



11 July 2012

PRESS SUMMARY

ANS and another (Respondents) v ML (AP) (Appellant) (Scotland) [2012] UKSC 30
On appeal from: [2011] CSIH 38

JUSTICES: Lord Hope, Deputy President; Lady Hale; Lord Wilson; Lord Reed; Lord Carnwath

BACKGROUND TO THE APPEAL

The issue in the appeal is whether section 31(3)(d) of the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”) is incompatible with the Convention right set out in article 8 of the European Convention on Human Rights 1950 (“the Convention”), with the consequence that it is outside the legislative competence of the Scottish Parliament as defined in the Scotland Act 1998 and is not law.

The appellant is the mother of a child who is the subject of adoption proceedings. She is opposed to the proposed adoption and has refused to give her consent. The first respondents are the prospective adoptive parents.

Section 31 of the 2007 Act is concerned with parental consent to adoption. Subsection (3) sets out the grounds on which the parent’s or guardian’s consent to the making of the adoption order may be dispensed with. In this case, one of the grounds relied on is that set out in section 31(3)(d). This provision applies only where neither section 31(4) nor section 31(5) apply: that is to say, where the court does not consider that the parent is unable satisfactorily to discharge her parental responsibilities or exercise her parental rights and is likely to continue to be unable to do so, or where the parent is not someone who is subject to an order removing parental responsibilities and rights and is unlikely to have such responsibilities or rights restored in the future. An adoption order may be made in these circumstances “where [...] the welfare of the child otherwise requires the consent to be dispensed with.”

JUDGMENT

The Supreme Court dismisses the appeal. The lead judgment is given by Lord Reed, with whom the other justices agree. Lord Hope and Lord Carnwath add brief concurring judgments.

REASONS FOR THE JUDGMENT

The Supreme Court first considers the correct approach to interpretation where Convention rights apply. It notes that the special interpretive duty imposed by section 3 of the Human Rights Act 1998 arises only where the legislation, if read and given effect according to ordinary principles, would result in a breach of the Convention. If the ordinary meaning of the legislation is incompatible with the Convention, it is then necessary to consider whether the incompatibility can be cured by interpreting the legislation in the manner required by section 3. If the legislation cannot be construed in a manner which is compatible with the Convention, then it will not be within the competence of the Scottish Parliament [15-17].

In interpreting section 31 of the 2007 Act, the Court notes that it is premised on the need for parents to consent to the making of an adoption order. Section 31(2)(b) however confers a power, exercisable only by a court, to dispense with the consent of a parent on the grounds specified in section 31(3).

Secondly, the Court observes that those grounds are specified in greater detail than in section 52 of the Adoption and Children Act 2002, on which section 31 of the 2007 Act was based [24-29].

Turning to the precise wording of section 31(3)(d), the word “welfare” has to be read in the context of section 14(3), which requires the court to have regard to the need to safeguard and promote the welfare of the child throughout the child’s life as the paramount consideration. The Court also considers that the court must have regard to the specific matters listed in section 14(4), so far as is reasonably practicable. Furthermore, section 31(3)(d) empowers the court to dispense with the parent’s consent only if it is satisfied that the welfare of the child “requires” it. The word “requires” must mean, as a matter of ordinary English, that it is necessary [30-32].

That ordinary meaning is appropriate for several reasons. First, the court will not lightly authorise the making of an adoption order against the wishes of a parent. Secondly, the 2007 Act was intended to operate in the context of the Convention rights, and the duty of courts, under section 6 of the Human Rights Act, not to act in a way which is incompatible with those rights. It must therefore have been intended that section 31(3)(d) would be construed and given effect by the courts in a manner which complied with the Convention. Thirdly, the 2007 Act is also to be construed in accordance with the presumption that it is not intended to place the United Kingdom in breach of its international obligations. The relevant international obligations include those arising under the Convention [33-37].

The Court next considers whether, construed on the basis of ordinary principles of statutory interpretation, section 31(3)(d) of the 2007 Act is incompatible with article 8 of the Convention. Having examined the relevant case law, the Court concludes that if the provision is applied as it considers it should be, then decisions made under it are compatible. Such decisions have a legitimate aim, namely to protect the welfare of children. Moreover, they meet the requirements of necessity and proportionality [38-43].

The Court rejects the contention that an order made under section 31(3)(d) is not “in accordance with the law”, within the meaning of article 8(2), because the provision is so imprecisely expressed that it lacks legal certainty. Interpreted in the light of its statutory context, it is plain that “requires” imports a test of necessity. Although section 31(3)(d) leaves much to the judgment of the sheriff, that reflects the nature of the subject-matter of the provision. It is impossible to spell out exhaustively the particular circumstances in which an order dispensing with parental consent may be necessary. The application of the provision is foreseeable, provided the court interprets the provision correctly and bases its decision upon a reasonable assessment of the facts [45-49].

The Court regrets the delay in these proceedings, and makes suggestions as to how such delays might be minimised in future. [51-64].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html