Named Persons in the Supreme Court: *The Christian Institute and Others v The Lord Advocate*

Scottish family law cases seldom find their way to the Supreme Court, but this particular challenge[1] to the competence of the Children and Young People (Scotland) Act 2014 (the "2014 Act") seemed destined to make it there from its inception. The decision handed down is significant in two respects. First, in a point that may be of greater political than legal interest, it unambiguously dismisses the argument that the named person scheme in itself amounts to an unjustifiable interference with family life (although a narrower human rights argument was successful). Secondly, in a point that will be of general interest to public law academics and practitioners, it clarifies and develops the court's approach to defining "reserved matters" in the devolution context.

The judicial review petition was raised in the Outer House by seven parties. The first four – the Christian Institute, the Family Education Trust, the Young ME Sufferers (TYMES) Trust and Christian Action Research and Education (CARE) – are charities with a focus on child and family matters. The remaining three are parents of children who will be subject to the provisions of the 2014 Act once in force. Prior to the first appeal being heard in the Inner House, the Community Law Advice Network ("Clan Childlaw") was permitted to intervene in the case in the public interest.

The central question in the case was whether the provisions of Part 4 of the 2014 Act fell beyond the legislative competence of the Scottish Parliament, with the result that they were "not law".[2] Before the Supreme Court, three grounds of argument were put forward: that the provisions related to a matter reserved to Westminster,[3] namely data protection; that they breached the rights of children and parents to respect for private and family life under article 8 of the European Convention on Human Rights; and, that they were in breach of European Union law in relation to data protection. The Court allowed the appeal in relation to the second and third grounds of argument. This note will explain the provisions that gave rise to the appeal before examining the first and second challenges to their legislative competence. The EU law challenge, which focused on breach of the Charter of Fundamental

[1] *The Christian Institute and Others v The Lord Advocate* [2015] CSOH 7 (Outer House); [2015] CSIH 64 (Inner House); [2016] UKSC 61 (Supreme Court).
[2] Scotland Act 1998, section 29.
[3] Ibid, section 30 and Sch 5.

Rights, succeeded on the same basis as the ECHR challenge, and does not require separate examination here.

A. THE NAMED PERSON SERVICE

The 2014 Act resulted from the development of Scottish Government policy on child protection over the previous 12 years. Beginning with the *For Scotland's Children* report in 2001,[4] the government had carried out a number of reviews of practice and consultations with stakeholders, including parents and children as well as professionals working in this area.[5] Over time, the broad policy ambition had developed beyond protecting children from harm to promoting and safeguarding their "wellbeing", as assessed by way of the SHANARRI group of factors (safe, healthy, active, nurtured, achieving, respected, responsible, included).[6] In support of this ambition, it was recognised that early intervention in the lives of troubled children was likely to lead to improved wellbeing outcomes. A model in which state agencies did not engage with the family until after harm had been suffered by the child could not have the same positive impact. It was also noted that, although a range of services (for example, GP practices, hospitals, schools, the police) might be involved in supporting any one child, there was a lack of collaboration between them that could be confusing for the family and lead to some children "falling between the cracks."

The Named Person Service, to be established under Part 4 of the 2014 Act,[7] was intended to tackle these barriers to improved child wellbeing, building on a models successfully piloted in some areas of Scotland.[8] The 2014 Act provides for an identified individual (the "named person") to be made available to each child in Scotland. Their functions will be to provide advice and support to the child and their parents, to help them access relevant public services, and to discuss matters relating to the child with relevant

[4] Scottish Executive, *For Scotland's Children*: *Better Integrated Child's Services* (2001).
[5] See particularly: Scottish Executive, *It's Everyone's Job To Make Sure I'm Alright: Report of the Child Protection Audit and Review* (2002); Scottish Government, *A Guide to Getting It Right For Every Child* (2008); Scottish Government, *A Scotland for Children: A Consultation of the Children and Young People (Scotland) Bill* (2014).
[6] Information on wellbeing and the SHANARRI list is available at http://www.gov.scot/Topics/People/Young-People/gettingitright/wellbeing (accessed February 2016).
[7] 2014 Act, sections 19-32.
[8] Policy Memorandum on the Children and Young People Scotland Bill, para 69.

