OUTER HOUSE, COURT OF SESSION

[2021] CSOH 19

P582/20

OPINION OF LADY WISE

In the petition

MB

Petitioner

against

THE PRINCIPAL REPORTER

First Respondent

Petitioner: JM Scott QC, Aitken; TC Young LLP (for Hunter & Robertson, Paisley)
First Respondent: Moynihan QC; Anderson Strathern LLP

16 February 2021

Introduction

[1] This petition raises issues about the fairness of a decision-making process leading to measures of interference with family life. The circumstances post-date the decision of the UK Supreme Court in *ABC* v *Principal Reporter* 2020 SLT 679 and concern the application of that binding authority to the sheriff court procedure that has taken place in the context of proceedings under the Children's Hearings (Scotland) Act 2011 relative to the petitioner's siblings.

[2] MB is the older brother of four sisters who will be referred to as T, LM, M and HR and who are aged 12, 10, 8 and 1 respectively. The principal reporter made referrals to the

Children's Hearing in respect of each sister and contends that a Compulsory Supervision Order ("CSO") may be required in respect of all four children. The grounds in each referral are the same, namely that each child has a close connection with someone who has committed a relevant offence under the Sexual Offences (Scotland) Act 2009. The petitioner is one of two named persons who have a close family connection to the referred children. He is alleged to have committed relevant offences but not against any of those four children. The statements of grounds for referral are disputed by the parents of the four girls and applications have been made to Paisley Sheriff Court for determination thereof. The grounds for referral appear to have been framed in September 2019. No proof on the disputed statements contained therein has yet been fixed due to the inability to hold such evidential hearings in the sheriff court during 2020 because of the Covid 19 pandemic. As a result of these delays, the sheriff at Paisley has from time to time been asked to extend Interim Compulsory Supervision Orders (ICSOs) in respect of each child. Each ICSO is in identical terms and each includes a measure prohibiting the petitioner from having contact with his sisters. This petition does not challenge the merits of any of the ICSOs or the prohibition on MB having such contact. Those would be matters that at this stage only the sheriff could determine. What the petitioner seeks to do is challenge the procedure that has taken place to date.

The relevant legislation and procedural rules

[3] Interim compulsory supervision orders are defined in section 86 of the Act which is in the following terms:

"86 Meaning of "interim compulsory supervision order"

(1) In this Act "interim compulsory supervision order", in relation to a child, means an order—

(a) including any of the measures mentioned in section 83(2),

(b) specifying a local authority which is to be responsible for giving effect to the measures included in the order ("the implementation authority"), and

(c) having effect for the relevant period.

(2) An interim compulsory supervision order may, instead of specifying a place or places at which the child is to reside under section 83(2)(a), specify that the child is to reside at any place of safety away from the place where the child predominantly resides.

(3) In subsection (1), "*relevant period*" means the period beginning with the making of the order and ending with whichever of the following first occurs—

(a) the next children's hearing arranged in relation to the child,

(b) the disposal by the sheriff of an application made by virtue of section 93(2)(a) or 94(2)(a) in relation to the child,

(c) a day specified in the order,

(d) where the order has not been extended under section 98 or 99, the expiry of whichever is the longer of—

(i) the period of 44 days beginning on the day on which the order is made, or

(ii) where the order is made by a sheriff, such other period of days beginning on that day as the sheriff may specify,

(e) where the order has been extended (or extended and varied) under section 98 or 99, the expiry of the whichever is the longer of—]

(i) the period of 44 days beginning on the day on which the order is extended, or

(ii) such other period of days beginning on that day as the sheriff may specify.

(4) Subsections (3) to (6) (except subsection (5)(a)) of section 83 apply to an interim compulsory supervision order as they apply to a compulsory supervision order."

Prior to the Covid 19 pandemic an ICSO lasted for no more than 22 days but this was increased to 44 days by the Coronavirus (Scotland) Act 2020, a provision that remains in force at the date of this Opinion.

[4] Sections 98 and 99 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") are in the following terms:

"**98 Application for extension or variation of interim compulsory supervision order**

(1) This section applies where—

(a) a child is subject to an interim compulsory supervision order ("the current order"), and

(b) **[** either—

(i) the current order is made under section 93(5) and by virtue of section 96(4) a children's hearing would be unable to make a further interim compulsory supervision order, or

(ii) the current order is made under section 100(2).

(2) The Principal Reporter may, before the expiry of the current order, apply to the sheriff for an extension of the order.

(3) The Principal Reporter may, at the same time as applying for an extension of the current order, apply to the sheriff for the order to be varied.

(4) The current order may be extended, or extended and varied, only if the sheriff is satisfied that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child it is necessary that the current order be extended or extended and varied.

99 Further extension or variation of interim compulsory supervision order

(1) This section applies where an interim compulsory supervision order is—

(a) extended, or extended and varied, under section 98(4), or

(b) further extended, or further extended and varied, under subsection (4).

(2) The Principal Reporter may, before the expiry of the order, apply to the sheriff for a further extension of the order.

(3) The Principal Reporter may, at the same time as applying for a further extension of the order, apply to the sheriff for the order to be varied.

(4) The sheriff may further extend, or further extend and vary, the order if the sheriff is satisfied that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child it is necessary that the order be further extended or, as the case may be, further extended and varied."

[5] In terms of section 96(4) of the 2011 Act the Children's Hearing may extend an ICSO twice only. Thereafter the children's reporter must apply to the sheriff for any further ICSOs in terms of sections 98 and 99. Again, the duration of an ICSO granted by the sheriff was extended by the Coronavirus (Scotland) Act 2020. The reporter may apply to the sheriff for an ICSO on any number of occasions pending proof. This has become routine during 2020 for the reasons mentioned.

[6] Section 83 of the Act defines Compulsory Supervision Order itself. The parts relevant to these proceedings include the following:

"**83 Meaning of "compulsory supervision order"**

(1) In this Act, "*compulsory supervision order*", in relation to a child, means an order—

(a) including any of the measures mentioned in subsection (2),

(b) specifying a local authority which is to be responsible for giving effect to the measures included in the order (the "*implementation authority*"), and

(c) having effect for the relevant period.

(2) The measures are—

(a) a requirement that the child reside at a specified place,

(c) a prohibition on the disclosure (whether directly or indirectly) of a place specified under paragraph (a),

(g) a direction regulating contact between the child and a specified person or class of person,"

The particular provision of a CSO that can be made in an ICSO and is relevant here is a direction regulating contact between the child and a specified person.

