

Welfare and the New Grounds for Dispensing with Parental Consent to Adoption

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Introduction

The Adoption and Children (Scotland) Act 2007 received Royal Assent on 15th January 2007 and is expected to be brought into force in early 2009. By and large a modernising and tidying statute, it completely replaces the existing Adoption (Scotland) Act 1978 without making structural changes to the adoption process, other than the abolition of both Freeing Orders and Parental Responsibilities Orders, and the creation of a new sub-adoption order, the Permanence Order. Many existing rules are, however, reframed in rather different language and, sometimes, have been changed. This is the case with the grounds for dispensing with parental consent to the adoption order, which is the issue that this article will explore in some detail. In particular we will examine the new ground for dispensation, that the child's welfare requires it. It will be suggested that this new ground will have to be interpreted narrowly in order to avoid the risk of it being incompatible with the European Convention on Human Rights.

The Basic Rule of Consent

The basic rule of consent, found in s 31 of the 2007 Act, will remain the same as that currently found in s 16 of the 1978 Act: no adoption order may be made over a child unless the court is satisfied *either* that each parent and guardian of the child has agreed to the adoption *or* that his or her consent should be dispensed with on one or more of the specified grounds. Parental consent or dispensation thereof is therefore one of the conditions-precedent that must normally be satisfied before the making of

an adoption order would be competent. The requirement for consent is, however, worded rather differently in the two provisions. Section 16(1)(b)(i) of the 1978 Act requires that the parent or guardian “freely and with full understanding of what is involved agrees unconditionally to the making of an adoption order”; s 31 of the 2007 Act requires that the parent or guardian “understands what the effect of an adoption order would be and consents to the making of the order”. Most noticeably, the reference to agreeing “freely” has been dropped. The word is likely to have been unnecessary since forced agreement would not be valid agreement as, for example, forced consent to marriage was not valid even before the Family Law (Scotland) Act 2006 put that rule on a statutory basis. A more significant difference in the wording between the two adoption statutes is that agreement under the 1978 Act is stated to be agreement to the making of “an” order, while consent under the 2007 Act is consent to the making of “the” order. The use of the indefinite article in the 1978 Act suggests that the consent that is currently required is consent to the mere idea of the child being adopted, but the use of the definite article in the 2007 Act will require that the parents or guardians consent to the actual adoption that is being proposed. This implies that they must have some knowledge at least of the characteristics of the prospective adopters though, perhaps, not necessarily their identity. This change in terminology, good in itself, explains the other difference in wording: the dropping of the requirement presently in the 1978 Act that agreement be given “unconditionally”. Such a requirement is understandable and necessary while it is a hypothetical possibility that is being agreed to (so parents are prevented from saying, “I agree in principle to my child being adopted, so long as he is brought up in a particular religion, or is adopted by a white married couple”) but is supererogatory when the actual adoption by the prospective adopter or adopters is what has to be consented to by the parents and guardians. Any further attempt to impose a condition (such as, for example, “I consent to Mr and Mrs Smith adopting my child so long as they agree to let me have contact with her”) ought to be regarded not as consent but as a negotiating stance. In reality the parent is saying not “I consent if ...” but “I refuse consent unless ...”. A conditional refusal is still a refusal.

Grounds for Dispensation Based on Impossibility of Obtaining Parental Consent

Under s 16(2) of the 1978 Act, parental agreement may be dispensed with where the parent or guardian “is not known, cannot be found or is incapable of giving agreement”; under s 31(3)(a) and (b) of the 2007 Act parental agreement can be dispensed with where the parent or guardian is dead, cannot be found or is incapable of giving agreement. The new Act has dropped the reference to the parent or guardian being “not known”, but it now includes that the parent or guardian is dead. If a parent is unknown dispensation will still be possible on the ground that the parent “cannot be found”: the reason why the parent cannot be found may well be that his or her identity is unknown. The addition of a ground that the parent is dead might be seen as being included for the avoidance of doubt, but in truth there is no doubt because though a parent who is dead might (on a rather tendentious view) be regarded as remaining a parent, he or she is not a parent who has - as opposed to had - parental responsibilities and parental rights, and so is not a “parent” as defined in s 31(15).

