Paternity, DNA Testing and the Children's Hearing: A Critical Examination of *JS, Appellant* 2021 SLT (Sh Ct) 116

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Abstract

JS, Appellant *is a decision of the sheriff court in which the issue was whether it was competent for a children's hearing to add a measure into a compulsory supervision order that would require the child to be DNA tested in order to determine whether the appellant was the child's father. The sheriff held that attaching such a measure was indeed competent and, instead of returning the matter to the children's hearing, she varied the compulsory supervision order herself to contain that measure. While the decision has little precedential value it does raise important and more general issues relating to the competency of measures to be included in compulsory supervision orders, the role of "necessity" in hearings' decision-making, the ECHR-compatibility of the Scottish rules for determining paternity and the extent to which sheriffs should themselves make welfare decisions in children's hearings cases. This article will seek to show that the sheriff's approach to most of these issues was misconceived, notwithstanding that she was seeking to remedy an injustice faced by the appellant. It ends with a suggestion of how that injustice ought to have been remedied.*

Introduction

Doubts over paternity have existed for as long as the law has recognised legal consequence to the genetic connection between a man and a child. For much of the history of humankind it was impossible to prove by evidence, directly and with certainty, who was the father of a child, and the law in most legal systems developed a system of presumptions of paternity to avoid, or deal with, disputes. Even in today's world, where DNA testing can establish paternity with a certainty far beyond any reasonable doubt, the law continues to rely on presumptions because it would be

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impractical to insist on such testing to establish paternity for every new-born child. In Scotland, the Law Reform (Parent and Child) (Scotland) Act 1986 sets down two presumptions that are relied upon by the vast majority of fathers: one based on marriage to the mother and one based on registration in the Register of Births.[1] Since 2006 being presumed to be a father under the 1986 Act, on either basis,[2] has carried with it parental responsibilities and parental rights,[3] and since 2013 being a father has brought a man within the definition of "relevant person" for the purposes of the Children's Hearings (Scotland) Act 2011.[4] It is important to notice that "being a father" for the purposes of the children's hearing system does not depend on either of the 1986 presumptions: any man whom the reporter believes is the father of a child will be treated as a parent and, therefore, as a relevant person within that system. That brings to such a man full rights of participation in any children's hearing process involving his child, including the right to deny grounds of referral, to have access to the background papers, to call for reviews and to appeal any substantive decision that the children's hearing makes – even if he holds no parental responsibilities or parental rights. It brings to the reporter much power.

Of course many fathers of children who have been referred to a children's hearing are neither married to the child's mother nor registered as the child's father, probably indeed a higher percentage of all fathers than in the general population. A putative father was at the heart of *JS, Appellant*,[5] an appeal to the sheriff from a decision of the children's hearing. Though he had originally been accepted as the father of the child – and therefore as a relevant person – a dispute had arisen as to whether he was in fact the child's genetic father. The sheriff sought to resolve the paternity dispute by varying the terms of the compulsory supervision order that had previously been made over the child to include a requirement for DNA testing. This approach was, it is the purpose of this article to show, profoundly misconceived.

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[1] Law Reform (Parent and Child) (Scotland) Act 1986, s.5(1)(a) and (b), respectively. For a discussion, see Norrie and Wilkinson *The Law Relating to Parent and Child in Scotland* (3rd edn, 2013) paras 3.09 – 3.20.
[2] At least of a child born after 4th May 2006, that is to say all children under 16 from 4th May 2022.
[3] Children (Scotland) Act 1995, s.3(1)(b), as amended by the Family Law (Scotland) Act 2006, s.23(2)(b).
[4] Children's Hearings (Scotland) Act 2011, s.200(1)(g); Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013, art.3.
[5] 2021 SLT (Sh Ct) 116.

Now, the precise facts of the case are unlikely to be repeated at all often, and the decision itself, being a first instance decision from the sheriff court, has little if any precedential value. However, a critical analysis of the decision is justified because the points at issue and the way the sheriff addressed them do raise matters of far broader significance than the facts themselves.

The Facts

The case started out as a fairly pedestrian child protection process. The reporter to the children's panel referred a four-month old child to the children's hearing under s.69(2) of the Children's Hearings (Scotland) Act 2011, the statement of grounds alleging that the child was likely to suffer unnecessarily, or have her health or development seriously impaired, due to a lack of parental care, and that the child had or was likely to have a close connection with a person who had carried out domestic abuse.[6] At a grounds hearing held in March 2018 both the attending relevant persons – the mother of the child and the putative father (the appellant) – accepted these grounds of referral, but since the child was too young to be capable of understanding any explanation of the grounds, the hearing directed the reporter to make an application to the sheriff to determine whether the grounds were established.[7] When the case called before the sheriff, both the relevant persons again accepted the grounds, allowing the sheriff to determine the application by finding the grounds established without hearing evidence.[8] When the case was returned to the children's hearing, the hearing made a compulsory supervision order in respect of the child, one of the terms of which was that there was to be no contact between the child and the putative father. So far, there was nothing unusual or surprising in either this process or its outcome.

But what happened next left many of the actors in the system unsure how to react. The mother claimed that the putative father was not in fact genetically related to the child in any way, notwithstanding (or perhaps now realising) that her earlier acceptance that he was the child's father had been the basis of his relevant person

[6] The grounds in, respectively, s.67(2)(a) and s.67(2)(f) of the 2011 Act.
[7] 2011 Act, s.94(2)(a).
[8] 2011 Act, s.106.

status. In February 2019, at the first annual review of the compulsory supervision order (at which the putative father continued to be treated as a relevant person) he sought contact with the child, but the children's hearing took the view that re-establishing contact could not be considered until the paternity issue was resolved.

