be shared. Section 26(11) appeared to overrule any enactment or rule of law prohibiting or restricting disclosure of information on the ground of confidentiality. It was accepted that the provisions had to comply with the Directive. However, the extent to which the provisions may have to be disapplied for this purpose highlighted the fact that they were not compatible with EU law. Fourthly, the Lord Ordinary had erred in concluding that such a reading of section 26(11) was "perverse and nonsensical" and did not affect duties of confidentiality arising under the 2008 Act.

[29] The third heading addressed the standing of the petitioners. The Lord Ordinary had misdirected himself by adopting novel tests in determining that the first to fourth petitioners did not have standing.

Standing of the first to fourth petitioners

Petitioners' submissions

[30] The petitioners originally attempted to demonstrate their standing based on an assertion (statement 9) that they:

> "each have a particular interest and expertise in, among other matters, issues concerning: respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association. … [T]he first to fourth petitioner are each acting in the public interest as responsible members of and participants in civil society. The excess or misuse of power highlighted in this petition affects the public generally. More particularly the named person provisions directly and immediately affects parents and children in Scotland whose interests the first to fourth petitioners, among others, seek to represent. They each have the requisite standing to bring the present public law proceedings...".

In the reclaiming motion, the petitioners contended that the Lord Ordinary had adopted a novel approach to standing and thereby misdirected himself in law. His decision ought to be reversed in order to avert "a chilling effect on public law challenges to general legislation by public interest groups/members of civil society".

[31] It had not been suggested that the first to fourth petitioners had "victim" status in terms of Article 34 of the Convention. It was accepted that such status was required in order to rely on the Convention, but the petitioners' arguments were not confined to those based on Convention rights. There was no need for them to demonstrate that they were directly affected by the legislation, or that they had engaged in parliamentary consultation prior to bringing judicial proceedings. They had demonstrated "sufficient interest" (*AXA General Insurance* v *Lord Advocate* 2012 SC (UKSC) 122; *Walton* v *Scottish Ministers* (*supra*)). They had raised these proceedings in the public interest rather than in defence of private law rights, the latter having no relevance to standing in public law proceedings. There was no requirement for the first to fourth petitioners to demonstrate any degree of expertise in order to do so.

[32] The standing of the fifth to seventh petitioners was irrelevant to the standing of the first to fourth petitioners, even though it was accepted that the fifth to seventh petitioners could argue the same points. It was relevant that the first to fourth petitioners were institutions, which did not depend on government. It was appropriate that interest groups, who showed sufficient interest in the subject matter, should be permitted to assist with the proper development of public law and to call public authorities to account. The petitioners were not officious bystanders. Given the potential liability for an adverse award of expenses, there was no need to introduce any additional hurdle to hinder the raising of matters of public concern and examining the lawfulness of government action.

Respondents' submissions

[33] The Lord Ordinary had correctly identified and applied the test of "sufficient interest" in his assessment of standing (*AXA General Insurance* v *Lord Advocate (supra*)). The phrase was synonymous with "directly affected" in the present context. The Lord Ordinary had not innovated on that test. Whether a party had standing depended upon the context. The Lord Ordinary had been entitled to take account of the various factors which he did in his assessment of whether the first to fourth petitioners showed "a genuine concern" about the alleged illegality. It was relevant to have regard to the importance of protecting the rule of law and to the risk that questions of the legality of public action might not be brought before the court. It was also legitimate to consider whether the petitioners were sufficiently qualified to act in a representative capacity on behalf of the public interest in the particular subject matter (*Walton* v *Scottish Ministers (supra)*). The first to third petitioners had not raised any of their concerns with the Parliament. Whilst an unduly restrictive approach was not appropriate, the requirement to demonstrate standing was not to be treated as so minor an obstacle that every potential petitioner was able to overcome it.

The interveners

[34] The interveners are a charity. They describe their aim as improving life chances for children and young people in Scotland by making sure that every young person has access to legal advice and by securing the recognition and enforcement of their rights. They claim to have "experience and expertise in working with children and young people".

[35] The interveners were granted leave to intervene at the appellate stage (RCS 58.8A(1)(b)) on the basis that the issue which they wished to address raised a matter of public interest (RCS 58.8A(6)(a)). The interveners sought to assist the court in relation to whether the information sharing provisions of the 2014 Act were compatible with children's rights under Article 8 of the Convention. The interveners had made representations to the Parliament.

[36] The interveners sought to adopt the sole perspective of children and young people who may be the subject of the information sharing regime. In contrast, the parties approached these proceedings on the basis of the public and private interests of families in general. The court was satisfied that the relative interests of parents on the one hand, and children and young people on the other, were sufficiently divergent to merit a separate public interest intervention on behalf of children and young persons. The interveners were suitably placed to assist the court.

Decision

[37] *AXA* v *Lord Advocate* 2012 SC (UKSC) 122, (Lord Hope at para [62], Lord Reed at para [170]) adopted a concept of standing based upon interests, as distinct from title and interest, as the applicable test to apply in determining whether a petitioner was entitled to pursue a judicial review of legislation. Lord Hope (at para [63]) initially expressed the view that this meant that a petitioner seeking review of a particular measure required to be "directly affected" by it. He then immediately referred to an alternative meaning that the person must have "a reasonable concern in the matter". This is a significantly weaker test. There follows a third formulation, whereby a person, who is purporting to act in the public interest, can "genuinely" assert that "the issue directly affects the section of the public that he seeks to represent". It is not entirely clear what the position might be if the petitioner does not in fact represent the views of that section.

[38] Lord Reed explained (para [159]) that, in a petition of this type, the petitioner is not seeking to vindicate a right vested in himself but requesting the court "to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law". Such a request could be made by any person with "sufficient interest" to do so (para [166]). A modern approach to standing could not be based on a concept of rights but must be grounded on one of interests (para [170]):

> "What is to be regarded as sufficient interest … depends … upon the context, and in particular upon what will best serve the purposes of judicial review in that context".