Unreasonable Refusal of Consent

The most important ground for dispensing with parental agreement under the 1978 Act is that the agreement is being withheld unreasonably (s 16(2)(b)). This is the most fluid and (doubtless for that reason) the most commonly used ground in the current law and it has generated an extensive jurisprudence including, importantly, the development of the two-stage test for a court determining whether to dispense with parental agreement (see in particular *Lothian Regional Council v. A* 1992 SLT 858). This test requires that the court first consider whether or not a ground for dispensation exists and secondly, and separately, whether parental agreement should indeed be dispensed with. The finding of a ground for dispensation does not oblige the court to dispense with parental agreement. The unreasonable refusal ground has not been repeated in the 2007 Act, but the two-stage test applies to all the grounds and it cannot be regarded as having been abolished.

Ground Based on Non-fulfilment of Parental Responsibilities

Section 16(2)(c) and (d) of the 1978 Act provide that if a parent or guardian has either persistently failed to fulfil parental responsibilities or seriously ill-treated the child, then their consent to the child's adoption may be dispensed with. The parent or guardian, it may fairly be said, forfeits the right to a say in the child's future in such circumstances. The tone of parental fault implicit in these existing grounds is entirely absent from the successor grounds in the 2007 Act, where the focus is on parental inability rather than parental failure. Section 31(4) will allow the court to dispense with parental consent when the parent or guardian is unable satisfactorily to discharge the appropriate parental responsibilities and parental rights, and is likely to continue to be so unable. There is no blame here, but simply a finding of fact.

An entirely new ground for dispensation is found in s 31(5), being that the parent or guardian has no parental responsibilities or parental rights because they have been removed by the making of a permanence order, and it is unlikely that such responsibilities and rights will be restored to the parent or guardian. A permanence order that maintains, confers or regulates the parent's or guardian's responsibility of contact (as an ancillary provision to the order under s 82) will not be sufficient to activate this ground for dispensation, for it applies only where all parental responsibilities and rights have been removed by the order.

The New Welfare-Based Ground

Section 52 of the English Adoption and Children Act 2002, which came into force at the end of 2005, provides only two grounds for dispensing with parental consent: (i) that the parent or guardian cannot be found or is incapable of giving consent, and (ii) that the welfare of the child requires the consent to be dispensed with. The Scottish provisions do not follow this deceptively simple language, but s 31(3)(d) of the 2007 Act does introduce "the welfare of the child" as a ground for dispensing with parental consent when neither of the grounds in s 31(4) or (5) applies. At first reading, this would seem to suggest that when parents *are* able satisfactorily to fulfil their parental

responsibilities and rights, and their responsibilities and rights have *not* been removed by a permanence order, then their consent may still nevertheless be dispensed with because it is in the welfare of the child that this happens. The applicant for dispensation will therefore have a much easier task than under the 1978 Act because under that statute the applicant must show either parental failure to fulfil responsibilities or parental unreasonableness. Under the 2007 Act, on the other hand, the applicant who is unable to establish parental inability to fulfil responsibilities might nevertheless rely on welfare as justifying dispensation. This is a substantial change in the law, for the mere fact that adoption would be in the child's welfare has never until now been regarded as sufficient to justify dispensation (*AB v. C* 1977 SC 27, per Lord President Emslie at 31; *AH & PH, Petrs* 1997 Fam LR 84, per Lord Marnoch at para 16.04; *Central Regional Council v. M* 1991 SCLR 300, per Lord McCluskey at 302).

This shift from parents' rights to children's welfare is highly problematic, for it is to be remembered that welfare is the test to be applied in determining whether, once a ground for dispensation has been established, parental consent should in fact be dispensed with (the second limb in the two-stage test set out in *Lothian Regional Council*), as well as the test for whether an adoption order is to be made at all. Section 14(3) of the 2007 Act requires the court "to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration". Once welfare becomes also the ground for dispensation itself, an adoption order may only be made if the court finds that (i) the welfare of the child requires parental consent to be dispensed with (i.e. that the ground in s 31(3)(d) exists), (ii) the welfare of the child requires parental consent to be dispensed with (i.e. that dispensation is justified under s 14(3)), and (iii) the welfare of the child requires him or her to be adopted (again, s 14(3)).

The problem is that, by asking the same question at stages (i) and (ii), two logically separate questions are conflated into one. Worse, stages (ii) and (iii) are also conflated with the result that dispensation itself becomes entirely meaningless. For it is impossible to envisage a circumstance in which welfare would require the door to adoption be opened but at the same time require that adoption itself be refused. And if dispensation of consent becomes meaningless then so too does consent itself.