[7] The procedure in respect of applications to the sheriff for a variety of orders, including ICSOs, are contained in the Act of Sederunt (Child Care and Maintenance Rules) 1997 ("CCMR") SI 1997 No 291 which has been amended to take account of the provisions of the 2011 Act. Rule 3.64A CCMR is in the following terms:

"**Interim compulsory supervision order**

3.64A (1) Where a sheriff makes an interim compulsory supervision order under section 100, 109 or 156(3)(d) of the 2011 Act, such order shall be in Form 65A and, subject to rule 3.3, shall be intimated forthwith to the child by the Principal Reporter in Form 65B.

(2) An application for the extension or extension and variation of an interim compulsory supervision order shall be made to the sheriff in Form 65C.

> (3) An application for the further extension of further extension and variation of an interim compulsory supervision order shall be made to the sheriff in Form 65D.
>
> (4) Subject to rule 3.3, an application under paragraph (2) or (3) must be intimated forthwith by the applicant to the child and each relevant person and such other persons as the sheriff determines and in such manner as the sheriff determines.
>
> (5) Where the sheriff grants an application under paragraph (2) or (3), the interlocutor shall state the terms of such extension or extension and variation and subject to rule 3.3, shall be intimated forthwith to the child by the Principal Reporter in Form 65B.
>
> (6) Subject to paragraph (1) and (5), where the sheriff -
>
> (a) makes an interim compulsory supervision order under paragraph (1); or
>
> (b) grants an application under paragraph (2) or (3),
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> The Principal Reporter shall intimate the order forthwith to the implementation authority and to such other persons as the sheriff determines in Form 65E."

There are standard forms for intimation of the ICSO application, including to any person the sheriff determines should receive such intimation (Form 65D). There is also a prescribed form to be issued by a sheriff granting an ICSO application (Form 65E). That form should contain the sheriff's reasons for the order.

Submissions for the petitioner

[8] In moving for declarator, damages and interdict against the first respondent, Mrs Scott explained that she now had challenges to four separate ICSOs which had been granted on 2 July, 13 August, 17 September and 4 November, all 2020, respectively. The petition was first raised in August but matters had evolved since then and, albeit that

different considerations arose in relation to each of the four ICSOs, each was challenged. It was important that each application had been initiated by the reporter seeking a prohibition of contact between each relevant child and the petitioner. Senior counsel's contention was that in each case there had been a failure to act compatibly with the procedural aspects of Article 8 ECHR. The children's reporter and the sheriff were of course both public authorities in terms of the Human Rights Act 1998 and so could not act incompatibly with any ECHR right. While it was certainly possible to apply the scheme in a convention compliant manner, to do so either there had to be direct intimation to the petitioner of the proposed ICSO or at least intimation of the parts of it that directly affected his family life. It was also necessary for the petitioner to see the documents that bore on that issue. The central right asserted was that of an opportunity to address the decision-maker having regard to the material placed before him/her by the principal reporter. Further, it was necessary for the petitioner to be advised of the outcome.

[9] Under reference to paragraphs 27, 28, 29, 30, 31 and 32 of the UK Supreme Court (UKSC) in *ABC* v *Children's Reporter* 2020 SLT 679 Mrs Scott submitted that the court had acknowledged the importance of sibling relationships and the procedural rights necessary to safeguard all those with established family life where there was a proposed state interference with those family relationships. The ability to express views was important and siblings required to be enabled to have an involvement in the decision-making process. It is clear from the court's decision that the system is ECHR compliant only if sensibly operated. The reporter and the Lord Advocate had told the UK Supreme Court in that case that practice is to give notice of hearings to siblings and senior counsel for the principal reporter had conceded to that court that a failure to do so would be judicially reviewable. On the

issue of documentation, paragraph 34 of the decision in *ABC* was key. The question was whether it was enough to give those concerned information about the substance or gist of the documents or whether, as the Children's Hearing (and the sheriff) is empowered to do, direct the release of documents. The local authority report that invariably accompanies such applications is clearly a relevant document. At paragraph 41 of *ABC* the UKSC outlined a range of measures which can be used to ensure that public authorities comply with their duties in this area. It was accepted each case required a bespoke inquiry before the particular level of participation could be determined. It was clear at paragraph 53 of the court's decision, which applied equally to a sheriff making an ICSO, that in order for siblings' rights to be effective, they would have to be informed of the nature of the proceedings and their rights in respect of the procedure taking place. All state authorities require to be aware of the sibling interests and it was for public authorities to address what further steps were desirable to protect a sibling's Article 8 interests.

[10] The case of *ABC* v *Principal Reporter* was the latest in a long line of authorities confirming that failures in ECHR compliant procedures in this area would give rise to a violation of Article 8 ECHR. Reference was made to *W* v *United Kingdom* 1987 10 EHRR 29 and the seminal passage at paragraph 64 thereof about whether the parents (as it was in that case) had been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. Further, in *McMichael* v *United Kingdom* 1995 20 EHRR 205 the court found two violations of what is now characterised as the procedural aspects of Article 8. First, the father who had not been married to the mother of the relevant children had been denied the opportunity to participate in the children's hearing. Secondly, the inability of both parents to see certain

confidential documents and reports had violated their ECHR rights. It was not enough to be given information about the substance of the relevant documents. The significance of that decision to the current situation was that the petitioner needed to secure full information about the outcome of each hearing so that he would know whether there were additional aspects that he needed to cover on the next occasion. He was at a substantial disadvantage similar to that involved in the *McMichael* case. It was noteworthy that in *McMichael* the failure to make relevant documents available to the couple itself attracted damages jointly to them in the sum of £8,000.