[39] This approach was applied by this court to potential parties and interveners in *Sustainable Shetland* v *Scottish Ministers* [2013] CSIH 116, in which there were applications both to enter the process by persons "directly affected" by the issue in the petition and to intervene in a matter of public interest on the basis that the person's intervention was "likely to assist the court" (RCS 58.8(2) and 58.8A(1)). It was applied also in *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67, in which Lord Reed (at para [92]) distinguished between "the mere busybody and the person affected by or having a *reasonable* concern in the matter …" (emphasis added); a busybody being "someone who interferes in something with which he has no legitimate concern". A personal interest need not be shown. Lord Reed expanded upon his thinking as follows:

> "[94] … Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it".

[40] The United Kingdom Supreme Court has thus made it abundantly clear that a very broad approach should be taken to the issue of standing. However, there is a limit defined by "sufficient interest". This, in turn, means that the person must be directly affected by the matter; which means that the petitioner must have a "reasonable concern" or be able to express such a concern "genuinely" on the part of a section of the public which he seeks to represent.

[41] In relation specifically to the first to fourth petitioners, the fact that they have a genuine interest in family matters is not seriously challenged, even although the first to third petitioners did not express such an interest in the course of the democratic process before Parliament. However, unless it could be said that the first to fourth named petitioners were acting in bad faith in ignoring the Parliament and then seeking to challenge legislation in the courts, that cannot be seen as a formal bar to proceeding. It may have a bearing on any award of expenses, but that is for another day.

[42] The Lord Ordinary did apply the correct test. The criticisms of his general reasoning concerning the first to fourth petitioners' interest are not well-founded. The court nevertheless disagrees with the Lord Ordinary in his conclusion that these petitioners lack sufficient interest. Notwithstanding their former lack of interest and probable lack of expertise in certain areas, applying the broad tests set out in *AXA* and *Walton*, they do have standing in general to challenge the legislation and may do so, as they have, on European Union law grounds, at least in so far as that law impacts upon child welfare issues.

[43] It is not contended that the first to fourth named petitioners are "victims" in terms of Article 34 of the European Convention. However, the practical effect of this concession in relation to arguments based upon a breach of the Convention was not clear in the Grounds of Appeal or the Note of Argument. The petition was, after all, presented by all petitioners and there is no distinction amongst the petitioners in the bases of their challenge. No such distinction appears in the Grounds of Appeal or the Note of Argument. It might have been thought that, notwithstanding the absence of victim status, the first to fourth petitioners were still advancing Convention incompatibility not in an attempt to vindicate their own rights but as representing those of persons who were potential victims (see *AXA* v *Lord Advocate* (*supra*), Lord Reed at para [159]). However, at the very end of the petitioners' submission, under probing from the court, it was expressly conceded that any petitioner would require to have victim status before mounting a Convention challenge.

[44] For the avoidance of doubt, therefore, it is accepted that a petitioner with general standing to challenge legislation cannot do so solely on the basis of Convention incompatibility without having victim status. If matters were otherwise, there would be a simple method of circumventing the clear terms of section 100 of the Scotland Act 1998, which states that proceedings such as these cannot be brought on Convention grounds alone unless the petitioner has victim status.

[45] The practical effect of this in a case of this type, other than in relation to expenses at the end of the day, may be limited. The first to fourth petitioners are at liberty to underwrite any parent's or child's challenge, without necessarily entering the process as a petitioner. They may apply to intervene in any case raised by a potential victim. The reason for there being seven petitioners in this process is not immediately clear, but there may be one.

Named Person Services

Petitioners' submissions

[46] The petitioners' challenge was modified from that in the petition to one which attacked the fact that a named person is to be "appointed to a family" (cf "assigned" to a child) without the consent of the parent or child, or without being otherwise justified by the necessity to prevent serious harm. Saying that the named person was simply to be "made available" to families was a misleading euphemism; the named person was not passive. There was no option (see, eg, Child Protection Perth & Kinross, CPC Guidance for Practitioners, Working with Hostile and/or Non-Engaging Parents and Carers). The Lord Ordinary had failed to deal with this principled challenge to the legislation (*In re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, at para 87).

[47] The legislation did not achieve the necessary balance between the obligation on the state to protect the family from unwarranted intrusion, whilst also protecting children from harm (*In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] 1 AC 680, at paras 1, 4 and 44). Consent or necessity, as the basic threshold conditions to protect the child and his family from unwarranted interference by the state, constituted a "golden thread" running through the petitioners' challenge. Without an objective basis for appointment, there would be no pressing social need for state interference.

[48] The interference was the appointment of a "state functionary" who had powers to collate information in relation to each and every child, to maintain a database and to share it with other service providers. It involved the creation of a direct relationship between the state and children, which "bypassed" parents. The

lack of an "opt out" provision constituted an *ex facie* interference with the rights of parents who, as a matter of conscience, did not wish to have a named person appointed to their child who would take up the responsibility for the wellbeing, upbringing and education of their children (Art 9 and Art 2, Pro 1).

[49] The petitioners were entitled to challenge the constitutionality of the legislation and the conferral of statutory functions, notwithstanding that the provisions were not yet in force (*Scotch Whisky Association* v *Lord Advocate* 2013 SLT 776, at para 3; *AXA General Insurance* v *Lord Advocate (supra)*; *Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153, at para 3; *Burden* v *United Kingdom* (2008) 47 EHRR 857). The proportionality of legislation of general applicability could be assessed by considering how the law might apply (*R (on the application of JF)* v *Secretary of State for the Home Department* [2010] 1 WLR 76, at paras 30 and 33). The "mere" conferral of statutory functions, which abrogated to the state functions that, in a democratic state, should be left to parents, was sufficient to constitute a state intrusion into family life (*Norris* v *Ireland* (1991) 13 EHRR 186). The petitioners' challenge was a fundamental one. It was not about whether or not the functions conferred might be exercised lawfully (*Carter* v *Canada (Attorney General)* 2015 SCC 5). It was conceded that it was entirely conceivable that a named person appointed of consent or to prevent identified harm to a child could exercise his functions in a Convention compatible manner.

[50] The promulgation of guidance or subordinate legislation could not alter the fundamental unconstitutionality of the blanket provision.