public services.[9] For the majority of children, the named person will be their attending midwife in the period immediately post-birth, then their local health visitor, moving on to a nursery or pre-school key worker if appropriate and finally the head teacher or a guidance teacher at school once the child reaches that age.[10] Named persons should carry out their statutory functions only where they consider it appropriate to promote, support or safeguard the wellbeing of the child.[11] The Supreme Court summarised the central purpose of the provisions as being:

> To establish new legal powers and duties, and new administrative arrangements, in relation to the sharing of information about children and young people, so as to create a focal point in the form of Named Persons, for the pooling and sharing of such information and the initiation of action to promote their wellbeing.[12]

B. THE HUMAN RIGHTS CHALLENGE

The challenge to the human rights compliance of the named person scheme evolved over the history of the case. In both the Outer and Inner Houses, it was argued that the provisions breached article 9 of the ECHR (right to freedom of thought, conscience and religion) and article 2 of the First Protocol (the right to an education, and the right of parents to have their children educated in accordance with their religious beliefs). Neither of these arguments seems to have taken up much space in the appellants' submissions, and judges in both lower courts dismissed them with little discussion. By the time of the Supreme Court appeal, these arguments had fallen away entirely.

The focus was instead the interaction of the named persons provisions with the article 8 right to respect for private and family life. Where action by the state interferes with this right it can be justified where necessary for one of the reasons listed in paragraph 8(2), which include the protection of health or morals and for the protection of the rights and freedoms of others.

Breach of the article was contended for on broader and narrower grounds. The broad challenge was, in brief, that the allocation of a named person was in itself a violation of the

[9] 2014 Act, section 19.
[10] 2014 Act, section 20. Alternative provision is made for exceptional groups of children, such as those attending fee-paying schools or kept in secure accommodation, in section 21.
[11] 2014 Act, section 19 (5).
[12] *Christian Institute*, (n1, Supreme Court) para 16.

rights of families, since there was no requirement that a family consent to the allocation, or that the allocation had become necessary in light the child being assessed as at risk of harm. The absence of any such threshold conditions to the appointment of the named person was said to result in the 2014 Act containing insufficient safeguards against unwarranted interference by the state in private and family life. In the Inner House, the petitioners stressed that this argument was not about how the exercise of the provisions might affect any individual family in a given case, but were rather a general attack on the "fundamental unconstitutionality of the blanket provision".[13]

The narrower challenge, put forward principally by the intervener, concentrated on the information sharing provisions contained within sections 26 and 27 of the 2014 Act (and discussed in more detail below). Here, the challenge was to the respect for privacy demanded by article 8. It was said that the threshold for the sharing of confidential information by the named person and other services was set at too low a level to protect the child's right to privacy. The intervener stressed its concern that children might ultimately be less willing to come forward with confidential information as a result, which could have a significant, detrimental impact on child protection measures.

The Supreme Court considered the challenge required answers to four questions. First, it found that the interests protected by article 8 relevant to the case were respect for family life, recognising that the state has a role to play in supporting parents to carry out their responsibilities as well as to protect the child from abuse and neglect, and respect for the privacy of children and young people. Secondly, it noted that the provisions of Part 4 of the 2014 Act breached these interests, but only to a limited extent. In particular, it held that the first two functions of the named person, in providing advice and support to families and helping them to access relevant services, "would not normally constitute an interference with the article 8 rights of either the child or her parents".[14] This short paragraph midway through the judgment is of considerable significance: it essentially puts to bed the broad challenge to article 8 insisted in by the appellants. The Supreme Court's finding here aligns with the approach taken in the unanimous opinion of the Inner House bench, who suggested the appellants' argument on this point had the appearance of hyperbole, noting that:

[13] *Christian Institute*, (n1, Inner House) para 50.
[14] *Christian Institute*, (n1, Supreme Court) para 78.

> …creation of a named person…no more confuses or diminishes the legal role, duties and responsibilities of parents in relation to their children than the provision of social services or education generally. It has no effect whatsoever on the legal, moral or social relationships within the family…[I]t does not involve the state taking over functions currently carried out by parents in relation to their children.[15]

Far from representing the totalitarian intervention with family freedoms that the appellants (and some tabloid newspaper commentary) claimed, the named person scheme in broad scope did not contravene article 8 at all.