[11] Mrs Scott accepted that there would be parts of the documentary material relating to the petitioner's four sisters that might relate to matters not concerning him. What mattered was that he had access to all relevant papers so that he could address the matters pertinent to him. If all the papers were provided, those could be redacted where appropriate but the essential matter was that he be put in a position where he could deal with the application. In adversarial proceedings a party cannot be expected to rely on a summary provided by an opponent. It was necessary to see everything that the opponent was telling the court so that any misapprehension on the part of one's opponent relating to material facts or law could be addressed. In the present case the petitioner had at later stages been permitted to make representations through the reporter but had not been entitled to see the submission made by the reporter to the sheriff. This resulted in him being told that the decision was that he should not have any contact with his siblings but not the reasons why. It was for the children's reporter as a responsible public authority to explain to the court why the procedural steps in this case were necessary and proportionate. Mrs Scott submitted that the challenge posed by the UKSC to children's reporters in the case decision of *ABC* v

Principal Reporter was to change their practices to ensure that they were Article 6 and 8 compliant. The assurances given to the court in that case did not appear to have been followed through to the petitioner's situation. The starting point was the first of the applications to extend the ICSO. In terms of Form 65D the petitioner was clearly "any other person" to whom intimation might be made because he had a direct interest in the outcome of the application which specifically sought to prohibit contact with him. The principal reporter had to address the question of why the petitioner's name had not been inserted in the part of Form 65D so that intimation would follow. In terms of rule 3.64A(4) the sheriff had the power to determine the manner in which intimation took place and so it would not have been necessary to intimate the whole form to the petitioner. The sheriff, as independent decision-maker, should decide how much of the application should be intimated. Similarly when the ICSO is granted, it is intimated in terms of Form 65E to such other persons as the court determines. That form gives reasons why the order has been made and it was perfectly possible to send the form to someone directly affected, such as the petitioner, regardless of whether intimation should have been made to him of the application itself. The terms of rule 3.64A(6) CCMR provides an opportunity for the process to be Article 8 compliant but that opportunity was not taken up in this case.

[12] Turning to each of the four decisions challenged, the first application, granted on 2 July 2020 was made on the basis that the reporter did not consider that the petitioner should receive intimation and he was not named in the Form 65D. The sheriff was not aware of the petitioner's desire to receive notice and ultimately the petitioner heard only informally about the application, no material information having been disclosed to him. The day before the application was due to be heard his solicitors sent an email asking to be

permitted to make representations and the reporter agreed to put those representations before the sheriff. This had to be prepared very quickly and the petitioner had no notice of the application itself nor of any reports or other papers. The reporter had supplied only very brief details of the basis for the application the day before it was made. The sheriff had duly granted the application but did not require the reporter to intimate the order or the reasons for it to the petitioner. In those circumstances declarator was sought that the order of 2 July 2020 in so far as it prohibited contact between the petitioner and his sisters was incompatible with the right to respect for family life under Article 8 standing the absence of appropriate safeguards.

[13] So far as the 13 August 2020 order was concerned, this was the first of the four orders that was made after this petition had been raised. The petitioner had enrolled a motion for *interim* interdict but on 7 August 2020 that was refused *in hoc statu* on the basis of an undertaking given by the reporter to submit the petitioner's written submissions to the sheriff. By the time of the *interim* interdict hearing intimation of the application for renewal of the ICSO had been made and the reporter had again not sought intimation on the petitioner. The matter of intimation was not raised with the sheriff albeit that the reporter was aware the petitioner wished to be heard. Consequently, the application was not intimated to the petitioner who was permitted only to make written representations via the reporter. Again the reporter summarised his position in an email but the petitioner had no sight of the application, the reporter's submissions, reports or other papers. The sheriff granted the application on 13 August but again did not require the reporter to intimate his decision or its reasons to the petitioner. The reporter advised the petitioner informally what had occurred. Accordingly the petitioner was not advised of the sheriff's reasons for the

order. At a much later date, on 28 September 2020, the reporter disclosed Form 65E in relation to the August hearing. In these circumstances the petitioner sought declarator that the order of 13 August 2020, in so far as it prohibited contact between the petitioner and his sisters was incompatible with the right to respect for family life under Article 8.

[14] Mrs Scott submitted that similar procedure was followed in the process that led to the order of 17 September 2020. Again the reporter did not consider that the petitioner should receive intimation of the application and he was not named in the Form 65D. The sheriff was not advised of any need for the petitioner to participate albeit that the reporter was aware that the petitioner wished to be heard. The warrants for intimation did not include the petitioner who received no material information about the application. No written representations on behalf of the petitioner were submitted to the sheriff via the reporter. There had been confusion about this. The reporter had offered to pass on the petitioner's submissions to the court but had intimated to those instructed by the petitioner that such submissions had to be emailed to him by 2pm on 15 August which date had passed. In essence this error arose because the reporter's office seemed to have used "cut and paste" to provide the same information about the application as had been given on the previous occasion. The reporter had indicated that he would provide any additional information that arrived from the local authority and that he would advise the petitioner of the terms of his own submissions. However, nothing further was heard from the reporter's office and on 17 September 2020 the sheriff granted the application. Again the sheriff did not require the reporter to intimate the order or the reasons for it to the petitioner. In those circumstances the petitioner also sought declarator that the order of 17 September 2020, in so

far as it prohibited contact between the petitioner and his sisters was incompatible with the right to respect for family life under Article 8.

[15] The final order under challenge was that of 4 November 2020. When the application was made the reporter did not seek intimation to the petitioner in the Form 65D. However in respect of that particular application the reporter agreed to draw to the sheriff's attention that the petitioner wished to receive intimation, including the relevant application itself and any report, submissions and other papers in so far as relevant to the issue of contact. The reporter maintained the position that formal intimation should not be given to the petitioner but was content that the sheriff be made aware of the different arguments in relation to that so that he could decide. Representations for both sides (number 6/16 of process) were submitted following which the sheriff refused to order intimation. On a request from this court, the sheriff subsequently provided a note explaining his reasons for refusing to order intimation on the petitioner. He quotes (at paragraph 12 of the note) from the reporter's submission which the petitioner had not seen. That extract appeared to state that any reports or updated information relating to the petitioner that had not been previously disclosed were provided to the petitioner's agents in extracts from the overall report. Mrs Scott confirmed this had not been done and so the sheriff had relied on details of a scheme that was not working and about which he had not been given accurate information. It appears that he was satisfied by safeguards that did not in fact exist. Furthermore, at paragraph 16 of his note, the sheriff referred to there being no submissions from the petitioner, or his representatives reported to the court via the reporter when the four applications called for determination on 4 November. That flew in the face of what the reporter had stated to the petitioner namely that submissions that the petitioner had

forwarded would be included in the report and submissions. By the date of the substantive hearing in this case the court had received an email from the sheriff clerk at Paisley confirming that all documentation (which included the petitioner's submission as part of the reporter's material) was before the sheriff when he made his decision, but Mrs Scott had not been provided with that. She submitted that this episode was part of the ongoing frustration on the part of the petitioner of continued misunderstandings about what was going on. All the petitioner sought to achieve was to be allowed to address the sheriff on his exclusion from the proceedings and in support of his position on contact. Paragraph 1 of the sheriff's note conveys that the sheriff considers himself to be continually monitoring the position having regard to the petitioner's interests and balancing those interests with the needs and protection of the four children involved in the ICSOs. However, that ignored the "muddle" of everything that had happened to date. Accordingly, the petitioner sought to establish that the refusal by the sheriff to order intimation to the petitioner of the first respondent's application and disclosure of relevant report, submissions and other papers bearing on the application that led to 4 November 2020 decision was incompatible with the right to respect for family life under Article 8.