[51] The respondents had failed to show that the provisions were justified in accordance with the principle of proportionality (*Pham* v *Home Office* [2015] 1 WLR 1559 at para 119; *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, at paras 71, 76). They had not even attempted to satisfy this test. The Lord Ordinary had failed to require them to specify the legitimate aim of the legislation. The protection of children from harm was a far more limited aim than the promotion of wellbeing. The former was legitimate when state intervention was targeted at children in need of protection (*Dynamic Medien* [2008] ECR I-505 at para 42). The promotion of wellbeing was at the opposite end of the spectrum. The aims were not interchangeable; they justified completely different measures. If the aim were to protect vulnerable and disadvantaged children (see, eg, Policy Memorandum, para 54; Official Report, Meeting of the Scottish Parliament, 23 April 2015, col 16), then the provisions became overly broad. The appointment of named persons regardless of risk or harm could not be justified, unless every child was potentially vulnerable, which was not the case. The contention that the named person was intended simply as a single point of contact was not reflected in the statutory duties.

[52] It was not appropriate for the state to stand *in loco parentis* where a child's parents were in place and fully able to provide nurturing and support. The proper role of the state in relation to wellbeing was strictly limited to providing a safe space in which families can flourish (*Re KD (a minor ward) (Termination of access)* [1988] 1 AC 806, at 812; *In re B (Children)*, [2009] 1 AC 11, at para 20). The respondents had failed to justify the scheme in either case.

[53] The Lord Ordinary had erred on the degree of latitude to be afforded to the legislature in the sphere of social policy and child welfare. The European Court held member states more strictly to account in relation to measures impacting on the relationship of parent and child (*Nielsen* v *Denmark* (1988) 11 EHRR 175 at para 61; *In re B (Children) (supra)*, at para 78). The margin of appreciation afforded by the European Court was not applicable at a domestic level (*In Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, Lord Hoffman at paras 32, 37 and 118-9). The fact that a measure was within a legislature's margin was not conclusive of its proportionality. The court required to form its own judgment on the question of devolved legislative competence and Convention rights compliance (*Re Recovery of Costs for Asbestos Diseases (Wales) Bill* [2015] 2 WLR 481, at paras 52, 54 and 67). The Lord Ordinary had failed to do this.

Respondents' submissions

[54] The respondents maintained that the Lord Ordinary had understood the petitioners' contentions of principle. He had been correct to conclude that the creation of the named person service did not interfere with any of the individual petitioners' Convention rights. If that were wrong, any interference by virtue of the mere enactment of the provisions was minimal. That the service was to be "universal" did not amount to interference. The legitimate policy aim could not be achieved by any other means.

[55] The service provider would be a public authority for the purposes of the Human Rights Act 1998. It would be bound to act compatibly with Convention rights. The exercise of those functions did not inevitably breach Convention rights. It could not be said that they could not be exercised in a Convention compliant manner. A right to opt out would defeat the legislative purpose.
[56] The Act did not interpose a named person on a family. It did not diminish the role, duties and responsibilities of parents. Any questions of interference with Article 8 rights could only arise once the named person exercised his or her statutory functions (*In Re S (Care Order, Implementation of Care Plan)* (*supra*), at paras 56, 57, 88; *R (Karia)* v *Leicester City Council* [2014] EWHC 3105 (Admin), at para 164). The provisions did not interfere with Article 9 rights to hold beliefs or to manifest those beliefs (cf *Eweida* v *United Kingdom* (2013) 57 EHRR 8). There was no explanation of the basis upon which the rights of the individual petitioners under Article 2, Protocol 1 were affected.
[57] There was no basis for the proposition that measures interfering with private or family life could be justified only if done with consent or out of necessity. The petitioners' challenge was speculative and premature. Any assessment of proportionality could only be carried out in relation to each specific case and once the legislative landscape had been fully formed (*Gillan* v *United Kingdom* (2010) 50 EHRR 45; *Silver* v *United Kingdom* (1983) 5 EHRR 347; *MM* v *United Kingdom* (*supra*)). Part 4 of the Act did not constitute a free-standing scheme for the establishment and operation of the named person service. The legislative framework was to be supplemented by subordinate legislation, statutory guidance and advice on best practice from appropriate bodies. The obligation to have regard to such guidance (ss 96(5) and 28(1)) imported an obligation properly to act on the basis of it, unless there was some justification for not doing so, including the need to act in a Convention compliant manner. It was not necessary for safeguards to be contained in the primary legislation (*Silver* v *United Kingdom (supra)*).
[58] In the absence of an actual breach of the individual petitioners' Convention rights, the court should be "extremely slow" to make a declarator of incompatibility (*R (Chester)* v *Secretary of State for Justice* 2014 SC (UKSC) 25, at para 102). The Lord Ordinary had not, however, held that the 2014 Act was proportionate, as it had not been possible to carry out a meaningful assessment.
[59] The Lord Ordinary had accurately summarised the legislative aim as promoting and safeguarding the wellbeing of every child by ensuring that there was a single point of contact for engagement with, and co-ordination of the provision of, public services for each child. The policy was to enable early intervention and to be pro-active in minimising any negative impact on wellbeing. It was a policy choice not to operate a different regime, which would involve waiting until harm had already been suffered. The whole point was that all children are potentially vulnerable. The focus was not restricted to those at immediate risk of serious harm. The promotion of wellbeing encompassed the prevention of serious harm and was a legitimate aim for the purposes of Article 8. The provisions of Part 4 of the Act conferred statutory functions on certain individuals, who were themselves to deliver services on behalf of and in the name of service providers (mainly, but not exclusively, in the public sector). They did not affect the law concerning parental rights and responsibilities. The measures were rationally connected to the aim pursued, and there was no other measure by which it could be achieved. On the basis of the enactment of the provisions alone, at this stage they could be readily justified (*Bank Mellat (supra)*).
[60] Ultimately, the Lord Ordinary had been entitled to conclude that whether to introduce the named person service was a judgment based on considerations of social policy falling with the margin of discretionary decision making entrusted to the Scottish Parliament. The legislature was better placed to assess how to strike the correct balance (*Gaughran* v *Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29, at para 46; *AXA General Insurance* v *Lord Advocate (supra),* at paras 31 and 33).