The information sharing function of the named person role – effectively the narrow ground of challenge put forward by the intervener – was, however, found to breach the child's right to privacy. Further, in addressing its third question, the court found the provisions on when information could be shared, particularly those contained in sections 23 and 26, to be extremely difficult to comprehend, particularly in relation to the "logical puzzle" they formed when read in conjunction with the requirements of the Data Protection Act 1998, section 35(1). Accordingly, these provisions were not in accordance with the law, as required to justify a breach of article 8. This was the first basis on which the human rights challenge was upheld.

Finally, in relation to the proportionality of any breach resulting from the named persons scheme, the court worked through the four now-standard questions. The court was satisfied – not surprisingly, given its earlier findings on the broad challenge – that the legislation pursued legitimate aims, and that the measures imposed were rationally connected to those aims and not, in principle, too intrusive for the achievement of those objectives within the bounds of the state's margin of appreciation. In relation to the non-information-sharing functions of the named person, the court was satisfied that the scheme *could* be operated in a proportionate manner, meaning that a challenge to the legislation as written on this basis had to fail. The court did note, however, that as the provisions came to be exercised in individual cases, there was a risk that parents might mistakenly believe there was an obligation to comply with the advice of the named person, particularly where a Child's Plan – a document setting out targeted interventions in relation to an identified wellbeing need – had been prepared under Part 5 of the 2014 Act. Governmental guidance would have to be very clear that parental compliance was voluntary to reduce this risk resulting in disproportionality in the practice of named persons. In relation to the information sharing role, it noted that the

[15] *Christian Institute*, (n1, Inner House) para 68.

named persons were asked to determine when information should be disclosed based on its connection to the SHANARRI factors, and it was difficult to see the immediate link between these and the justifications for breach of article 8 set out in paragraph 8(2). The fact that this threshold for disclosure was so low, when taken together with the lack of even a qualified obligation to inform children or parents of the risk or the fact of disclosure, meant that the overriding of the child's confidentiality was often likely to result in a disproportionate interference with the child's right to privacy.

On this limited basis, focused on the information sharing role of the named person, the court allowed the challenge under article 8.

C. THE RESERVED MATTERS CHALLENGE

Whilst the Supreme Court agreed with the Second Division that the 2014 Act does *not* encroach upon a reserved matter, this aspect of the judgment deserves close attention for the way in which it develops devolution jurisprudence more generally: first, with regard to the test to be applied in determining where a provision sits in relation to the reserved/devolved boundary; second, with regard to the relevance in Scottish cases of devolution jurisprudence in Wales and Northern Ireland.

The basis of the reserved matters challenge was that the information sharing and disclosure provisions of the 2014 Act "relate to" the reserved matter of Data Protection and therefore are not law. Section B2 of schedule 5 of the Scotland Act 1998 defines this reservation as being the subject matter of the Data Protection Act 1998 and of the Council Directive 95/94/EC. As summarised by the court, the Directive:

> …was designed to harmonise the laws of the member states relating to the protection of individuals' interests in relation to the use of their personal data…[by]…specify[ing] the standards of protection which the laws of the members states must afford, and the methods by which those standards must be secured and enforced.[16]

The DPA, which was designed to implement the Directive:

> …establish[ed] standards of protection of individuals' interests in relation to the use of their personal data, and methods by which those standards are to be secured and enforced… In particular, it imposes obligations on data controllers in relation to the

[16] *Christian Institute*, (n1, Supreme Court) para 39.

> processing of data, and creates rights on the part of data subjects. It also creates a system for the regulation of data controllers by the [Information] Commissioner. It allows scope, however, for derogation from certain of its requirements by legislation which need not be UK-wide in application.[17]

The test as to whether or not an Act of the Scottish Parliament "relates to" a reserved matter is well established in devolution jurisprudence.[18] It requires "more than a loose or consequential connection"[19] and – as per the statutory language – should be determined "having regard (among other things) to its effect in all the circumstances".[20]

In holding that sections 26 and 27 do not "relate to" data protection as defined above the Supreme Court was influenced by two factors. First, that whilst the objective of these provisions is to "ensure that information relating to young people is shared", that objective is consequential upon the Sottish Government's aim to promote the wellbeing of children and young persons. This aim, it was accepted, had hitherto been undermined by the reluctance of agencies to share information until the stage at which a child or young person is at risk of harm.[21] Second, that whilst the 2014 Act adopts thresholds for the disclosure of information without the consent of the 'data subject' that *prima facie* are lower than those set out in the DPA and in the Directive: (1) the powers and duties of disclosure under the 2014 Act do "not permit or require the provision of information in breach of a prohibition or restriction on the disclosure of information arising by virtue of an enactment or rule of law"[22] and therefore are significantly curtailed by the DPA and Directive,[23] and (2) the DPA itself leaves scope for derogation from certain of its requirements by the UK Parliament and – as in this case – by the Scottish Parliament.[24]