[16] Mrs Scott submitted that in each of the four episodes referred to there had been no appearance of impartiality and an inequality of arms was clearly present. There had been several procedural breaches of Article 8. Additionally, it was important that any interference with family life must take into account the views of the children affected. Section 27 of the 2011 Act requires those views to be taken. Although the youngest child involved in this case, aged only one was too young, the views of the children aged 12, 10 and 8 ought to have been elicited. The sheriff in the proceedings had been told repeatedly

that their views were relevant. There had been interference with established family life between the children and their brother and it was over a year since they had seen him. While the sheriff had thought to involve the safe-guarder in this, as a matter of fact no views had been elicited. Mrs Scott submitted that this case was an important one in which the court could lay down clear markers about what was and was not Article 8 compliant procedure. Finally, she also sought interdict against the sheriff in Paisley as an office bearer of the court so that matters could be resolved for future ICSO applications involving the petitioner. The interdict sought was designed to secure procedure that was Article 8 compliant. Mrs Scott submitted that the sheriff's note at 7/8 of process illustrated that he had misapprehended the decision of the UK Supreme Court in *ABC* v *Principal Reporter*, in particular paragraphs 34, 40, 41 and 53 thereof. The extent to which a non-relevant person should be given access to papers relevant to his interests is to be determined as part of the "bespoke inquiry" to be undertaken in each case. The sheriff in this case would have been able to order the release of relevant documents or at least the parts of them which engaged the petitioner's interests. If the sheriff was interdicted from making further orders on the application of the first respondent regulating contact between the petitioner and each of the referred children without first ordering intimation and receipt of relevant documents the mistakes to date would not be repeated in future. So far as damages were concerned, the *McMichael* case had already been referred to. In the case of *Akin* v *Turkey*, ECHR, 6 April 2010, application No 4694/03, a case also involving siblings prevented from maintaining contact with each other, the applicants were awarded damages of €15,000. Further, in *NJDB* v *United Kingdom* 2015 Fam LR 150, a case emanating from Scotland where the length of child contact proceedings had resulted in a violation of the father's right under Articles 6

and 8 ECHR €7,700 was awarded. Reference was made also to a domestic case involving damages, from the English Family Court. *Prospective Adopters for T (Children)* v *Herefordshire District Council* [2018] EWFC 76 where more substantial damages were awarded. Mrs Scott accepted that any damages awarded in this case may not be so significant but contended that if the violations were established the petitioner as victim of those violations should be awarded an appropriate sum.

Submissions on behalf of the first respondent

[17] Mr Moynihan QC adopted his written note of argument and confirmed that there were separate proceedings in relation to the grounds for referral themselves in which the sheriff had now agreed that MB could take part. There was to be a procedural hearing in that aspect in the immediate future. Senior counsel for the reporter made certain preliminary observations on the issue of the remedies sought by the petitioner. Should a declarator be granted in the terms framed by the petitioner it would require the reporter to include MB as an interested person in the Form 65D. If the court was satisfied that should be done, it would be sufficient for the petitioner's purposes. There would be no need for an interdict and it would be incompetent in any event to pronounce interdict in the terms sought because the sheriff was not personally named and an interdict could not be sought against an unnamed office holder. And there were few exceptions to that rule. A further general preliminary point was that the papers illustrated that the reporter in this case had done everything reasonable to facilitate resolution of the procedural issue that had arisen. If the court decided that in the event the scheme devised by the reporter was not enough, then bare declarator could be sought but in the circumstances that should not lead to damages

being awarded. The reporter's primary position was that there had been no failure to follow the UK Supreme Court's decision in *ABC* v *Principal Reporter*.

[18] Dealing as a separate point with the rights of the four sisters concerned, section 27(3) of the 2011 Act required the views of children to be obtained so far as practicable. There was no information about the practicalities in this case and the sheriff had, very properly, picked the matter up and asked for further enquiries to be made. It was wrong of the petitioner to contend that only his separate representation at a hearing was sufficient to comply with the requirement to seek his sisters' views. The four girls had separate Article 8 rights and it was simply not known at this stage what their position on the matter of contact was. It should always be borne in mind whose rights are being discussed when any potential breach of the procedural aspects of Article 8 is concerned.

[19] Mr Moynihan concentrated on the decision in *ABC* and what the UK Supreme Court had decided was incumbent upon public authorities such as the reporter in cases of this sort. At paragraph 53 of the court's judgment, the statement appeared that it was for the public authorities involved to address whether further steps were desirable in any given case to protect the relevant Article 8 interests involved. It was clear there were no finite solutions to problems such as those arising in the present case but that each situation required a bespoke solution. There was a need for everyone involved in proceedings of this type to be aware of the various interests within the system before it would be convention compliant. The reporter in this case had been acutely aware of the various competing interests and had to date adopted a bespoke approach. It was noteworthy that the four propositions that were advanced by senior counsel for the petitioner were exactly those advanced by senior counsel for the petitioner in *ABC* and ultimately rejected by the UK Supreme Court. In essence these

were summarised at paragraph 21 of *ABC* and could be read across to the petitioner's situation and to applications for an ICSO. All of the arguments about making representations, an opportunity to see the documents, to address the decision-maker and be told of the outcome were raised in *ABC* with the decision being that no illegality had occurred. On the document issue, in *ABC* the reporter had ultimately relied on a possible interpretation of a rule (r. 61(1)(g) of the relevant Children's Hearings Rules) to suggest that a power directing the release of documents was sufficiently generally worded that the chair of a children's hearing could use it to remedy a situation where a summary produced for someone like a sibling who did not have full participation could be remedied if it was inaccurate. That was the sort of creativity that was required to cater for bespoke situations. For example, it would be difficult for the chair of a hearing to give a summary of a detailed psychiatric report and so the power could be used to adjourn and then provide a copy of a single report having decided that should be done before a decision was made. The power existed to make partial disclosure, something that was particularly relevant where siblings were involved who were not afforded access to all documentation. It was submitted that the only two differences between the present case and that of the sibling in *ABC* were first that this case deals with *interim* ICSOs made by the sheriff as opposed to compulsory supervision orders made by the children's hearing. This made no difference as the same issues would arise for MB if the grounds for referral are established. Secondly, because of Covid 19 ICSO hearings have in 2020 been dealt with on written submissions in chambers. It was accepted that this presented a form of handicap to all concerned, illustrated by paragraph 16 of the sheriff's note where he appeared to record a lack of cognisance of MB's submissions albeit that the clerk of court had confirmed these were sent to him with the papers. In an oral

hearing of course the sheriff would have been directed to those submissions. These unusual circumstances were not a reason to invert the law and create a new procedure.