Yet, having herself created the doubts over the man's paternity, the mother now refused to assist in resolving these doubts: she refused to consent to the DNA testing of her child. The reporter then threatened to stop treating the putative father as a relevant person, which would remove his right to participate directly at any subsequent hearing, as well as his right to call for a review. The putative father did indeed call for a review and the reporter, seemingly still at this point treating him as a relevant person, responded by arranging another review hearing, which was held in June 2019. At this review, in light of the mother's continued refusal to allow DNA testing, the putative father asked the children's hearing to vary the existing compulsory supervision order by attaching thereto a condition that the child be subjected to DNA testing in order to resolve the paternity issue. Being unsure of its power to do so, the hearing deferred its decision[9] in order to take legal advice from the National Convener.[10] The advice given by the National Convener (which the hearing was not obliged to follow) was in these terms:

> "Even if the mother consented to the DNA test, is it necessary for the hearing to know whether the putative father has a genetic relationship with the child in order to determine whether compulsory supervision is necessary and/or to determine contact? That doesn't appear to be the case. It may or may not be in the child's best interests to have the question of parentage resolved at some stage but is that inextricably linked to the hearing's determination of compulsory measures in this case at this time?"[11]

The reconvened children's hearing seems to have interpreted this as advice that a condition requiring the child to be DNA-tested would be competent only if it were necessary for the decision it had to make. Its conclusion was that, since contact with this man with a history of domestic violence was clearly not in the child's best interests, it was not necessary in the present case to resolve the parentage dispute and so the

[9] 2011 Act, s.139.
[10] 2011 Act, s.8.
[11] 2021 SLT (Sh Ct) 116, [6].

hearing refused to vary the compulsory supervision order to include a condition requiring DNA testing. It was against this refusal that the putative father appealed to the sheriff. The appeal came before Sheriff Stirling, who overturned the hearing's decision as being unjustified: she attached the sought-for condition to the compulsory supervision order. The sheriff identified four issues that needed to be addressed.

Issue 1: Competency

The first issue identified by the sheriff was the central one of whether it was competent for a children's hearing to include as a measure in a compulsory supervision order a requirement that a bodily sample be taken from the child for the purpose of DNA testing and to require the implementation authority to arrange and facilitate this. While compulsory supervision orders are designed to be as flexible as possible, in order to allow the children's hearing to design an order that addresses the individual child's needs, the statute makes plain that the terms of the order cannot be entirely open-ended: the only measures that may competently be attached to a compulsory supervision order are those that are listed in s.83(2). An incompetent measure does not become competent merely because it is needed, or is in the child's best interests. The listed measures permit the children's hearing to require action only from the child and the relevant local authority and so it would obviously be incompetent for the compulsory supervision order to include a measure that required something of the parent, such as that they provide their own sample for DNA analysis, or make the child available for DNA testing. It would similarly be incompetent to include a requirement on an NHS or private health care provider to carry out any medical procedure such as testing. The appellant argued that the measure he was asking for would be competent as coming under either paras (f), (h) or (i) of s.83(2). These are:

(f) "a requirement that the implementation authority[12] arrange –

(i) a specified medical or other examination of the child, or

(ii) specified medical or other treatment for the child".

(h) "a requirement that the child comply with any other specified condition".

[12] This is the local authority named in the CSO as being responsible for giving effect to its terms.

(i) "a requirement that the implementation authority carry out specified duties in relation to the child".

The appellant argued that taking a DNA sample by cheek swab was within the phrase "medical or other examination" in paragraph (f)(i). While any requirement under this paragraph is explicitly stated not to override the (competent) child's own refusal to undergo any such examination or treatment,[13] there is nothing explicit to this effect in relation to the parent, and the appellant argued that a requirement for DNA sampling would supersede the need for parental consent. It is difficult to see how this can be so. The reason the child's right to refuse is explicitly protected is because all compulsory supervision orders will require something of the child, and the point of s.186 is to place a limitation on that – the hearing can never require that the child submit to medical or other examination or treatment against the child's own wishes. But a compulsory supervision order can competently require nothing of a parent, and so there is no need for the statute to qualify the extent of any requirement on the parent.

The sheriff did not go so far as the appellant. She held that the measure would be "clearly competent" as coming within the terms of s.83(2)(f), but that is a different issue from its enforceability. If the direction to the local authority to arrange DNA testing could not be carried out due to lack of consent then the remedy, the sheriff said, was found in the provisions for reviewing the compulsory supervision order under s.131(2)(b).[14] The sheriff is correct on the enforceability point, for a requirement under s.83(2)(f) neither replaces a missing consent nor obviates the need for consent before any medical examination or treatment of a child becomes lawful. There is no general power on the medical profession (other than in an emergency situation) to provide treatment without consent and certainly no power on the children's hearing to *require* a health care worker to act without consent. And there is nothing in the 2011 Act giving the hearing itself the power to consent to the measures that it authorises.[15]

However, on the major point at issue, that of the competency of the measure, the sheriff's conclusion is far more doubtful. Competency turns not on enforceability but

[13] 2011 Act, s.186.
[14] 2021 SLT (Sh Ct) 116, [29].
[15] Cf. the provision in Maltese law challenged in *Mifsud v Malta* [2019] 69 EHRR 22 that allows the Maltese court to provide the consent that the medical tester needs.

on whether the measure comes within the terms of s.83(2). Properly construed, the measure in s.83(2)(f), in my view, is simply not capable of covering DNA testing. While the words “other examination” in s.83(2)(f)(i) seem open-ended, they need to be read in context, and interpreted in light of the whole provision, especially s.83(2)(f)(ii), which authorises a requirement to arrange “specified medical or other treatment”. The overall purpose of para (f) read as a whole is to ensure that the child is examined for a purpose: to identify their medical needs and afforded the treatment that meets any such needs identified thereby. “Other examination” in para (f)(i) should be interpreted *noscitur a sociis*, or in light of the words surrounding it, and doing so suggests strongly that “medical or other examination” must be an examination designed to determine the need for medical or other treatment. The DNA testing proposed in *JS, Appellant* was not for the purpose of addressing the child’s medical needs, but to resolve a dispute primarily between adults and therefore does not, it is submitted, come within the terms of s.83(2)(f).