The more general significance of the discussion on reserved matters is two-fold. First, the Supreme Court firmly and explicitly rejected the approach taken by the Second Division to determine whether or not the 2014 Act "relates to" a reserved matter. The Second Division had adopted a "pith and substance" test – borrowed from federal systems (notably from Canada) where similar boundary disputes require to be resolved – in which a view is taken of

[17] Ibid, para 44.
[18] *Martin v Most* [2010] UKSC 10; *Imperial Tobacco v Lord Advocate* [2012] UKSC 61.
[19] *Martin,* ibid, para 49 per Lord Walker.
[20] Scotland Act, section 29(3).
[21] *Christian Institute*, (n1, Supreme Court) para 64.
[22] 2014 Act sections 23(7) and 26(11).
[23] *Christian Institute*, (n1, Supreme Court) para 64.
[24] Ibid, para 65.

the statute *as a whole* in order to determine whether the substance of the legislation is within or outwith competence. Having been persuaded that the "pith and substance" of the 2014 Act was a devolved matter – child protection – the Inner House held that there had been no encroachment upon a reserved matter.[25] However, the Supreme Court recalled and reaffirmed dicta by Lord Hope in *Imperial Tobacco*[26] that, whilst "pith and substance" formed part of the background to the test set out in the Scotland Act, that language did not appear in the statute itself and so "should not be confused with" the purpose test that underpins section 29. The difference between the two is most stark where no single predominant purpose can be identified, and where one or more of the relevant purposes can be attributed to a reserved matter.[27] Accordingly, the Supreme Court held that - by applying the wrong test - the Second Division had failed to answer the question whether any of the provisions within the 2014 Act relate to the subject matter of the reservation.

Second, despite not having been cited by counsel during the course of the hearing, the Supreme Court was careful to weave into its judgment a reference to *Welsh* devolution jurisprudence which addressed the method to be employed when identifying the purpose of legislation.[28] Notwithstanding the different models of devolution which have been adopted in each of Scotland, Wales and Northern Ireland the approach by the court suggests that it sees value in – and, where appropriate, will encourage – the read across from one settlement to another. Put differently, for counsel in devolution cases, as well as for those who work within the devolved institutions, assessments of legislative competence may be incomplete absent a nuanced understanding of developments *across* the devolution settlements and the relevant jurisprudence.

D. CONCLUSION

The decision of the Supreme Court in *Christian Institute* is a significant one for a number of reasons. First, and most immediately, it has meant a significant delay to the scheme coming into force. As it stands the Education Secretary, John Swinney, has told Parliament that the Scottish Government intends to implement the scheme by August 2017, one year later than

[25] *Christian Institute*, (n1, Inner House) paras 104-105.
[26] *Imperial Tobacco*, (n18) para 13.
[27] *Christian Institute*, (n1, Supreme Court) para 31.
[28] Ibid, para 30 citing *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43 at para 50 per Lord Walker.

planned. What is more, given the nature and the strength of the opposition that it has faced it seems likely that the proportionality of the scheme *as implemented* might yet be tested in the courts. Second, the Supreme Court has taken the opportunity to develop devolution jurisprudence in two important ways: on the one hand reaffirming the statutory purpose test over and above the "pith and substance" test common to federal jurisdictions and adopted in the Inner House; on the other hand, encouraging and developing a devolution jurisprudence that is of general application across the devolved settlements. Third, the sharpening of the issues by the intervener in the Supreme Court is a reminder of the value that can be added by original and well-made submissions by third party interveners acting in the public interest. Whilst this is a resource that is frequently used to good effect in the Supreme Court[29] the Court of Session has to date been a far less accommodating to assistance of this kind.[30]

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[29] S Shah, T Poole, M Blackwell, "Rights, Interveners and the Law Lords" (2014) 34(2) OJLS 295.
[30] See P Scott and C McCorkindale, "Public interest judicial review in cross border perspective" (2015) 26(3) *KLJ* 412.