[20] In response to the contention of senior counsel for the petitioner that the reporter should be asked why there was a refusal to add MB's name onto the relevant form of intimation but could tell him informally when hearings were to take place and that he could forward a submission for that, there were two reasons. First, the focus of the reporter was properly on the referred child, in this case each of the four girls. Their sibling MB has rights but is not the focal point of the applications being made by the children's reporter. Secondly, the natural assumption contained within Form 65D and the relative rule is that anyone participating receives a copy of the whole application. In matters involving human rights, it was important to try to interpret provisions and rules in a convention compatible way rather than rushing to a conclusion that matters are being conducted incompatibly. Further, reducing the numbers of people to as few as reasonably necessary was a central proposition underlying the whole children's hearing system. The four girls involved in the proceedings about them were relatively young and some of the matters being discussed were of extreme sensitivity. The UK Supreme Court has accepted the importance of keeping to a minimum the number of people involved in cases of this sort. That was in general terms in the interests of the referred child. (See paragraph 13 of *ABC.)* The learned sheriff in this case has echoed this approach as illustrated by the note he had provided. He had sensibly decided that while MB and the other person named in the grounds for referral should be party to the referral proof proceedings, there was no need for them to receive formal intimation of the ICSO. This was an appropriate decision giving different levels of participation to those with an interest as the importance of the issue dictates. In *McMichael* v

United Kingdom those who had not been afforded sufficient participation were the parents and what will be fair in that context will differ when siblings are involved. There is no blanket requirement for siblings to get papers. The Children's Hearing Rules allow the chair of the hearing to give a summary to those who are not there as relevant persons and this is not mandatory. The papers' issue is dealt with at paragraph 34 of *ABC* which confirms beyond doubt the procedure that was deemed to be convention compliant. Further, the UK Supreme Court had approved of the suggestion that other rules could be read purposively to avoid any perceived incompatibility in relation to the provision of papers (paragraph 40 of *ABC)*. Similarly in the present case rule 3.64A CCMR could be interpreted as allowing the sheriff to restrict the papers to be given to someone to whom the application was being intimated although that would not be the normal course. It would require the powers set out in rule 3.64 to be purposively interpreted. The issue was what was needed for MB to have adequate participation. Senior counsel for the petitioner had started her argument at the point where the petitioner has already instructed solicitors and counsel but the UK Supreme Court in *ABC* had stressed that there were other means of ensuring that the views of young people could be heard or participation afforded. On the issue of contact there was some distinction between an ICSO and a CSO and in particular section 29A of the 2011 Act applied only to a CSO and not to an ICSO. However, the views of siblings would always be considered and the duties of the local authority in this regard as recorded at paragraph 36 of *ABC* were pertinent to this case. That was why the sheriff had, very properly, asked for details of the siblings' current views as the information he had been given was historic. There were a number of mechanisms that could be used for MB to have some sort of input. As was noted at paragraph 39 of *ABC* one would expect a parent, the mother in this case to

be able to speak on behalf of all of her children. Accordingly, before there was any question of MB seeking participation through lawyers, there may already be effective means of having his views taken into account.

[21] In the present case the reporter was going further than what might be regarded as a basic minimum requirement and offering MB participation through giving him notice of the various applications, albeit informally and forwarding any submissions he wishes to make to the sheriff making the decision on the ICSO. Notwithstanding that section 29A of the 2011 Act did not apply to ICSOs the sheriff, in the proper exercise of his functions, had indicated that he would wish to hear about the children's views from the safeguarder and from the local authority. In summary, there was nothing in the UK Supreme Court case of *ABC* that supported the imposition of the stringent steps that counsel for the petitioner asserted was required for siblings such as MB. There was no support for the view that the steps taken by the reporter to date had been inadequate. It was clear that MB wanted contact with his siblings. What he is entitled to is that the relevant state authorities give due consideration to his wish for contact and take it into account.

[22] Turning to MB's representations for the November hearing, these were lodged at 6/18 of process. It had to be accepted that the sheriff's note (6/20 of process) recorded that there were no submissions from MB or his representatives reported to him on 4 November. However, it was possible that the sheriff thought that he had only the August representation although that was not clear from the note. In any event it had to be accepted that the sheriff appears not to have read any recent submission on the part of the petitioner but that did not matter as the petitioner had made no positive articulation of reasons why he should currently be given contact. The sheriff had sought and will obtain further information and

there will be up to date representations on the next occasion that the case calls for an extended ICSO. The obligation set out by the UK Supreme Court was that every relevant party (including the sheriff) had to do their best to ensure that the interests of someone such as MB were taken into consideration.

[23] It was indisputable that there had been a "muddle" in September and November in relation to communications. It should be noted, however, that there had never been anything to prevent MB's legal team putting in a submission separate from the reporter. The reporter was not trying to be the gatekeeper and stop MB making submissions direct to the sheriff. The reporter's view was simply that MB did not require to receive intimation as a party in matters that were focussed on the four girls. As the reporter's only interest was in providing a summary of reasons why, in the reporter's view, contact should not take place. The representations made by MB in August (6/10 of process) address the matters that are within his knowledge that the reporter has highlighted are the reasons for the seeking of prohibition of contact and which he can address. These included the alleged sexual offences, alcohol use and self-harming. The petitioner's desire to make submissions on these issues had to be understood in the current context where no party is receiving an oral hearing because of the Covid 19 emergency. In any event, the reporter is not the ultimate decision-maker and whether and to what extent to allow participation of MB is a matter for the sheriff. Two sheriffs at Paisley have been involved in the decision-making under discussion in this case. First, Sheriff McCartney on 13 August dealt with a situation where MB had been told the substance of the reporter's view on contact and had forwarded a reply to those. The sheriff had clearly been able to make a decision on that basis. So far as September and the hearing before Sheriff Ireland was concerned, it was clearly unfortunate