The whole adoption process would then be determined by the single consideration of the welfare of the child. Some may argue that this is as it should be, but this argument needs to be resisted, for the unfashionable reason that *parents have rights too*. A parent who is perfectly able satisfactorily to fulfil parental responsibilities and exercise parental rights and who refuses to consent to adoption on reasonable and rational grounds has at the moment the legal power under the 1978 Act to prevent the adoption going ahead. If welfare is the sole test under the 2007 Act then that Act takes away this right of the competent and reasonable and satisfactory parent, and as such renders the right to refuse a meaningless process, devoid of any effect.

It is difficult to see how it could be compatible with art 8 of the European Convention on Human Rights for adoption to be permitted against the wishes of a competent and reasonable and satisfactory parent with whom the child has enjoyed family life. Adoption, a process that necessarily breaks existing family ties, is always an interference with the right to family life, protected by art 8(1) of the Convention, and as such always needs to be justified as being necessary in a democratic society in terms of art 8(2). In other words, adoption is Convention-compliant only when it is a proportionate means of achieving a legitimate aim. Now, child welfare is always a legitimate aim, but the complete destruction of the existing parent-child relationship in order to create a new one is not always a proportionate means of achieving that aim. The UN Convention on the Rights of the Child needs also to be remembered. Article 7 of the UNCRC protects the child's right to be cared for by his or her parents; art 8 provides that a child has a right to respect for his or her identity, including nationality, name and family relations; and art 9 gives the child the right not to be separated from his or her birth parents. These various provisions do not prohibit adoption, for none is absolute, but they do mean, as art 8(2) of the ECHR does, that sound and substantial reasons are needed before it is legitimate to take away these rights, to change that identity and to disrupt these relationships. "Sound and substantial" means something beyond the simple fact that the child's welfare is served thereby, for the following reason.

The welfare test is seldom one that pits good against evil, but is rather designed to identify the best alternative out of sometimes many more or less acceptable choices. It is a test that is ideal for balancing different options none of which is actually

harmful, because it is the only standard that puts the child's interests and wellbeing before those of any of the disputants. But the justification for state interference in family life is risk of harm and not balance of options, especially when the interference takes as radical a form as adoption. Identifying where the child's welfare lies is not the same as identifying a harm that the state may legitimately seek to avoid. It is simply the identification of the best outcome, and the failure to ensure the best outcome is not the same as a risk of harm. It follows that the state has no right to effect a permanent removal of a child from his or her family environment merely because the best outcome cannot otherwise be provided. For the choices may be between an acceptable outcome and a good outcome, or between a good outcome and a better outcome. But an acceptable outcome is not "harm" just because a good outcome is possible, and a good outcome is not "harm" just because a better outcome is possible. It is a fundamental misapprehension of the welfare test to see it as identifying the *only* acceptable outcome for any child. In adoption proceedings the court has a dual task: to protect the child from danger and to determine between different alternatives for the child's future. These two tasks should never be confused, as they would be if the questions of dispensing with parental consent and adoption itself were conflated into one question: would the welfare of the child be advanced by being adopted?

The European Court of Human Rights has made plain that a mere application of the welfare test - the identification of the best alternative - is an insufficient justification on its own for the implementation of compulsory measures of state intervention. In *Olsson v. Sweden* (1988) 11 EHRR 259 at para 72 the Court said: "It is not enough that the child would be better off if placed in care". In *KA v. Finland* 14 January 2003 at para 92 and *Haase v. Germany* 8th April 2004 at para 95 the Court said "The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the 'necessity' for such an interference with the parents' right under art 8 to enjoy a family life with their child". And in *Buchberger v. Austria* 20th December 2001 the Court at para 40 made plain that the Convention requires "that a fair balance must be struck between the interests of the child and those of the parent". The parent's right to

family life “may” be overridden by the best interests of the child, but this is not inevitable - a point obscured by but not fundamentally inconsistent with domestic law’s focus on the “paramountcy” of the child’s welfare - and will be Convention-compliant only when such overriding is a proportionate response to the risk faced by the child. Removing a child from satisfactory carers is not a proportionate response to the fact that these carers are not the best possible carers. Parents are not obliged by any domestic legal system or by the European Convention to provide the best alternative for their child, but merely one that is not positively harmful. Now, the making of an adoption order has always, in Scotland, been possible on the mere application of the welfare test, but this is acceptable only if some other condition-precedent addressing risk at an earlier stage and thereby providing a proportionality justification to adoption is satisfied. That role is presently served by the process for dispensing with parental consent, which until now has required more than welfare: it has required parental absence, or parental unreasonableness, or parental failure. To allow that process to be determined by the same welfare test as is applied to the making of the adoption order itself is to remove the necessary protection of the parent’s right to family life and as such is contrary to the jurisprudence of the European Court referred to above.