The sheriff went on to hold that even if s.83(2)(f) were not capable of covering DNA testing, then that testing could be competently ordered under either s.83(2)(h) (that the child “comply with any other specified condition”) or s.83(2)(i) (that the local authority “carry out specified duties in relation to the child”). This too is doubtful. Though a requirement on the child to “comply with any other specified condition” seems unlimited (if artificial in its application to babies), it must be interpreted in light of the protective purpose for which the order is made: it could not, it is submitted, be used to require the child, for example, to submit to punishment for any criminal (or sub-criminal) damage they have caused. Determining paternity was not designed to offer any protection to this child but, as we will see further below, to resolve a question of the putative father’s right to participate in the child’s children’s hearing. In any case to require a baby to submit to medical examination is, when the issue is the mother’s failure to consent to that examination, really a requirement on the mother and for that reason is outwith the terms of s.83(2)(h) also. The same is true with s.83(2)(i), that the local authority carry out specified duties in relation to the child. These mean the duties that the local authority already has towards the child, and this paragraph does not allow the children’s hearing to create additional (and entirely unenforceable) duties unconnected to any other aspect of the local authority’s responsibilities towards the child.

The above is really an argument based on statutory interpretation. But there is, it is submitted, a more fundamental problem with seeking information relating to the child's genetic origins (or indeed any other information) through the medium of a compulsory supervision order, whichever paragraph in s.83(2) is used. There are many mechanisms through which a children's hearing can request bodies to obtain information, but obtaining information is never an end in itself – just as the making of a compulsory supervision order is not an end in itself. The making of an order is a route to an outcome (an improvement in the child's life), and the obtaining of information is a signpost along that route. A children's hearing reads the signpost only in order to determine the route: it needs information only in order that it may make its welfare judgment in respect of the child. It follows that the hearing may seek information only *before* making (or varying) a compulsory supervision order. It is circular reasoning to argue that it is in the welfare of the child for information to be obtained in order to decide what is in the welfare of the child: a sign on a roundabout saying "this exit to find out which exit you need" is a logical dead-end.

If the children's hearing wishes to require the obtaining of information that it does not presently possess then this can be competently done only through the medium of an *interim* measure. A children's hearing may, for example, appoint a safeguarder to provide it with some information beyond that which it presently has, but the hearing may only do this when it defers making its dispositive decision, and it would be incompetent to make the appointment of a safeguarder one of the terms of a full compulsory supervision order.[16] Likewise, information may competently be sought about a child's genetic origins in order to assist the hearing coming to its dispositive decision (such as in relation to with whom it is beneficial for the child to have contact, if genetics is relevant to that issue) but not *as* a dispositive decision in itself (however beneficial to the child in their general life the information is). That is to confuse the process with the outcome.

Confirmation that this is so may be gleaned from an examination of ss.92(3) and 120(6). These permit the children's hearing to make a medical examination order, which is defined in s.87 as an order authorising a variety of measures such as requiring the child to attend a hospital or clinic, and requiring the local authority to "arrange a

[16]2011 Act, s.30(2) provides that a safeguarder may be appointed whenever "the children's hearing is *still deciding* matters in relation to the child".

specified medical examination of the child". Not being tied with any treatment, a DNA examination would seem in this case clearly to be within these terms[17] but, tellingly, medical examination orders are available only when a children's hearing *defers* making a dispositive decision either at the initial grounds hearing or after the case is returned to the hearing after the sheriff has found the grounds to be established. There is no equivalent power granted in s.139 to review hearings which defer making decisions. This is because deferral under ss.92 and 120 is for the purpose of obtaining information upon which the hearing can, once in possession of that information, decide whether it is necessary to make a compulsory supervision order: it is not competent for a children's hearing that makes (or, on review, continues) a compulsory supervision order at the same time to make a medical examination order to seek further information. Though a review hearing cannot make a medical examination order it may of course defer its decision to seek information, and this will sometimes require that the hearing make an interim variation of the compulsory supervision order. However, an interim variation on review is competent only when the child's circumstances are such that for the child's "protection, guidance, treatment or control… it is necessary *as a matter of urgency* that the compulsory supervision order be varied".[18] It is difficult to imagine a situation in which the resolution of a paternity dispute through DNA testing would satisfy this requirement. In *JS, Appellant* it was indeed a matter of urgency to resolve the dispute – but, as we will see below, not in respect of the child.

In sum, a dispositive decision cannot competently contain a provision requiring further investigation. If the information that an investigation will uncover is relevant to the dispositive decision the hearing must defer and use whatever powers on deferral that it possesses to obtain the information. It follows that the attaching by the sheriff in *JS, Appellant* of a condition in the compulsory supervision order that information be sought about the child's genetic origins was incompetent, as it would have been had the children's hearing done so.

[17] Though the medical examination order itself does not authorise – in the sense of making lawful – the examination itself, and consent is still required.
[18] 2011 Act, s.139(3).