Decision
[61] It is useful to bear in mind at the outset the nature and scope of the Article 8 right to respect for private and family life and home and correspondence. These concepts are interlinked: the focus on family life is upon the protection of family relationships; notably, but not exclusively, that between husband and wife, or equivalent, and between parent and child. In relation to the latter, a fundamental element is the "mutual enjoyment" of each other's company (*Olsson* v *Sweden* (1989) 11 EHRR 259 at para 59). However:

> "The family life for which Article 8 requires respect is not a propriety right vested in either parent and child: it is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child. … [T]he … right is not to family life as such but to respect for it. The purpose … is to assure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related and well-intentioned, to create or perpetuate situations which jeopardise their welfare" (*Re F (Adult: Court's Jurisdiction)* [2000] 2 FLR 512, Sedley LJ at 531-2 cited with approval in *White* v *White* 2001 SC 689, LP (Rodger) at para [24]).
>
> "Particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under [Art 8] … to have such measures as would harm the child's health and development" (*Elsholz* v *Germany* [2000] 2 FLR 486 again cited in *White* v *White* (*supra*).

[62] The legislation under challenge followed from a series of Government papers which attempted to encapsulate the thinking of various experts on how better to integrate children's services; notably those provided by local authorities (education), the NHS and the voluntary sector. There was a consensus that the various agencies were not co-operating as they might. There was a concern to ensure that all children had appropriate access to education and health facilities. The central idea was to create a named person who could function as a co-ordinator of information and arrangements. A pilot project had been developed in the Highlands. It had proved successful in the process of gathering and sharing information about children in need. The Government consultation paper on a new Child and Young People Bill sought views on proposals designed to establish a network of support to promote the wellbeing of children so that they could access appropriate help at the right time.

[63] At the heart of the Government proposals was the pivotal concept of the named person; a scheme which already operated in practice in parts of the country. It would become the duty of all public services to co-operate with the named person. A Policy Memorandum followed. It too stressed the need for a single point of contact for each child. The legislation was informed by the views of experts in child welfare, health and education. Its policy is to put the best interests of every child at the centre of decision-making. It encourages professionals to work together. It promotes preventative investigation and early intervention on child welfare issues and is designed to prevent some of the tragedies which have occurred in the recent past.

[64] Essentially all that the legislation does, and is intended to do, is, as the Lord Ordinary put it (*supra*), to provide for every child and his or her family a suitably qualified professional who can, if necessary, act as a single point of contact between the child and any public service from which the child could benefit. This provision is part of what is intended to be an enlightened scheme to promote child welfare generally, albeit one not universally seen in such a positive light. The named person is someone who, in all likelihood, would in any event already have been involved with the child in some way, normally as a health visitor or a teacher. The core issue for the court is to determine whether this approach to child welfare amounts to a breach of Convention rights; specifically the right to respect for a person's private and family life (Art 8) or the right to determine a child's welfare and upbringing (Art 9, Art 2 of Protocol 1).

[65] The petitioners' contention that the Lord Ordinary misunderstood the principled nature of their challenge to the legislation is without foundation. The Lord Ordinary correctly addressed the challenge as being one involving a matter of principle, which attacked the general scheme in Part 4. This is so, even if the focus of the attack in the reclaiming motion did not entirely follow that set out in the averments of the petition. The petitioners' argument that there can be such a principled challenge in the absence of an actual effect on an individual and in advance of legislation being brought into force is not in doubt and was not challenged. In this respect, much of the petitioners' submission in these areas can reasonably be discounted.

[66] It is accepted that, once Part 4 is brought into force, a service provider, as the employer of a named person, may be liable for the actions of a named person which engage the Article 8 rights of a parent or child. The issue at this stage is whether the existence of Part 4 of itself interferes with those rights or will inevitably do so. The existence of the possibility of interference, if a person acts in a particular way once the scheme is operating, does not mean that there has, or will inevitably be, a breach of the Convention and thus

that the legislation is incompatible with a Convention right (*In Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, Lord Nicholls at para 56).

[67] The scheme of Part 4 involves appointing a person who may assist a parent or child in a number of ways. In that respect the person may act positively, but it is impossible to characterise an offer of help, which may simply be rejected, as an interference with a person's right to respect for his or her family life. It would indeed be surprising if the many public services which are provided by the state in order to assist persons in all sorts of domestic circumstances could be viewed as involving such an interference. The particular service provider, who will be subject to the provisions of the Human Rights Act 1998, may overstep the mark and do something which does interfere with a Convention right, but that is not an inevitability and would be capable of forming a separate challenge, should it occur.

[68] The mere creation of a named person, available to assist a child or parent, no more confuses or diminishes the legal role, duties and responsibilities of parents in relation to their children than the provision of social services or education generally. It has no effect whatsoever on the legal, moral or social relationships within the family. The assertion to the contrary, without any supporting basis, has the appearance of hyperbole. Similar considerations apply to the description, of what has been thought by Parliament to be an appropriate step to protect the welfare of children, as an "arrogation by the state to itself of functions which, in a properly regulated democratic state, require to be left with parents". The legislation does not involve the state taking over any functions currently carried out by parents in relation to their children. For these reasons, the petitioners' challenge, in so far as it is based upon the Article 8 right to respect for a private and family life, must fail.

[69] Article 9 of the Convention provides a right to freedom of thought, conscience and religion or belief; with religion and belief being capable of limitation which are necessary in the interests of, amongst other things, public safety, health and the protection of the rights and freedoms of others. The 2014 Act contains no colourable interference, or even potential interference, with a parent's or child's right to any of these freedoms.

[70] Article 2 of Protocol 1 provides a right to education and obliges the state to respect a parent's right to ensure that a child is taught in conformity with the parent's own religious or philosophical convictions. The 2014 Act contains no provision which bears upon a child's right to education or his parent's right to bring up a child according to his conscience and religion. The challenges under Article 9 and the Protocol must therefore also fail.

[71] If, contrary to the above, the scheme of the legislation is seen as interfering with Convention rights, the next question is whether such interference is in accordance with the law, has a legitimate aim and is necessary in a democratic society in the interests of, amongst other things, public safety, the prevention of crime, the protection of health or morals or of the rights of others (see Arts 8(2) and 9(2)). The latter will include the right to life (Art 2) and not to be subjected to inhuman or degrading treatment (Art 3).