that the reporter, having introduced the procedure in August that would work may have caused confusion by a typing error which may in turn have been read by those representing the petitioner incorrectly, but the terms of the reporter's message were clear in terms of what the petitioner was invited to do. Finally, in November, the reporter agreed to go further and give MB an opportunity to make representations to the sheriff on whether he should be included in the Form 65D and be given access to all the papers. On that occasion MB had been given a full opportunity to assert his rights before any decision was taken. It was on that that the learned sheriff (Ireland) had made a decision and written a note. The whole pattern illustrated that MB's rights were being protected and that significant efforts had been made to afford him the procedural rights he sought. There was nothing more the reporter could really do as it was inappropriate in the circumstances of the present case to give MB access to the whole papers. If that was controversial, MB would have the right to use rule 3.63A(4) to ask the sheriff to disclose parts of any relevant report to him, at least on one interpretation of that rule. In effect, there were four stages of safeguards that taken together clearly satisfied MB's procedural rights. First, his views could be conveyed through a parent (his mother) who is a party to the proceedings; secondly, his position can be conveyed through the local authority who prepare reports; thirdly, at the invitation of the reporter he can and has on occasions made submissions to be included with the papers to go before the sheriff and fourthly and finally, the sheriff can take such steps as he considers appropriate to decide what further intimation if any should be given to the petitioner.

[24] Mr Moynihan moved that the court should sustain the first respondent's first plea-in-law. The reporter has explained why MB was not included as a party to receive formal intimation on the relevant form. Even if the reporter was wrong to have reached that

conclusion, only a bare declarator would be required and the matter would be addressed at source perhaps with a note that the petitioner should receive intimation but only limited papers. Neither party would be seeking expenses in this case and the court could deal with those.

Reply for the petitioner

[25] In a brief reply Mrs Scott stated that she was at a loss as to why the reporter was trying to keep MB out of the proceedings in this case. The reporter could not contend that everything was alright when patently it was not. The sheriff's note was a clear indication that the petitioner had not been heard in the proceedings. Further, it was well known that the court would displace decisions that had been taken when children's views had not been heard. *S* v *S* 2002 SC 246. Mr Moynihan had focussed on the case of *ABC* v *Principal Reporter*. However the challenge to the decision-making in MB's case was whether there had been a proper application of the relevant rules as they apply to MB rather than a challenge to the rules themselves.

Discussion

[26] It must be acknowledged at the outset that the backdrop to the circumstances about which the petitioner complains in this case is the significant impact the Covid 19 pandemic has had on the way in which court proceedings operate. In the absence of oral hearings in the sheriff court at the material time, the petitioner would only ever have been able to make written representations on the issue of contact with his siblings for the duration of the period under challenge. In normal circumstances, at least some of the issues that have arisen

could have been resolved by permitting the petitioner to appear (by video conference or in person) and make an oral submission to the decision maker, here the sheriff. My understanding is that such a resolution, at least through video conference, may now have become practicable in the sheriff court. However, this discussion is necessarily restricted to consideration of whether the reporter could have done more than adopt the scheme he did in the particular circumstances in which these applications required to be made during the second half of 2020.

[27] As Counsel recognised, the UK Supreme Court's recent consideration of the issue of sibling participation in the Children's Hearing system, provides binding authority on that issue. This proposed review is to decisions about the level of participation afforded to one individual subsequent to that decision with a view to examining whether the type of bespoke enquiry envisaged by that court has operated effectively in his situation. In *ABC* v *Principal Reporter [2020] UKSC 26,* the court emphasised (at paragraph 13) that the primary focus of the children's hearing must be the welfare of the child who is the subject of the proceedings. Similarly, in considering an application for an ICSO, or extension of an ICSO, a sheriff must have at the forefront of his or her mind that it is an application concerning the welfare of the child or children to whom it relates. Where there is a dispute about what is best for that child or children, those primarily involved in the child's upbringing will always have the opportunity to participate as "relevant persons" both before the children's hearing and in relation to applications to the sheriff. Those such as siblings who have established family life with the subject child or children may or may not have an opportunity to participate directly, but will invariably have some involvement to the extent that the decisions affect that family life. The UK Supreme Court recognised that "… *there are*

differences between the relationship of a parent and a child and the relationship between a sibling and a child" (paragraph 46). Accordingly, there is no assumption that a sibling who has not been significantly involved in the upbringing of a child will participate as fully in decision making for that child as either the parents or, where it has been determined they should not do so, the public authorities.

[28] The operative parts of the decision in *ABC* v *Principal Reporter* that are said to have been departed from in this case are in the following terms –

> "… There is now a clear recognition of the interest of both the child and the sibling in maintaining a sibling relationship through contact … in most cases. The nature of the sibling relationship will vary from family to family and there needs to be a nuanced approach which addresses the extent of family life in that relationship, the home circumstances, how far the interests of the parents, the sibling and the child coincide and the possibility that the child, the parents and other siblings may have art.8 rights which are in conflict with those of the sibling. There needs, in short, to be a bespoke enquiry about the child's relationship with his or her siblings when the children's hearing is addressing the possibility of making a CSO". (paragraph 52).

Those statements clearly apply also to a sheriff considering whether to make or extend an ICSO.

[29] In paragraph 53 of the UK Supreme Court judgment, the need for relevant public authorities and others involved in the process to be aware of sibling's interests was emphasised, together with a requirement:

> "… that the siblings and family members are informed of the nature of the proceedings concerning the child and of their rights in relation to the proceedings."

[30] There are four matters raised by the petitioner that relate to the issue of the level of participation he states he should have in the various ICSO applications. First, there is the issue of intimation of the application, secondly the opportunity to address the decision

maker, thirdly access to relevant documents and finally intimation of the outcome and reasons therefor. I will address each of these in turn.