Compatibility Solution 1: Interpretation of “Applies”

If the above argument is correct, the Scottish court will be obliged to seek an interpretation of the dispensation of consent provisions in s 31 that ensures that the right to refuse consent is effective, that is to say is capable of being used by competent and reasonable and satisfactory parents to prevent an adoption going ahead notwithstanding that it is in the welfare of their child (in no higher sense than being a better outcome than they themselves could offer their child). I should like to suggest two alternative interpretations of s 31 that might achieve this.

The first means of achieving Convention compatibility is to limit the scope for applying the welfare ground in s 31(3)(d) to circumstances in which the parents are unsatisfactory in some way. Section 31(3)(d) is stated to apply only when “neither [subss 31(4) nor (5)] applies”. The section then explicitly states that subs (4)

“applies” if three apparently cumulative conditions exist, and the obvious interpretation of this is that it does *not* apply when any one of these conditions cannot be established. But if we are trying to avoid welfare becoming a competent ground when parents are satisfactory, this may be achieved by regarding the first condition (that the parent has parental responsibilities and rights beyond that of merely contact with the child) as the sole competency test for the application of subs (4), and regarding the other two conditions (that the parent is unable satisfactorily to discharge parental responsibilities, and that the parent is likely to continue to be so unable) as the factual basis upon which dispensation under subs (4) is justified. This interpretation would allow the welfare ground for dispensation to be used when the parent has, in non-satisfaction of the first condition, no more than the parental responsibility and right of contact; but, crucially, would prevent it from being used when the parent has full parental responsibilities and, in non-satisfaction of the second condition, *is* satisfactorily able to discharge them. The non-satisfaction of the second (or third) condition in subs (4) should not, in other words, be held to disapply subs (4): it should simply mean that the ground for dispensation contained therein has not been established to exist.

Similarly, subs (5) is stated to apply if two conditions exist: (i) that there is a permanence order removing all parental responsibilities and rights and (ii) that it is unlikely that the parent will reacquire parental responsibilities and rights. The obvious interpretation - that the subsection will not apply (and the welfare ground therefore activated) when either condition is not satisfied - would allow the welfare ground to be applied in circumstances in which a parent who has admittedly lost parental responsibilities is likely to recover them. But excluding a parent who is likely in the future to be able to give the child an acceptable family life would be inconsistent with the European Court’s repeatedly-expressed view that family reunion should, whenever possible, be the ultimate aim of all child care processes (see *Johansen v. Norway* (1997) 23 EHRR 33 at para 78, *K & T v. Finland* (2001) 31 EHRR 484 at para 156, *R v. Finland* May 30, 2006 at para 89). This can be avoided, as with subs (4), by regarding only the first condition as the competency test for the applicability (or non-applicability) of subs (5) and the second condition as the basis upon which dispensation under that subsection is justified. The result

would be that it is only when the first condition is not satisfied that subs (5) will “not apply” and the welfare ground in s 31(3)(d) activated. If only the second condition is not satisfied, then subs (5) “applies” but is not established: since it “applies”, s 31(3)(d) cannot.

Putting both restricted interpretations together, the result would be that subss (4) and (5) do not apply when the only parental responsibility and parental right held by the parent is that of contact and there is no permanence order over the child: this becomes the sole factual circumstance in which the welfare ground for dispensing with parental consent to adoption may competently be pled. Using welfare to dispense with the consent of a parent in this circumstance is likely to be Convention-compliant, for such a parent will not be intimately involved in the day to day control of the child’s life, and his or her family life with the child might therefore be deemed to be less important than the child’s welfare (see *Söderbäck v. Sweden* (1998) 23 E.H.R.R. 342). It is to be admitted that this result is achieved only with a rather creative, even cumbersome, interpretation of the word “applies” as it appears in subss (3), (4) and (5), and by giving that word slightly different meanings depending upon which subsection it appears in. But none of this changes fundamentally the meaning of the word as it is variously used and as such is within the interpretative power and, it is suggested, duty of the court under s 3 of the Human Rights Act 1998.