[72] The named person provisions are set out in detailed legislation. There is no lack of clarity in the statutory provisions. In so far as they might constitute an interference, they are in accordance with the law. The aim of the legislation is the promotion of child welfare. This is a legitimate aim in terms of Article 8. The issue is then one of necessity, in the sense of the scheme addressing a "pressing social need". This involves an assessment of proportionality. In that respect, the legislature does have a "margin of appreciation", in social or welfare issues (*Salvesen* v *Riddell* 2013 SC (UKSC) 236, Lord Hope at para [36]), even if it is narrower than that afforded by the European Court to national legislatures (see *CM* v *State Hospitals Board* 2015 SC 112, LJC (Carloway) citing *Kay* v *United Kingdom* (2012) 54 EHRR 30 at para 66; *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, Lord Reed at para 71). The margin is also narrower when intimate or key rights, such as that to respect for family life, are under threat (*Kay* v *United Kingdom* REF at para 66 citing *Connors* v *United Kingdom* (2005) 40 EHRR 9, at para [82]).

[73] Lord Reed's recent exploration of the nature and origins of the concept of proportionality in *Bank Mellat* v *HM Treasury (No 2)* (*supra,* at para 68) renders it unnecessary to indulge in further analysis. In order to demonstrate the proportionality of a measure restricting a fundamental right it is necessary (para 75) to determine:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less

intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter".

In relation to the third element, it is not enough that the court can envisage a less intrusive measure. Rather the limitation must be one that "it was reasonable for the legislature to impose" (*ibid*, at para 75 citing *R* v *Edwards Books and Art* [1986] 2 SCR 713, Dickson CJ at 781-2). The courts must not be used to "substitute judicial opinions for legislative ones as to the place at which to draw a precise line" (*ibid*).

[74] Part 4 of the 2014 Act appears to meet the four part test. The objective of promoting child wellbeing is important. The petitioners sought to draw a distinction between promoting the wellbeing of children and protecting them from harm. The subtlety of this distinction is not easy to grasp. The idea that, in Convention terms, the state must wait until a particular child is the subject of a specific threat is also one which may not commend itself to social reformers, who may be anxious to devise a scheme which will detect a threat in advance and anticipate potential harm to children, rather than one which will only react when it is too late to prevent the harm occurring. The measure selected by Parliament is thus rationally connected to the objective and without it there would be a potential lack of communication which would seriously undermine the achievement of that objective.

[75] The petitioners' submission that the state's role is limited to providing a safe space in which families can flourish is not borne out by the *dicta* cited in its support (*Re KD (a minor) (word: Termination of Access)* [1988] 1 AC 806, Lord Templeman at 812; *In re B (Children)* [2009] 1 AC 11, Lady Hale at para 20). No doubt the role of the parent is to be respected, but there is no prohibition on the state putting in place reasonable measures to assist children and young persons, and their parents, where that is appropriate to promote, support or safeguard their welfare. Such measures might legitimately provide for the sharing of information between local and central government agencies and others in order to ensure that any danger signals are picked up by all those already concerned with child welfare in a particular area and are acted upon with due despatch. That, in essence, is what the statutory scheme envisages. It is designed to prevent crucial information on welfare being missed, as it has been on occasion in the past. However, in the event of a danger being detected, *this* legislation does not authorise any positive action beyond the offering of assistance. Any compulsory measures would require authorisation under different legislation. Such measures would themselves remain subject to Article 8 and other Convention rights considerations.

[76] Although the Lord Ordinary did not decide on proportionality, in the absence of anticipated subordinate legislation and guidelines or an actual instance of the operation of the Act, it is sufficient to say that the scheme has the appearance of achieving a balance in which the advantages of early detection of potential welfare issues involving a child outweigh any adverse effect of the measure on the Convention rights of parents and children generally.

Information Sharing

Petitioners' submissions

[77] The Lord Ordinary's rejection of the petitioners' challenge to the data sharing and retention provisions was subject to a similar criticism of "mischaracterisation" of the nature of the challenge. European Union law afforded the protection of personal data a very high degree of importance (*Volker and Markus Schecke GbR* [2010] ECR 1-11063 at para 52; *Digital Rights Ireland* v *Minister for Communications etc* (*supra*) at paras 52-3; Treaty on the Functioning of the European Union, Art 16(1); EU Charter of Fundamental Rights, Arts 7 and 8; Data Protection Directive 95/46/EC, Arts 1, 2(a) and 6). The rights of parents and families under Articles 14(3) and 33(1) of the Charter were also relevant. The Charter had to be respected and complied with whenever national legislation fell within the scope of EU law (*Aklagaren* v *Akerborg Fransson* [2013] 2 CMLR 46, at para 19). There was limited scope for variation in the implementation of the Directive, in order to ensure consistent levels of protection across member states (*Criminal Proceedings against Bodil Lindqvist* [2003] ECR I-12971, at para 3). The Directive had to be applied in a manner compatible with the Charter and other principles of EU law, such as proportionality (*Asociacion Nacional de*

Establecimientos Financieros de Credito v *Administracion del Estado* (*supra*), at paras 41-3; *Criminal Proceedings against Bodil Linqvist* (*supra*)).

[78] The data sharing and retention provisions of the 2014 Act were "fundamental rights incompatible" in that they contravened the requirements of the Charter by: (i) failing to provide for familial (parental or child) consent as a pre-requisite for the sharing of personal data; and (ii) allowing the sharing of personal data at a threshold lower than necessity. No issue was taken with the lawful holding of personal data by service providers; only the sharing of it contrary to duties not to do so.

[79] There was a general presumption in EU law that personal data should be shared only if the individual unambiguously consented (*Commission* v *Bavarian Lager* [2010] ECR I-6055, at paras 75 – 79). It was a general principle of EU law that personal data should be shared only if strictly necessary (*Digital Rights Ireland* v *Minister for Communications (supra)* at para 52). "Expediency" fell short of the required standard. The sharing of information by reference to whether it may affect the wellbeing of a child was inherently vague (*Digital Rights Ireland* v *Minister of Communications (supra)* at para 54). The effect of section 26(11) was to authorise, and in some cases require, the sharing of information contrary to obligations of confidentiality (Draft Statutory Guidance, para 10.1.6: "a duty to share information"). The data protection principles did not apply to the extent that they were inconsistent with the statutory framework.

[80] The exemption of information holders from their duties of confidentiality breached the fundamental right to confidentiality protected as a general principle of EU law (see, eg, *X* v *Commission* [1994] ECR I-4347). The legal framework was insufficiently transparent, accessible and predictable so as to be in accordance with law (*Peruzzo* v *Germany* (2013) 57 EHRR SE17, at para 35; *R (Gillan)* v *Comr of Police of the Metropolis* [2006] 2 AC 307, at para 52). The lack of a procedure to seek the removal of information in relation to a particular child from a named person's "database" contravened the EU law "right to be forgotten" (*Google Spain (supra)* at paras 72, 93 – 7).