[31] So far as intimation of the applications to extend the ICSOs is concerned, with the exception of the July hearing, it is not disputed that the petitioner was told about these by the respondent, the challenge is to the mode of intimation. In essence the reporter chose to intimate informally to the petitioner through his agents rather than to include him in the relevant Form (65D) as someone suggested to the sheriff as requiring intimation. While the petitioner was self-evidently someone who would have an interest in that part of the application that sought to prohibit contact, it does not follow that the decision of the reporter not to include him in the Form 65D, which was concerned primarily with the need for intervention to safeguard the welfare of each of the four children, was unlawful. It would have been legitimate and reasonable to include the petitioner as someone to whom the sheriff should intimate, but that was not the only reasonable course. The reporter was aware that the petitioner had instructed solicitors and that he had an application pending before the court seeking to be involved in the grounds for referral proceedings as a relevant person. His application for that had been lodged with the court in February 2020 (see No 6/2 of process). He had notice (albeit not directly from the reporter) that the 2 July hearing was to take place and so asked to make submissions. For the three subsequent hearings the petitioner received intimation directly from the reporter and on one occasion (prior to the November 2020 hearing) it was agreed those representing him could argue before the sheriff that he should receive formal intimation. It is clear, then, that none of the four decisions complained about were made without the petitioner having knowledge that a hearing was taking place. In any event, it is for the sheriff to decide whether there are persons other than

those suggested by the reporter to whom formal intimation should be given (Rule 3.64A). As the petitioner was clearly named in the applications as a sibling of the subject children and as someone that the reporter considered should have no contact with them, the sheriff had an opportunity to consider the matter and could have determined that he should receive formal intimation. The reporter is not the ultimate decision maker on the issue of intimation, albeit that there are clear duties imposed on that office to consider in each case whether or not anyone who is not a relevant person should receive formal intimation of hearings. It is apparent from the reporter's email to the petitioner's agents dated 14 August 2020 (no 7/9 of process) that the sheriff had considered the matter of formal intimation raised by the petitioner and decided that this was unnecessary, correspondence from the reporter being deemed sufficient notice. In October 2020, the issue of principle on formal notification or not was put before the sheriff for a decision and this court has the sheriff's reasoned decision on that matter (No 6/20 of process). What the UK Supreme Court has mandated is that issues of this type should be considered in every case, not that any particular outcome is inevitable. The sheriff's decision and stated reasons for refusing the application for formal intimation are within the ambit of reasonable decision making. It does not matter whether this court would have reached a different decision on the same facts. In any event, I have concluded that the issue of intimation in this case is one of form rather than substance for the reasons given.

[32] The issue of the form of intimation on the petitioner and the second matter of whether he had the opportunity to address the decision maker are to some extent inter-related, as the purpose of intimation is to avoid anyone who ought to have some involvement or participation being precluded from doing so. It is not disputed that on three

of the four occasions under challenge the petitioner tendered a submission on the contentious issue of whether he should have contact with the four children (or any of them) pending a decision on the grounds for referral. He made such submissions in July, August and November, but not in September. Before that hearing there had been an unfortunate typing error in the reporter's email advising of the date. There is an issue about that and about what occurred in November, when the sheriff appears not to have known of or read the petitioner's submission.

[33] Dealing first with the absence of representations in September, this was conceded to be a "muddle" and Mr Moynihan accepted that the reporter's office had erred in giving a date of 15 August 2020 rather than 15 September 2020 in an email to the petitioner's agents. While it is of course important for a public authority to give accurate information in all dealings with those such as the petitioner's representatives, the documentation on the matter puts the single error made into context. The petitioner's representatives had been involved in a hearing before the sheriff on 1 September 2020 when they succeeded in an application to represent MB in the grounds for referral proof at a future date. It was acknowledged in the relevant interlocutor (No 6/12 of process) that applications to participate in the separate ICSO hearings could not be made in the referral proceedings. Then on 7 September 2020 the reporter's office intimated the date of 15 September for the next ICSO hearing to the petitioner's representatives and invited them to tender submissions for passing on, as they had done before. The correct date for the hearing is given in the first and second paragraphs of the email, No 6/13 of process, but the typing error indicating that submissions should be sent by 15 August appears in paragraph 4. As that date had passed, it seems to me that anyone reading the whole email carefully would be likely to spot the

inconsistency and seek clarification. The petitioner's agents wrote to the reporter by email on 8 September about the issue of intimation (No 6/14 of process), but it appears that the two emails crossed and that the petitioner's agents probably hadn't seen the 7 September message from the reporter before sending their message. That was certainly the reporter's assumption when that office wrote again to the petitioner's agents on 11 September 2020 (No 6/15 of process) explaining certain aspects of the formal intimation that had taken place and confirming that any relevant parts of the reporter's submission to the court would be provided. Unfortunately, because the reporter's office appeared to be unaware of the typing error in the 7 September email, neither that nor the correct date is referred to in this last email. No steps were taken by the petitioner's agents to raise any dubiety about the last date for representations to be made. Against that background, particularly given the petitioner's representatives' ongoing active involvement in two separate processes before the court, it would be overstating the matter to conclude that the petitioner was deprived of an opportunity to make representations for the September hearing such that his Article 8 rights were breached. The clear anticipation had been that there would be an ICSO application in September and the reporter' correspondence of 7 and 11 September gave clear enough notice to the petitioner that he was again invited to make representations on the issue of contact.

[34] The November decision is different in this respect. While the petitioner had been given an opportunity to argue before the sheriff for the right to formal intimation and had received an adverse decision, it was agreed by all that he should be given the opportunity to make relevant submissions on the issue of contact. His agents duly tendered a submission to the reporter for onward transmission. That submission (No 6/18) of process included relevant material such as information about supervised contact having recommenced

between MB and his brother and also advanced the suggestion of eliciting the referred children's views on contact. However, in his note (No 6/20) the sheriff states:

> "When the four applications called for determination on 4th November as chance would have it these called before me. There were no submissions from [MB] or his representatives reported to me by the Reporter."

The first respondent later sought to clarify this with the sheriff clerk who states that all of the relevant material was placed before the sheriff. However, the sheriff's clear statement is that there were no such submissions. What is clear is that the decision maker did not consider any such submission and so in November, the scheme designed to allow MB the opportunity to make representations failed. If someone with a relevant interest makes representations to a decision maker who, for whatever reason, does not consider them, there is a deprivation of the right to participate, in this case amounting to a breach of the procedural requirements of Article 8. While I accept Mr Moynihan's submission that there was nothing to prevent the petitioner's legal team sending representations direct to the court, they can hardly be criticised for adopting the very practice suggested by the reporter of tendering the submissions through that office. Having done so, the petitioner had a reasonable expectation that those submissions would be considered by the sheriff. There was nothing more the petitioner could or should have done. However it came about that the sheriff did not have or did not read those submissions, I conclude that the bespoke procedure that had evolved failed to provide the petitioner with adequate participation on that single occasion. The court failed to ensure that his interests were taken into account.