Issue 2: Welfare or Necessity as the test

Sheriff Stirling formally identified the children's hearing's focus on necessity in determining whether to attach a condition of DNA testing to the compulsory supervision order (following the terms of the advice given by the National Convener) as the error of law that rendered the hearing's decision unjustified and allowed her to overrule it.[19] She rejected the argument of the reporter that necessity applies not only to the question of whether state intervention is justified but also to the question of what measures are to be attached to the compulsory supervision order. She held instead that the question of whether state intervention in private and family life is necessary in a democratic society is relevant only when a manifestation of the state is deciding *whether* to intervene, and not in determining the nature of that intervention. The only tests to be applied in deciding whether to attach any measures to the compulsory supervision order[20] are to be found in ss.25-28 of the 2021.[21] It is difficult to see how this can possibly be so, both as a matter of statutory interpretation and as a matter of ECHR compliance. The concept of "necessity" is as ubiquitous in the 2011 Act, if less obvious, as the concept of the child's welfare. It is clearly applicable (as the sheriff accepted) to the question of whether any state intervention should be effected: "The grounds hearing must, if satisfied that it is necessary to do so for the protection, guidance, treatment or control of the child, make a compulsory supervision order".[22] But it is equally applicable (which the sheriff denied) to the question of whether any measures in the order should be varied: "The children's hearing [at a review hearing] may vary or continue a compulsory supervision order only if the children's hearing is satisfied that it is necessary to do so for the protection, guidance, treatment or control of the child".[23] Varying an existing order can only involve either amending, adding or removing a measure, and that may be done only if the hearing "is satisfied that it is necessary to do so". Indeed the original making of a compulsory supervision order cannot be done in isolation from a consideration of the measures that it is to include. This is made plain by s.83(1), which defines the order: "In this Act 'compulsory

[19] 2021 SLT (Sh Ct) 116, [36].
[20] Other than those which explicitly import a necessity test, such as a movement restriction condition and a secure accommodation authorisation: 2021 SLT (Sh Ct) 116, [33]. The sheriff considered that since the legislation expressly imposed a necessity test for these conditions (2011 Act, s.83(3)(b) and s.83(4)(c)) the other conditions implicitly had no such test.
[21] 2021 SLT (Sh Ct) 116, [33]-[34].
[22] 2011 Act, s.91(3).
[23] 2011 Act, s.138(4).

supervision order' …. means an order – (a) including any of the measures mentioned in subsection (2)…." It follows that in both making the order and deciding its terms, necessity is central.

Nevertheless, it is a category error to conceptualise necessity as an additional test to be satisfied over and above the tests in ss.25-28. The statutory provisions mentioned in the preceding paragraph serve the purpose of requiring the decision-maker to limit the intervention it is authorising to that which is necessary in a democratic society to achieve the legitimate aim of protecting the child. In other words, the role of necessity is to import the ECHR concept of proportionality into the decision-making process, as was made plain in a series of private law cases in which the court considered contact between the child and a non-resident parent. In *M v K*[24] the Inner House adopted this definition of "necessity": "where a court was invited to bring to an end the substance of the relationship between a parent and his or her child, there required to be weighty and cogent grounds before the court could properly hold that the best interest of the child necessitated the termination of that family relationship".[25] The court rejected the notion that the test of necessity was applicable only when full termination of the parent-child relationship was being contemplated. Proportionality requires that "the greater the substance and extent of the interference, the more is required in the opposing scale of the balance to justify that interference."[26] The matter was revisited by the Inner House in *J v M*[27] where the court pointed out that the requirement for interference in family life to be "necessary" did not constitute a distinct and separate test to the welfare and minimum intervention tests in s.11(7) of the Children (Scotland) Act 1995. They endorsed the approach of Sheriff Holligan in *H v M*,[28] who pointed out that "necessity" is derived from the ECHR requirement that interference in family life be "necessary in a democratic society" which itself meant that the measure sought had to be "relevant and sufficient" for the purposes of Article 8. The matter was one of balancing rights and interests rather than "necessity" in its imperative sense.

Sheriff Stirling in *JS, Appellant* was correct to conclude that the child's right to know her origins was a weightier interest than the mother's right to determine the medical

[24] 2015 SLT 469.
[25] 2015 SLT 469, [27] and [18].
[26] 2015 SLT 469, [27].
[27] 2016 SC 835.
[28] Unreported, but quoted extensively in Sheriff Sheehan's judgment in *C v M* [2016] Fam LR 85, [49].

examinations her child was to be subjected to. But that is striking the wrong balance. The National Convener's original advice was for the children's hearing to ask itself whether they considered it "necessary" to know the child's genetic origins in order to determine the issue before it – whether compulsory measures of supervision were required and whether the putative father should have contact with the child. That is not imposing an additional test, but is advising the hearing to focus on what was relevant to the decision it was faced with. "Do you need to know this?" is another way of asking "Is that information relevant to the decision you have to make?" DNA testing is not, in itself, a particularly great interference in family life but if the result of the testing is not relevant to the question of contact that the children's hearing had to determine then it was not necessary for them to order it. It is of crucial importance to remember that the question before the children's hearing was *not* who the child's father was: it was whether compulsory measures of supervision were needed and whether the appellant was to have contact with the child while any compulsory measures were in force. It is true that at the hearing at which the DNA testing was requested, the issue of contact was not the question asked of the hearing, but the testing was requested to allow the appellant to ask for contact in the future so that issue underpinned the whole case.

By following the advice of the National Convener the children's hearing did not import an additional "necessity" test in determining whether to vary the compulsory supervision order in the way the putative father sought. The hearing's assessment that they did not need to know, at this stage, about the child's genetic origins was an assessment on its relevance and was not unjustified in the sense of being plainly wrong. The hearing's focus on "necessity" was therefore no basis upon which the sheriff could overrule their refusal to order DNA testing.

Issue 3: Article 8 ECHR

However, Sheriff Stirling also found that the children's hearing had acted incompatibly with the European Convention on Human Rights by refusing to attach the sought-for DNA testing condition to the existing compulsory supervision order: that too would allow the sheriff to overturn the hearing's decision. In reaching her conclusion the

sheriff relied heavily on the decision of the European Court of Human Rights in *Mikulić v Croatia*,[29] where it was accepted that Article 8 of the European Convention was engaged in paternity cases since respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. But the sheriff went significantly further than what the European Court decided in that case.