[81] Data protection was a reserved matter. The court required to ascertain the purpose of the provisions. The effect of a provision was one circumstance to which the court must have regard in determining its purpose (*Joint Liquidator of Scottish Coal* v *SEPA* 2014 SC 372). The purpose may be clear from the context of a provision (*Imperial Tobacco* v *Scottish Ministers (supra)*, at para 16) or pre-legislative reports (*Attorney General for England and Wales* v *Counsel General for Wales: In re Agricultural Sector (Wales) Bill*, [2014] 1 WLR 2622, at para 50). It was clear from the Policy Memorandum (paras 73 – 77) that the purpose of the provisions was to lower the current data protection standards in order to make it easier for professionals to share information about children's wellbeing. Their likely effect was that professionals would share such information regardless of the data protection principles. Accordingly, they could not be said to have only a loose or consequential connection with the subject matter (*Martin* v *Most* (*supra*), at para 49). They clearly related to reserved matters.

Interveners' submissions

[82] The interveners contended that the sharing of information about children and young people in terms of sections 26 and 27 of the 2014 Act allowed "for the onward disclosure of information provided by a child in circumstances where the child would otherwise expect that the person to whom the child was providing the information owed the child an obligation of confidentiality". The disclosure of confidential material was an interference with Article 8 rights, which may be justified only by an overriding requirement in the public interest (*Z* v *Finland* (1998) 25 EHRR 371, paras 95 and 96). The current, and correct, threshold for disclosure in breach of confidentiality is necessity to avert a risk of significant harm (see, eg, *National Guidance: Under-age Sexual Activity: Meeting the Needs of Children and Young People and Identifying Child Protection Concerns*, para 40). The threshold was necessarily a high one, given the importance of protecting confidentiality and the "informational autonomy" of the individual.

[83] The interveners advanced three strands of complaint. First, the circumstances in which the Act permitted disclosure of confidential information was considerably broader, and set a markedly lower threshold for disclosure, than was compatible with the rights protected by Article 8. Even if it were the correct threshold, it was not expressed with sufficient clarity and precision. Secondly, the 2014 Act did not require consent of the person to whom the obligation of confidentiality was owed, or specify the circumstances in which it may be overridden, in order to disclose confidential information. The policy underlying the protection of information was to protect individual privacy and to preserve individual

confidence in health services in the public interest (*Z* v *Finland (supra)*). There was equal force in the application of those policy grounds to other services, which children and young people may access for advice and assistance. The disclosure of private information about an individual without consent represented a failure to respect personal autonomy (see, eg, *Campbell* v *MGN* [2004] AC 457, at paras 50 – 51, and 134). Thirdly, the conditions for disclosure were not set out with sufficient precision (*Sunday Times* v *United Kingdom* (1979) 2 EHRR 245, para 49). The threshold for disclosure could be met where "wellbeing concerns" were observed, in terms of the SHANARRI "wellbeing indicators" (see, eg, Draft Statutory Guidance, paras 2.9.1, 8.4 – 8.5, and 10.2.9). The wellbeing indicators, and the explanations used in the draft guidance to give further content to them, were unclear and imprecise. They were not coherent. They were inconsistent in style, tone and structure, and sometimes descriptive of aspiration. They were not measurable. They were subjective.

[84] The importance of the interest in protecting confidentiality was relevant to the proportionality of any requirement to disclose otherwise confidential information in the absence of consent. The court had to weigh any benefits of the measure against the detriments to other interests (*Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] 2 WLR 481, para 52). The measure placed at risk the willingness of children and young people to seek services which had the potential to protect them from harm. There was a real and significant risk that children and young people would not engage with the services they needed if they felt that information was likely to be shared without their consent and without protection of their right to confidentiality. That risk was borne out by the experience of organisations dealing with children and young people, and by research into the views of children and young people themselves.

[85] Whereas it might be suggested that the information sharing provisions were directed towards the prevention of child deaths due to agencies not working together effectively, investigations into recent cases had generally identified failures to record adequately, share and act upon information that was already available. Such deficits as may have been identified in professional practices in recent cases, concerning the deaths of babies and young children, were not obviously relevant to the threshold test for disclosure of confidential information.

Respondents' submissions

[86] The 2014 Act expressly provided (s 26(11)) that it did not permit the sharing of information in breach of a prohibition or restriction on the disclosure of information arising by virtue of an enactment, other than in relation to a duty of confidentiality. Such enactments would include the Data Protection Act 1998 and the Human Rights Act 1998. Section 26(11) reinforced the fact that both Acts continue to apply. No question of implied repeal arose. The 2014 Act was not inconsistent with either Act. Thus, for example, sharing of information where "expedient" (ss 26(8) and (9)) did not lower the threshold where the Data Protection Act 1998 and wider legal framework remained applicable. In some cases, where no other conditions were met, it might be necessary to obtain consent in order to share data for the sake of expediency, but consent may not be required where such information did not constitute personal data. The information to be shared under sections 26 and 27 would not in all cases amount to either personal data or information sufficiently "private" to engage the protection of Article 8 of the Convention or the Charter.

[87] Subordinate legislation and guidance would address the circumstances in which it may be appropriate to seek consent to information sharing. Consent was not a pre-requisite to the sharing of personal data in terms of the Directive, the 1998 Act, the Charter or the Convention. The processing did not have to be "strictly necessary" (cf *Digital Rights Ireland (supra)*). The Directive provided for lawful processing of data where necessary for certain purposes, including the protection of the "vital interests" of the data subject, the performance of tasks carried out in the public interest, the exercise of official authority vested in the data controller and the pursuit of legitimate interests by the data controller (Directive, Art 7; 1998 Act, sch 2). The whole purpose of the scheme was to set out the circumstances in which processing could be carried out, subject to the "safety net" of the data protection principles. Such processing would always be subject to Convention and Charter rights. The appropriate test was whether it was "reasonably necessary" (*South Lanarkshire Council* v *Scottish Information Commissioner* (2014 SC (UKSC) 1, at para 27). The Directive did not require that the public interest task was itself necessary. The fact that the 2014 Act provided a legitimate basis for the sharing of personal data did not mean that it required or permitted sharing in breach

of Convention or Charter rights. Whether information "ought" to be shared would depend on an assessment of proportionality. The processing of personal data under the 2014 Act, fell within the permitted categories. The processing of data was necessary for the exercise of the named person functions. There had been no suggestion of the manner in which such processing would be inconsistent with the data protection principles. Section 35 of the 1998 Act was a "red herring". There was no need for a free-standing "right to be forgotten" (cf *Google Spain* (*supra*)).