Compatibility Solution 2: Interpretation(s) of “Welfare”

A second means of ensuring consistency with the European Convention (and one which, perhaps, does less to further complicate an already complicated section) is to interpret the welfare test in s 31(3)(d) in a different way from the welfare test as it appears in s 14(3) of the 2007 Act. Under s 14(3) the court must regard the need to safeguard and promote the welfare of the child throughout the child’s life as the paramount consideration. This allows the court to make the order that is the best of the options available, *even if the other options are, in themselves, perfectly acceptable*. Now, while s 14(1) states that this is to apply whenever the court is “coming to a decision relating to the adoption of a child” this cannot mean each and

every decision that the court is required to make in an adoption application. An implicit limitation is that welfare is paramount only with discretionary decisions, such as whether to dispense with consent and whether to make an adoption order, but not with decisions of fact (such as who is a parent) or decisions on competency (such as whether joint applicants are a “relevant couple” in terms of s 29(3)). Whether the parent has consented and whether a ground for dispensation exists are both questions of fact and competency, since the adoption order cannot be made without one or the other. If so, then the welfare test as it appears in s 14(3) is not applicable to the question whether the ground for dispensation in s 31(3)(d) has been made out. This allows “welfare” in s 31(3)(d) to take on an independent meaning.

Now, that paragraph (unlike s 14(3)) focuses attention not on one option among many acceptable options but on what the welfare of the child “requires”. In *P, C and S v. United Kingdom* (2002) 35 EHRR 1075 the European Court said this at para 118: “As regards the extreme step of severing all parental links with a child, the Court has taken the view that such measures could only be justified in exceptional circumstances or by the overriding requirement of the child’s best interests”. The use of the word “requires” in s 31(3)(d) echoes the European Court’s language of “overriding requirement”, and so “welfare” in this context might be interpreted to contain “the connotation of an imperative, what is demanded rather than what is merely optional or reasonable or desirable” (per Wall LJ in *SB v. County Council* [2008] EWCA Civ 535 at para 125). In other words, welfare in s 31(3)(d) might be interpreted to “require” dispensation when this is the only or most efficacious means of protecting the child from a positively harmful outcome. In this way again, the competent and reasonable and satisfactory parent who refuses consent will not have that consent dispensed with - not because it would be incompetent to do so but because the welfare test, in this stricter sense, will not have not been satisfied.

True it is that the Court of Appeal in *SB v. County Council* expressly rejected the argument that “welfare” has an enhanced meaning in s 52 of the English 2002 Act (the equivalent to s 31 of the 2007 Act). But that authority is not persuasive in Scotland for a number of reasons. First, the process for dispensing with parental consent in England has always conflated the grounds for dispensation with the

question of whether to dispense. Secondly, and following from this, nowhere does the Court of Appeal distinguish between the decision to dispense and the assessment of whether there is a ground for dispensation. And thirdly, the structure of the 2002 Act requires (the Court of Appeal held) that the general welfare test in s 1 thereof applies to the dispensation issue in s 52 while, as shown above, the structure of the 2007 Act does not. The English approach is to regard dispensation as inevitable once the ground for dispensation is established (see *Re S (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 819 at para 71), but this has never been the case in Scotland (see *FB & AB v. AC*, (July 10, 1998, Outer House) when a ground was held to exist for dispensation but the court did not dispense with consent). The Scottish position requires a two-stage test, with a different test applying to each: since the word “welfare” is used in the 2007 Act for both stages, it follows that the word must have a different meaning in each.

Conclusion

The major change of law in s 31 is to introduce the concept of welfare of the child as a distinct ground for dispensing with parental consent to adoption. But the wording is open to different interpretations, some of which avoid the dangers of incompatibility with the European Convention. The two interpretations suggested above are probably not the only ones that avoid the welfare of the child being the sole determinant of whether or not that child will be adopted. One or other, or some other method of achieving the same end, will need to be adopted by the courts in their interpretation of the new Act if competent and reasonable and satisfactory parents are to preserve their right, guaranteed by the European Convention - and which they should have in any case - of preventing an adoption which, while desirable, is not necessary to protect the child from harm.