The Reporter, in defending the decision of the children's hearing, had argued that Article 8 does not require the resolution of paternity disputes in whatever process the issue arose: it simply required that Scots law provide an efficient mechanism for resolving paternity disputes, which it does through the Law Reform (Parent and Child) (Scotland) Act 1986 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The breach in *Mikulić v Croatia* was constituted by Croatia's failure to provide any such efficient mechanism, because of the time it took in that case to resolve the paternity dispute. However, Sheriff Stirling found the Scottish system, which allows the court to request DNA samples and to draw "adverse inferences" if its request is rejected, to be "unsatisfactory" because one sheriff might draw the inference and another not. She considered that if declarators of parentage under the 1986 and 1990 Acts were the only mechanism to resolve paternity disputes then Scots law would "likely" be in breach of Article 8. But, in her view, families subject to the children's hearing system had another, and quicker, and ECHR-compliant, remedy in the form of making DNA testing a condition in the compulsory supervision order. It followed that a refusal by the children's hearing to adopt that route to speedy resolution of the paternity dispute was a breach of Article 8: as such, the hearing's decision was "not justified".[30] Effectively, the sheriff interpreted Article 8 as imposing a requirement on public authorities to resolve paternity disputes as soon as they could, whenever and in whatever context they arose. That conclusion does not consist with the jurisprudence of the European Court of Human Rights

Before examining that jurisprudence, it is as well to remind ourselves of the provisions in the 1986 and 1990 Acts, which set out the primary process in Scotland for resolving parentage disputes. A party may apply to the sheriff court or the Court of Session

[29] [2002] 1 FCR 720.
[30] 2021 SLT (Sh Ct) 116, [44]-[46].

under s.7 of the 1986 Act for a declarator of parentage (or of non-parentage), and if evidence of DNA analysis is sought, but the necessary consent is refused, then under s.70 of the 1990 Act the court may request a party to provide a sample of blood or other body fluid or of body tissue, or consent to the taking of such a sample from a child. If the party refuses that request the court may draw "such adverse inference, if any, in relation to the subject matter of the proceedings as seems to [the court] to be appropriate". The Scottish courts have been noticeably slower than the English courts in drawing any inferences,[31] though it does so in appropriate cases.[32]

Sheriff Stirling accepted the appellant's argument that requiring him to seek a declarator of parentage by these means was inappropriate, for the same reasons the same suggestion had been rejected in *Principal Reporter v K*:[33] seeking a s.7 declarator would take time and the hearing will likely be making decisions in the meantime, which may be impossible to unravel if the action is successful; the loss of relevant person status has immediate effects in the hearings process; legal aid for such an application is not guaranteed. As Lord Rodger famously put it in that case: "the train may have left the station while the father is still waiting at the barrier".[34] But *Principal Reporter v K* involved a father who did not have relevant person status and was seeking it; the present case involved a putative father who did have relevant person status but was at risk of losing it. Maintaining the status quo until the paternity issue was resolved was disadvantageous to the father in *K*, but would be advantageous to the putative father in *JS*. The concerns in the earlier case do not apply here.

There is nothing in *Mikulić* that suggests these Scottish rules for declarators of paternity are incompatible with Article 8. The primary complaint in that case was in the delay in decision-making rather than the compatibility with Article 8 of the means

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[31] Cf *Re A (A Minor) (Paternity: Refusal of Blood Test)* [1994] 2 FLR 463 (CA) and *Smith v Greenhill* 1994 SLT (Sh Ct) 22 (Sheriff Principal). The Scottish legislation is, however, different from the English because while the Scottish court can merely "request" the party to undergo testing (or consent to the child undergoing testing) the English court can "direct" that this be done (Family Law Act 1969 s.20). So a failure to comply in England is refusal of a direction rather than (as in Scotland) the refusal of a request. (Adverse inferences are drawn in England under s.23 of the 1969 Act, headed "Failure to Comply with Direction for Taking Blood Tests" while the equivalent Scottish section is headed much more neutrally "Blood and Other Samples in Civil Proceedings").
[32] See for example *S v S* 2014 SLT (Sh Ct) 165. For a discussion of this case, see G. Black "Identifying the Legal Parent/Child Relationship and the Biological Prerogative: Who Then is my Parent?" (2018) *Juridical Review* 22.
[33] [2010] UKSC 56.
[34] [2010] UKSC 56, para [33].

of proof, and there are other European Court decisions that more directly address the matter at issue in *JS, Appellant*.

In *Pascaud v France*[35] the European Court found a breach of Article 8 when the French court disregarded the results of DNA testing that showed a 99.9% certainty that a wealthy vineyard owner was the father of the applicant. The father had submitted to DNA testing while his understanding was impaired, but the domestic court's rejection of the results for that reason was found to have failed to strike the appropriate balance between the father's interest and those of the applicant in knowing his parentage.

In *Cannone v France*[36] the complaint to the European Court was made by a man who had been deemed to be father after he had refused to submit himself to DNA testing. The Court decided that his application was inadmissible because it was within states' margin of appreciation how they responded to such a refusal. The main difference from *Mikulić* was that in *Mikulić* it was the state's inability to prevent the man from hampering the establishment of parentage that constituted the breach of Article 8 while in *Cannone* the state had responded appropriately to the man's attempts at hampering the establishment of parentage.

In *Mandet v France*[37] the child claimed an infringement of her Article 8 right to respect for family life after her genetic father successfully overturned the presumption of paternity in favour of the husband of her mother (whom the applicant lived with and regarded as her father). The European Court found no violation of Article 8 on the grounds that the child's interests lay in knowing the truth, that she had been involved in the process and that her family life with those bringing her up was not affected. The Court rejected, as a matter of fact, the allegation that the child's and mother's refusal to undergo DNA was a deciding factor in the French court's decision.