[88] The 1998 Act implemented the Directive, and there was no suggestion that it had failed to do so faithfully. There was, therefore, no need to look at the Directive itself. It recognised that, where the processing of data was authorised by another enactment, many of the restrictions which would otherwise have applied would not have effect (s 70).

[89] A degree of trespass into reserved areas was inevitable; it was the "pith and substance" that had to be considered (*Martin* v *Most (supra)*, at para 46). If an Act fairly and realistically satisfied the test of falling within a devolved area, it did not matter that it might also relate to a reserved area (*In re Agricultural Sector (Wales) Bill* (*supra*), at para 67). The rules required to be interpreted in a way which upheld the stability and operation of the devolution scheme (*ibid*; *Joint Liquidators of Scottish Coal Co* v *SEPA (supra)*, at para [152]). It would be an unworkable interpretation of the devolved settlement to hold that the Scottish Parliament could not legislate for the sharing of information in the process of legislating in the devolved areas of children and young people, which included adoption, child protection, parental rights and responsibilities and special education needs.

[90] The purpose of the data sharing provisions was to enable the named person to exercise more effectively the functions conferred, to which they were directly linked (Policy Memorandum, para 73). They had no free standing purpose, but for the creation of the named person service and functions. Their effect was consistent with their purpose and was no more than a loose or consequential one, if any, on the subject matter of the Directive or DPA (*Joint Liquidators of Scottish Coal* v *SEPA (supra)*, at para [156]).

[91] The data protection regime was not a matter of Scots private law for the purposes of section 29(4) of the Scotland Act 1998. Nor was the Scots private law of confidentiality modified "as it applies to reserved matters". No question of incidental or consequential modification of the law on reserved matters arose (Scotland Act 1998, sch 4, para 2).

[92] The submissions of the interveners related to an impact yet to be felt by any children, where information had yet to be shared and the regime had yet to be fully formed. It was inappropriate to criticise the scheme on the basis of draft guidance. In any event, confidentiality was not given absolute protection by Article 8 of the Convention. There was no blanket ban against the sharing of confidential information *(R(S)* v *Plymouth City Council* [2002] EWCA Civ 388). The question whether an individual might share confidential information with a service provider was not covered by the 2014 Act. The obligation to share information for the purposes of the named person service fell on the service provider only. The legislation did not deal with whether that individual would share the information with a child's parents. Such matters would be governed by other regimes, including the 1998 Act.

Decision

[93] The Treaty of European Union provides (Art 6(1)) that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (2000) and affords them the same effect as the contents of the EU treaties themselves. The Charter mirrors many of the rights of the Convention. Given that the Charter is directed at member states only when they are implementing (or derogating from) EU law (Art 51(1)), its relevance for present purposes is not entirely clear. However, it contains specific provisions (Art 8) whereby:

> "1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law…" (see also the Treaty on the Functions of the European Union, Art 16(1)).

There are subsidiary rights of access to, and rectification of, data. The rights are closely related to that of respect for a private and family life contained in Article 7 of the Charter (*Volker and Markus Schecke GbR*

[2010] ECR – 1-11063, at para 47). They are not, however, absolute. They may be limited, subject to the principle of proportionality, where necessary to protect the rights and freedoms of others (Art 52), including, presumably, the right of children to "such protection and care as is necessary for their well-being" (Art 24). The degree of necessity required in the assessment of the legitimacy of a limitation (Art 52) has been said to be "strict" (*Digital Rights Ireland* v *Communications Minister* [2015] QB 127, at para 52) although, at least when dealing with the assessment of justification of a particular action, it means "reasonably" necessary (*South Lanarkshire Council* v *SIC* 2014 SC (UKSC) 1, Lady Hale at para [27])

[94] The European Parliament and Council Directive (95/46/EC) stresses in its preamble (para [2]) the need to respect the right to privacy in the context of processing personal data. It introduced (Art 6) the data processing principles. These require a data holder (controller) to ensure that data is processed fairly and lawfully, collected for specified purposes and is adequate, relevant and not excessive relative to those purposes. The data must be accurate, up to date and kept in a form which permits identification of the data subject for no longer than is necessary. An obligation (Art 7) is imposed on member states to provide that personal data can only be processed with the consent of the individual or where it is necessary for certain purposes, including the protection of the individual, the performance of a public interest task or the exercise of official authority. There is specific provision for the processing of data concerning a person's health and sex life. Processing requires either consent, or circumstances in which the data subject's vital interests are at stake or, where consent is not forthcoming, the vital interests of others are concerned.

[95] The Directive was converted into domestic law by the labyrinthine Data Protection Act 1998. This statue enshrines (Sch 1 Part I) the data protection principles, largely as contained in the Directive. It adds (Sch 1 Part II) an explanatory gloss to those principles. There are specific additional provisions relative to education (Sch 11) and social service (Sch12) records; health records being dealt with in other legislation.

[96] The 1998 Act is the principal mode by which the Charter rights and the Articles of the Directive are transposed into the law of the United Kingdom. It is not contended that the provisions of the Act fail to reflect these rights and articles (cf *Asociacion Nacional de Establecimentos Financieras de Credito Administracion del Estado* [2011] ECR 1-1218). There is no ambiguity identified in the construction of the statute which requires recourse to the antecedent European Union instruments. In these circumstances, there is no obvious reason to stray outside the legislation when identifying the applicable law on data protection.