[35] I turn then to the third complaint, access to relevant documentation. This was presented largely as an inequality of arms challenge and with particular reference to the case of *McMichael* v *United Kingdom 1995 20 EHRR 205*, where the court found that denying

parents access to certain confidential documents and reports in the children's hearing context had breached what we now regard as the procedural aspects of Article 8. I have already acknowledged the distinction, recognised by the UK Supreme Court, between the parent/child relationship and the sibling/sibling relationship. There is no direct read across from *McMichael* to the petitioner's case. Mrs Scott also contended that a party in adversarial proceedings could not be expected to rely on a summary provided by an opponent. That ignores two related points. First, applications for ICSOs, like the children's hearings proceedings, are *sui generis* and so not quite analogous with traditional private law disputes. That is relevant when dealing with those who may have an interest but are not parties to the proceedings in the traditional sense. The second and more fundamental point is that, while all those with an interest must be afforded a meaningful opportunity to participate, there is no assumption that such participation must include access to all documentation by a person whose legitimate interest in the proceedings is limited to a single issue such as contact. The need to tailor the procedure to the facts of the case, as clarified in *ABC,* precludes any such blanket requirement. There is scope within the applicable rules for those such as the petitioner to be provided with any documentation that would be necessary for him to advance his argument. The sheriff could order that. As it happens the facts of this case as outlined to me support the view that the petitioner was able to make sufficient representations on the issue of contact with his siblings having been provided with an outline of the matters on which the reporter was relying. For example, the detailed submission made on his behalf in August 2020 (No 6/10 of process) illustrates that he was well able to articulate his position on contact to the sheriff.

[36] The final point, that of whether the petitioner should receive formal intimation of the outcome of each ICSO decision, can be addressed quite briefly. In essence, for the reasons given in relation to formal intimation of the application itself, it is not a breach of the petitioner's Article 8 rights to be given informal rather than formal intimation of that. It is consistent with the more limited role he has in the proceedings and with the procedure adopted by the reporter in this particular case to keep him informed. The reporter's email to the petitioner's representatives following the November hearing (No 7/17 of process) is the most recent example of this. The petitioner is informed of the sheriff's decision and a note attached to the interlocutor is reproduced. Through that the petitioner is advised of what next steps have been ordered in relation to eliciting the views of two of the petitioner's siblings on contact with him. Details of the date on which a further extension of the ICSO will be sought are given. Formal intimation of the decision would not have provided the petitioner with any greater opportunity to participate than such informal intimation has afforded him.

[37] I have addressed each of the complaints made by the petitioner about the procedure adopted rather than taking each ICSO decision in turn but my conclusions would not have differed had I adopted the approach of looking at each application rather than each issue raised. The situation is of course an evolving one and the overall decision I must make is whether there have been any occasions in which the decision making process in this case was incompatible with the petitioner's right to respect for family life under Article 8 ECHR and so unlawful. The one matter that I have identified as unfair is the apparent failure to take any account of representations made on behalf of the petitioner for the November 2020 hearing. There is no suggestion that the reporter's office failed to comply with the

agreement that the petitioner's representations would be passed to the sheriff, but the sheriff states in terms that he did not have sight of any such submissions and so the petitioner was deprived of an opportunity to participate meaningfully in the process on that occasion. The question then arises as to what should be done about that single instance of unfair procedure. The context matters because the situation is a fluid one, with regular hearings on whether the ICOSs should be extended and recurring opportunities for the petitioner to make representations on the issue of contact with his siblings. I proceed on the basis that the petitioner will continue to be informed of each hearing, that he will be advised of the tenor of the reporter's position on contact and whether it has changed, that he will have an opportunity to submit representations to the sheriff either directly or with the assistance of the reporter's office and that he will be informed of the outcome of each hearing. The sheriff is aware of the need to take account of the views of the older children who are able to express a position on contact and the petitioner will be advised of those views.

[38] It is important that all aspects of the system adopted in this particular case for the petitioner's participation are adhered to in future. In light of the decision I have made about the November hearing, I consider it appropriate to grant declarator in respect of that single decision which was incompatible with the petitioner's Article 8 rights and so unlawful. In all other respects the system devised and implemented by the reporter to cater for the petitioner's limited participation in the proceedings was, in the circumstances, adequate. I have considered the question of damages but conclude than no order for those should be made. While having regard to the whole background, the petitioner's submission ought to have been considered before any decision prohibiting contact could properly be made in November 2020, the sheriff's decision was necessarily of an interim or temporary nature and

he anticipated a revisiting of the issue as soon as the safeguarder had undertaken the task of eliciting the children's views. I am cautious about making any assumptions as to what would have occurred if the sheriff had considered the petitioner's submissions, but an approach that would have deferred any substantive decision on contact until the children's views were known would certainly have been reasonable. As it happens the sheriff chose to request that the referred children's views be sought even without reading the petitioner's submission to that effect. It seems, then, that the unfairness of the procedure on 4 November did not have the effect of depriving the petitioner of contact, in contrast to the decisions such as *Akin* v *Turkey* relied on by Mrs Scott. I conclude that a bare declarator will suffice to mark the deficiency in the sheriff court procedure on that single occasion.

[39] It would be inappropriate, in my view, to attempt to set out guidance for future cases. By definition a bespoke approach requires fact sensitive solutions that are not capable of being standardised. For example, a different decision on formal intimation might well be considered appropriate in another sibling case and in cases with a complex care history it may be that a sibling seeking to express a view might properly be provided with redacted reports. Much depends on the context, but what is required in every case is a well-considered scheme that gives all those with an interest an opportunity to participate in a manner proportionate to their level of relevant interest in the particular case and bearing in mind that the central consideration must always be for the children who are the subject of the proceedings. In the proceedings involving T, LM, M and HR, the reporter has instigated a procedural solution that balances these various factors effectively enough. It is unfortunate that on one occasion the execution of that reasonable mechanism failed.

[40] For the reasons given above, I will grant only declarator in the terms outlined and refuse all of the other orders sought. The parties were agreed that no order for expenses should be made in this case regardless of outcome and I will award no expenses due to or by either party. I am grateful to all involved for the careful way in which both the written and oral arguments were presented, which was of considerable assistance.