Most pertinently for present purposes is the case of *Fröhlich v Germany*,[38] which involved an applicant who was seeking to prove that he was the father of a child being brought up by her mother (with whom he had had a relationship) and her mother's husband. The husband was presumed by law to be the father and the German courts refused to override the legal parents' refusal to consent to DNA testing. Having spoken

[35] Appl. 19535/08, Chamber Judgment 16 June 2011.
[36] Appl. 22037/13, Admissibility Decision 25 June 2015.
[37] Appl. 30955/12, Chamber Judgment 14 January 2016.
[38] Appl. 16112/15, Fifth Section Judgment 26 July 2018.

to the child (who was by then five years of age) the German domestic courts held that it was not necessary at that point in time to determine the child's paternity since it might disturb her existing secure family environment. On the applicant complaining to the European Court of Human Rights, that Court held that since the decision had been taken in the child's best interests, with full involvement of all the parties, there had been no violation of Article 8.[39] The Court reiterated "that the member States' margin of appreciation is wide in respect of the determination of a child's legal status, but is more limited regarding questions of contact….".[40] and it confirmed that a domestic court "could refrain from ordering a paternity test in cases where the further conditions for contact were not met".[41] The applicant's complaints were thus manifestly ill-founded.[42]

The most recent case from the European Court is that of *Mifsud v Malta*[43] where the Court held that a provision of Maltese law that allowed the court to require a man, against his wishes, to provide a genetic sample in paternity proceedings raised against him was not incompatible with Article 8. Though it was certainly an interference with the applicant's private life it was justified as a means of protecting the rights of others, including the right to uncover the truth of one's parentage. However, as the reporter pointed out in *JS, Appellant*[44] that case is no authority for the proposition that ordering genetic testing whenever paternity was in dispute was the only Article 8-compliant response to such a dispute. The European Court in *Mifsud* discussed the variety of approaches to paternity disputes in various earlier cases and emphasised that its role was to "assess whether the decision-making process, seen as a whole, was fair and provided the applicant with the requisite protection of his interests safeguarded by Article 8".[45]

In sum, these decisions show that the state has a wide margin of appreciation in how it balances the various interests involved in disputes relating to parentage, and that no one approach, whether to request or to require DNA testing, and the response to any refusal, is without further investigation to be held compatible or incompatible with

[39] Ibid, [64].
[40] Ibid, [41].
[41] Ibid, [43].
[42] Ibid, [45].
[43] [2019] 69 EHRR 22.
[44] 2021 SLT (Sh Ct) 116, [26].
[45] [2019] 69 EHRR 22, [59].

Article 8. Fairness in the whole process, including participation by the interested parties, is the crucial issue. The decision closest to the circumstances in *JS, Appellant* is that of *Fröhlich* where the claimant was, like the appellant in *JS*, seeking to be recognised as genetic father but failed in his quest due to the domestic authorities' approach. That the European Court found no violation of either the 5-year old child's or the complainant's Article 8 rights suggests strongly that there was similarly no violation when the children's hearing refused to authorise a procedure to resolve the paternity dispute when it was raised with them – especially since "the further conditions for contact" (i.e. a finding that contact would be in the child's best interests) were not met. The sheriff's decision that the child's interests demanded the immediate resolution of the paternity dispute, delivered two days before the child's 2nd birthday and long before she could remotely understand its implications, or express any view, has no basis in the European Court's jurisprudence and is contrary to that Court's finding in *Fröhlich*.

The paradox is that the sheriff was not wrong to conclude that the dispute required urgent resolution: the matter was indeed urgent, not for the child but for the putative father. The Court in *Fröhlich* pointed out that "the existing family ties between the spouses and the children they actually care for warrant protection under the Convention".[46] In that case the mother's husband enjoyed family life with the child even if he might not be the genetic father and this existing status quo demanded protecting. In *JS, Appellant* the putative father enjoyed existing rights, though of a different nature – participation rights within the children's hearing process. These rights were threatened with removal not by any court (or children's hearing) decision weighing up all the different claims and the rights and interests of each of the parties in a process that offered an opportunity for all interested parties to participate, but simply by the reporter's response to the mother's changed position. This non-judicial subversion of the status quo is far closer to a breach of the appellant's Article 6 Convention rights to a fair hearing than any breach of Article 8 constituted by the children's hearing's refusal to order DNA testing. This matter is explored further below.

[46] Appl. 16112/15, Fifth Section Judgment 26 July 2018, [60].

Issue 4: Outcome

The final issue to be addressed by the sheriff was whether, having upheld the appeal, she should (i) return the case to the hearing to determine whether it would be in the child's welfare to vary the order to include a requirement for DNA testing, or (ii) vary the compulsory supervision order herself to include that measure. Though sheriffs have had the power, when upholding an appeal, to impose their own terms on the compulsory supervision order since the Children (Scotland) Act 1995,[47] sheriffs have rightly been reticent in exercising this power, since doing so somewhat subverts what Lord President Hope famously called "the genius" of the Kilbrandon reforms[48] – the separation of roles between the sheriff (fact-finding) and the children's hearing (welfare-based disposition in light of the facts). I have previously suggested that, though variation by the sheriff on appeal is permitted under the terms of s.156 of the 2011 Act, sheriffs should exercise this power only when it is clear that there is only one possible option that would serve the child's interests and when, therefore, it would be a procedural waste of time to send the matter back to the children's hearing for disposal.[49] If more than one reasonable outcome is available from the welfare judgment that still requires to be made after an appeal then the children's hearing remains in all cases the best forum for making it.