[97] The points advanced by the petitioners, and to an extent the interveners, might have some substance if there were merit in the central contention that the terms of the 2014 Act in some way trump the Data Protection legislation when defining the circumstances in which information can be shared. It is not possible to construe it as so doing. Section 26(11) of the 2014 Act expressly provides that, with the exception of rules on confidentiality, the information sharing provisions are not to be held as permitting, far less requiring, the provision of information when it is prohibited or restricted by virtue of an enactment or rule of law. This makes it clear that the operation of section 26 involves compliance with existing law. That includes the Data Protection Act 1998 and hence the rights of the Charter and the principles in the Directive.

[98] Exactly how the data protection principles will operate within the information sharing regime of the 2014 Act will depend upon the particular circumstances of a given case. However, there will be no breach of the principles where, for example, the child or young person gives his or her consent (1998 Act Sch 3 para 1; 2014 Acts 26(6)). Other examples of permissible sharing are where the information is required to protect the vital interests of a child incapable of giving consent or where the vital interests of others are under consideration and consent is being unreasonably withheld (Sch 3 para 3). A third situation may arise where the processing of the information is required for the purposes of protective legal proceedings (sch 3 para 6). In short, there is no substance in the contention that the 2014 Act cannot be operated within the confines of the data protection regime. It may be that in particular circumstances a breach will occur. Apart from the prospect of that resulting in a prosecution, such a situation can be the subject of a specific challenge based on real events. Such situations are illustrated by some of the cases cited (EG *Criminal Proceedings against Bodil Lindqvist* [2003] ECR I-12971; *Volker and Markus Schecke GbR* [2010] ECR – 1-11063; *Commission* v *Bavarian Lager* [2010] ECR I-6055).

[99] Once the 2014 Act is seen as operating within the data protection regime, it cannot be regarded as breaching that Act, the Directive from which it is derived, or the wider Charter rights. Given that context, there is no need for the 2014 Act to incorporate data protection principles, such as the need for consent or

other specific protections, including the destruction of out of date data, within its four walls. The 2014 Act creates a regime involving child welfare which directs what should happen regarding the sharing of relevant information, but it assumes that the actions of those operating the system will comply with data protection principles.

[100] The 2014 Act does not involve the creation or collection of any new data; personal, sensitive or otherwise. It attempts to introduce a system for the co-ordination and sharing of existing data in relation to children and young persons whereby situations involving a potential risk to a child's or young person's well-being, as defined, can more readily be identified and the relevant agency alerted. On one view, the regime is only needed because of the way in which children's health, educational and welfare services are separated into different departments of local or central government and other sectors. No doubt this separation is for good administrative reasons, albeit some may be mainly historical in origin.

[101] A separate point is made relative to the right of confidentiality. Such a right undoubtedly exists in the context of a person's medical records as part of the general Article 8 right to respect for private life (*X* v *Commission* [1994] ECR I-4347, at para 17; *Z* v *Finland* (1998) 25 EHRR 371, para 95). However, this right is not an absolute one and restrictions upon it may be made if they correspond to objectives of general public interest and are neither disproportionate nor amount to an intolerable interference with the fundamental right (*ibid*, para 18; *Z* v *Finland* (*supra*), at para 97 referring to data protection). Any restriction must have a basis in law, in the sense of being "accessible to the person concerned and foreseeable as to its effects. A rule is 'foreseeable' if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct" (*Peruzzo* v *Germany* (2013) 57 EHRR SE17, at para 35; *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245, para 49)). The law must "afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise" (*ibid* citing, *inter alia*, *Malone* v *United Kingdom* (1985) 7 EHRR 14 at paras [66]-[68]). However, not every eventuality can be expressly catered for. The "level of precision… depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed" (*ibid*).

[102] It is, once again, important to note that the 2014 Act is not a statute which introduces information sharing into the field of child welfare law. The sharing of what may be regarded initially by the parent, child or service provider as confidential medical or other information may be necessary in order to protect the wellbeing of the child. This is, for example, something which is done day and daily by the medical profession, and health visitors, on discovering signs of child abuse. Teachers too may decide to report signs of child neglect to the local Social Work Department and may disclose what may appear to be evidence of criminal activity to the police. Rather than establishing a regime for the sharing of information between those who have an interest in acquiring it for the benefit of the child, the 2014 Act attempts to put what is an existing, albeit apparently inadequate and sporadic, sharing exercise onto a firmer, and more transparent, statutory footing. It does so in the context of the applicability of Convention rights in general and the data protection principles in particular to personal data, such as medical records, of the type which appear to be of most concern to the interveners.

[103] The 2014 Act makes it clear to all those concerned that information may be shared between service providers in certain defined circumstances; notably if it is necessary or expedient to enable a named person to carry out his or her statutory functions. These functions are clearly set out and involve, broadly stated, advising the child or young person and helping him or her to access the correct service or support and raising a matter concerning the child with a service provider or relevant authority. There is a discretion left to the service provider in that a decision may have to be made about whether the sharing of the information has benefits which will outweigh any adverse effects. The existence of that level of discretion is inevitable if the system is to have sufficient efficacy and flexibility to deal with the wide range of anticipated problems likely to arise. In these circumstances, the challenges to the information sharing and disclosure provisions in the Act must be rejected.

[104] The final area requiring exploration is the issue of whether the 2014 Act encroaches upon reserved matters in terms of the Scotland Act 1998. The principles to be applied were recently set out in *Joint Liquidators of Scottish Coal* v *SEPA* 2014 SC 372 (LJC (Carloway) delivering the Opinion of the Court, at paras [150] et seq. under reference to the *dicta* of Lords Walker and Rodger in *Martin* v *Most* 2010 SC (UKSC) 40).

The court requires to decide the question "by reference to the purpose of the provision, having regard… to its effect…" (Scotland Act 1998 s 29(3)). The effect is only one of the circumstances to which regard must be had when determining purpose. The "pith and substance", or "true nature and character" of the provision requires to be ascertained in order to decide whether any illegitimate encroachment has occurred.

[105] For the reasons already explored relative to the parallel operation of the data protection legislation, the 2014 Act does not encroach upon reserved matters. Its pith and substance is child protection. If it has any effect on data protection, that effect is both incidental and *de minimis*. For these reasons, the provisions in sections 26 and 27 fall within the competence of the Parliament and the challenge on this ground too must fail.

[106] For all of these reasons, the reclaiming motion will be refused. With the exception of that part sustaining the respondents' third plea in law (which will be repelled), the court will adhere to the interlocutor of the Lord Ordinary dated 22 January 2015.