Sheriff Stirling may well have followed this approach in *JS, Appellant* with her conclusion that there was no merit in requiring the reporter to arrange a children's hearing. The matter before her was one of law and the factual background was as known to the court as to the hearing. She considered that there was no room for doubt that attaching the DNA condition was in the child's best interests[50] and that refusing to do so would be contrary to the ECHR. If she were right that the only lawful conclusion that could be reached was that the condition sought should be attached, then it would indeed be a waste of time to send the matter back to the children's hearing to reach that conclusion. Now, I have already suggested that she was mistaken in her ECHR analysis and the matter must therefore rest (assuming *ex hypothesi* that the condition was competent) on the welfare of the child. Occasionally there is no real doubt as to

[47] Children's Hearings (Scotland) Act 1995, s.51(5)(c)(iii). This power was extended by the 2011 Act to cases in which appeals to the sheriff were dismissed: 2011 Act, s.156(1)(b).
[48] *Sloan v B* 1991 SLT 530, p.548E.
[49] Norrie, *Children's Hearings in Scotland* (4th edn, 2022) para 14.20.
[50] 2021 SLT (Sh Ct) 116, [47].

where a child's interests lie,[51] but that is rare and in the present case it is suggested that the sheriff was in error in assuming that any child's interests will *always* require paternity doubts to be resolved as soon as possible. In *Fröhlich v Germany*, discussed above, the European Court of Human Rights accepted that the interests of the 5-year old child in that case did not demand the immediate resolution of such doubts. In the present case, where the child was less than 2 years old it could not have mattered less *to her* to have the doubt about her genetic origins resolved – though as she grew older the matter may well have taken on more significance, to her (again as recognised in *Fröhlich*). The question of whether DNA testing would serve this very young child's interests in the context of her being subject to compulsory measures of supervision for the next year[52] was not one to which there was only one possible answer.

The Forgotten Issue: the Right to Participate

In any case, that is not the question that was at the heart of *JS, Appellant.* The real dispute, obscured by the focus on the child's welfare, was the appellant's right to continue to be considered a relevant person and entitled, thereby, to attend and fully participate in the children's hearing process. The appellant did not seek DNA testing, nor appeal its refusal, in order to ensure his child's right to know her origins. In truth, he was seeking to secure his own legal status as relevant person. This case was never about the child's welfare, or the child's Article 8 right to family life: the *real* issue of contention was the appellant's Article 6 rights – to a fair hearing, including in particular his right to participate. Though the matter of the child's genetic origins could be of no immediate importance to the child (given her age) it was of immediate importance *to the appellant* because his right to participate in the children's hearing as a relevant person was entirely dependent on his being the child's father.[53]

[51] An example is found in *CA v Children's Reporter* 2020 Fam LR 50 where the hearing had applied to wrong test in determining to remove a measure prohibiting the disclosure of the child's (and prospective adopters') address to the natural parents. Having decided that that was unjustified, the reinstatement of the non-disclosure measure was inevitable and convenience required that the sheriff do this immediately.

[52] Remembering that CSOs last only one year before they require to be renewed, varied or terminated at a review hearing.

[53] The judgment does not make clear the nature or extent of the social relationship between the child and the appellant, but it is unlikely that he had sufficient involvement in the upbringing of the child to be able to claim to be deemed a relevant person under s.81 of the 2011 Act.

The Inner House has previously pointed out, in a closely related context, that not all matters before a children's hearing are to be determined by the welfare test in s.25 of the 2011 Act. In *T v Locality Reporter*,[54] it was held that the right to participate as a relevant person is determined by whether the appropriate test has been satisfied or not, and the child's welfare has no role to play in that determination. That case involved whether an individual met the test in s.81(3) to be deemed to be a relevant person, but the point of principle that it confirmed applies also to whether an individual meets the definition of relevant person in s.200.

In *JS, Appellant*, though the sheriff may have reached the wrong conclusion on more than one point, there was an earlier and much more egregious flaw in this whole process, for which the sheriff was by no means responsible. This was the decision of the reporter to stop treating the appellant as the father, on no stronger grounds than the mother's say-so. The appellant, being neither married to the mother nor registered as the father, could not rely on any presumption of law that he was indeed the father, but he had been accepted by the mother as the father and had been treated as such by the state authorities with whom he came into contact. Crucially, the reporter had treated him as being a relevant person – not as an individual *deemed* to be a relevant person by a decision of a pre-hearing panel or children's hearing under s.81 of the 2011 Act, but as an individual who came within the definition of relevant person under s.200(1)(g) of that Act. That paragraph takes us to the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013, art.3, itself the legislative reaction to *Principal Reporter v K*:[55] a relevant person is "a person who is a parent of a child other than a parent [falling within an earlier part of the definition]". Since in earlier proceedings in this case – the grounds hearing, the proof hearing before the sheriff, the subsequent children's hearing that made the original CSO and at least one review hearing – everyone accepted the appellant as the parent, he came within the definition of "relevant person" and enjoyed thereby full participation rights in the children's hearing process in respect of his child. The sheriff herself, indeed, treated the appellant as a relevant person, because it was only that status that gave him title to take the appeal she was dealing with.[56] Yet for subsequent

[54] 2015 SC 359.
[55] [2010] UKSC 56.
[56] 2011 Act, s.154(2)(b).

children's hearings, the reporter was proposing to withdraw that recognition with the result that the appellant would no longer be regarded as a relevant person until such time as he provided DNA proof of his parenthood – all because the mother was now denying his parenthood and at the same time refusing to make the child available for testing that might prove his parenthood. Whatever the legal flaws in the sheriff's judgment, she was at least attempting, by finding in his favour in the appeal, to provide justice to the appellant.

Now, the original position of the Scottish Children's Reporter Administration in applying the "parent" part of the definition of relevant person created by the 2013 Order was that they would not treat as "parent" anyone without formal recognition (that is to say, being presumed parent under the 1986 Act). But that was found in practice to be unsustainable and in SCRA Practice Direction 3[57] reporters were instructed that a person was to be regarded as a parent even without formal recognition so long as there was no dispute that the person is the parent. To SCRA, "no dispute" means that both the formally recognised parent (the mother) and the other person have a "sustained agreement" that the other person is the genetic parent. Reporters are also instructed in Practice Direction 3 that if a dispute subsequently arises, they are to contact the SCRA Practice Team.

In the present case, there was originally no dispute between the mother and the putative father, and he was therefore accepted by the reporter as being a parent, and consequentially as coming within the s.200 definition of "relevant person". On the dispute subsequently arising the advice from the SCRA Practice Team was, it seems, to stop treating him as a relevant person. What this does is to give power to the mother to remove a putative father's right to participate in a process even if he has previously participated fully. It treats the status of defined relevant person as an ongoing and changeable position in the same way that the status of deemed relevant person is a changeable position, but one in which the mother gets to decide whether the test is satisfied. This is the single most serious flaw in this whole case. Once a person is treated as a relevant person that status ought to be retained, indeed protected, until it is removed by due process and not simply by a question being raised about it. Had the appellant been a deemed relevant person he would have retained that status even

[57] 2013, revised in 2015 and 2019, paras 2.6-2.9.

if the mother now denied his recent involvement in the upbringing of the child in a deliberate attempt to have him excluded from the process. The mother's denial would have no effect on its own other than to require the reporter to arrange a pre-hearing panel under s.79(5A)(a) of the 2011 Act in order to address the question. Being a defined relevant person rather than a deemed relevant person should not make the appellant's participation rights more vulnerable, nor should this allow them to be removed on an unproven allegation by a very interested (prejudiced) party. It is as well to recall that in *Principal Reporter v K*[58] the UK Supreme Court found that it would be incompatible with the ECHR for the father in that case to be excluded from participation in a process driven by unproven allegations against him. That is what would have happened here had the sheriff not allowed the appellant title to appeal, but in doing so she assumed that the onus was on the appellant to prove why his relevant person status should be maintained rather than on the challenger to prove (which she was refusing to do) that his relevant person status should be removed.

An Easier Solution

There seems little doubt that the sheriff was motivated by good intentions. The appellant, through no fault of his own, found himself in a bind, and the sheriff offered a way out. I have sought to argue above that the sheriff's solution of using the very terms of the compulsory supervision order to obtain the necessary information was fundamentally misconceived, but I wonder if there existed a much easier mechanism by which the sheriff could have provided justice in this case. Instead of finding that the children's hearing had the power to order DNA testing, could the sheriff herself have simply declared the appellant to be the father?

Section 7 of the Law Reform (Parent and Child) (Scotland) Act 1986, which as we have seen governs declarators of parentage, contains subsection (5) which provides that "Nothing in any rule of law or enactment shall prevent the court making in any proceedings an incidental finding as to parentage [or non-parentage] for the purposes of those proceedings." "Any proceedings" seems wide enough to include an appeal to the sheriff court from a decision of a children's hearing. The sheriff herself, in other

[58] [2010] UKSC 56.

words, could simply have made an incidental finding that the appellant was the child's father. She would, of course, need some evidentiary basis upon which to do so, but sheriffs are entitled under s.155(4) to hear evidence in appeals (and implicitly to make new findings of fact). An adminicle of evidence is to be found in the fact that the appellant had been previously accepted by the mother and by the reporter, and was indeed now being accepted by the sheriff herself, as the child's father. That would be fairly weak evidence on its own, but the sheriff might also herself have relied on s.70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which is designed for the exact purpose of filling in an evidentiary gap. That provision is not limited to actions for declarator of parentage or non-parentage raised under s.7 of the 1986 Act: it explicitly applies to "any civil proceedings brought in the Court of Session or the sheriff court",[59] which might well include appeals to the sheriff from a decision of the child's hearing. Section 70(1) of the 1990 Act provides that "the court may (whether or not on application made to it) request a party to the proceedings … to consent to the taking of such a sample from a child….". So it was open to the sheriff, even if neither the appellant nor the reporter asked her to do so, to have requested the mother to consent to the child's DNA testing; if the mother had persisted in her refusal, then s.70(2) of the 1990 Act authorises the sheriff to draw "such adverse inference, if any… as seems to it to be appropriate". The sheriff could, and I suggest should, have drawn the inference, if the mother continued with her intransigence, that it was the mother and not the appellant who was lying (or mistaken) about the child's paternity.[60] Making an incidental finding of fact in this appeal might not have resolved the child's paternity definitively, but it would at the very least have prevented the reporter from carrying out the threat to no longer treat the appellant as a relevant person. The participation issue – which as argued above was the real issue in this case – would have been resolved, for the purposes of the children's hearing process involving this child. If the mother was unhappy, and continued to deny the appellant's paternity, then it is she who could raise an action for declarator of non-parentage in the civil courts: the onus would be on her to provide evidence of her own claim. No train would have left the station with

[59] 1990 Act s.70(4).

[60] I am not arguing that drawing inferences is in all cases appropriate, but in this case the reporter's approach gave the mother an interest in denying proof of her own allegation. She simply had to make the allegation that the appellant was not the father for the reporter to threaten to remove his relevant person status, but if DNA proved that he was the father then that status would be restored. It suited the mother to refuse access to information that might deny her own allegation, and in these circumstances, drawing the adverse inference is justified.

the pursuer stuck at the barrier during the inherent delay in that process since the status quo would be maintained until the matter was fully resolved: the appellant would be carried along in the "relevant person" carriage, until his ticket was *proved* to be invalid.

Conclusion

The sheriff gave a thought-provoking judgment in this odd and interesting case. She sought to do right by one of the parties who was facing an injustice caused by the decisions of others but it was fundamentally misconceived to seek to protect that party's interests by imposing a condition on the child. There are a number of important messages that I have sought to draw out from this case. First, the child's welfare is not the solution to all issues, nor even always relevant, in cases that are referred to a children's hearing: sometimes it is adult interests that are being fought over. Secondly, and following on from this, it is important that all parties are honest about the real source of dispute and that the decision-maker is robust in identifying that real source. Thirdly, however, the case illustrates that reporters as public authorities should not overstep their role and make decisions that undermine the participation rights currently being exercised by parties to the proceedings. Above all however the case illustrates that when paternity issues arise (as they do but infrequently in the Scottish courts) the children's hearing system is singularly ill-equipped to deal with them. The advice of the National Convener in this case, and the approach of the children's hearing acting upon that advice, were entirely sensible, entirely consistent with the European Convention on Human Rights, and justified in all the circumstances of the case.