Trinity Term
[2012] UKSC 30
On appeal from: [2011] CSIH 38

JUDGMENT

ANS (Respondent) and another *v* ML (AP) (Appellant) (Scotland)

before

Lord Hope, Deputy President
Lady Hale
Lord Wilson
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

11 July 2012

Heard on 21 and 22 May 2012

Appellant
Lord Davidson of Glen Clova QC
Maria Clarke
(Instructed by Drummond Millar LLP)

Respondent
Morag B Wise QC

Catherine Dowdalls
(Instructed by JK Cameron)

Respondent
Gerry J B Moynihan QC
Alastair J Duncan
(Instructed by The Scottish Government Legal Directorate)

LORD REED (WITH WHOM LADY HALE AND LORD WILSON AGREE)

1. The issue in this appeal is whether section 31(3)(d) of the Adoption and Children (Scotland) Act 2007 is within the legislative competence of the Scottish Parliament. It is contended on behalf of the appellant that the provision is incompatible with the Convention rights set out in Schedule 1 to the Human Rights Act 1998, that section 29(2)(d) of the Scotland Act 1998 therefore applies, and that the provision is accordingly not law.

2. The issue has arisen in the course of adoption proceedings in the Sheriff Court, in circumstances to which I shall return. The sheriff decided to refer the issue to the Inner House of the Court of Session, in accordance with paragraph 7 of Schedule 6 to the Scotland Act. The Inner House held that the provision was not incompatible with the Convention rights and was within the legislative competence of the Parliament: *ANS and DCS v ML* [2012] CSIH 38, 2012 SC 8. The present appeal is brought against that decision, in accordance with paragraph 12 of Schedule 6.

3. The appellant is the mother of the child who is the subject of the adoption proceedings. She is opposed to the proposed adoption and has refused to give her consent. The first respondents are the prospective adoptive parents. The second respondent is the Lord Advocate, who has become a party to the proceedings in order to defend the lawfulness of the provision in issue.

The legislation

4. Section 31 of the 2007 Act is concerned with parental consent to adoption. Subsection (1) provides that an adoption order may not be made unless one of five conditions is met. The first condition is set out in subsection (2):

> "(2) The first condition is that, in the case of each parent or guardian of the child, the appropriate court is satisfied—
>
> > (a) that the parent or guardian understands what the effect of making an adoption order would be and consents to the making of the order (whether or not the parent or guardian knows the identity of the persons applying for the order), or

(b) that the parent's or guardian's consent to the making of the adoption order should be dispensed with on one of the grounds mentioned in subsection (3).”

Put shortly, the first condition will therefore be met where the court is satisfied that each parent or guardian of the child consents to the making of an adoption order, or that the parent’s or guardian’s consent should be dispensed with on one of the grounds mentioned in subsection (3).

5. It is unnecessary for the purposes of the present appeal to consider the remaining conditions in detail. It is sufficient to note that they concern situations where the consent of parents or guardians, or dispensing with such consent, is no longer a live issue.

6. Returning to the first condition, the grounds on which the parent’s or guardian’s consent to the making of the adoption order may be dispensed with are set out in subsection (3):

“(3) Those grounds are—

(a) that the parent or guardian is dead,

(b) that the parent or guardian cannot be found or is incapable of giving consent,

(c) that subsection (4) or (5) applies,

(d) that, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with.”

7. Paragraphs (a) and (b) of subsection (3) are self-explanatory. Paragraph (c) refers to subsections (4) and (5), which are in the following terms:

“(4) This subsection applies if the parent or guardian—

(a) has parental responsibilities or parental rights in relation to the child other than those mentioned in

sections 1(1)(c) and 2(1)(c) of the [Children (Scotland) Act 1995],

(b) is, in the opinion of the court, unable satisfactorily to—

(i) discharge those responsibilities, or

(ii) exercise those rights, and

(c) is likely to continue to be unable to do so.

(5) This subsection applies if—

(a) the parent or guardian has, by virtue of the making of a relevant order, no parental responsibilities or parental rights in relation to the child, and

(b) it is unlikely that such responsibilities will be imposed on, or such rights given to, the parent or guardian."

A "relevant order", for the purposes of subsection (5), is a permanence order which does not include provision granting authority for the child to be adopted: section 31(6).

8. Section 31 has to be read along with other provisions of the 2007 Act. In particular, it is necessary to have regard to section 14, which is concerned with the considerations relevant to the exercise of powers under the Act. So far as material, it provides as follows:

"(1) Subsections (2) to (4) apply where a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The court or adoption agency must have regard to all the circumstances of the case.

(3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.

(4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to—

(a) the value of a stable family unit in the child's development,

(b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity),

(c) the child's religious persuasion, racial origin and cultural and linguistic background, and

(d) the likely effect on the child, throughout the child's life, of the making of an adoption order."

9. It is also necessary to have regard to section 28, which so far as material provides:

"(1) An adoption order is an order made by the appropriate court on an application under section 29 or 30 vesting the parental responsibilities and parental rights in relation to a child in the adopters or adopter.

(2) The court must not make an adoption order unless it considers that it would be better for the child that the order be made than not.

(3) An adoption order may contain such terms and conditions as the court thinks fit."

10. Section 31(4) and (5) also has to be read along with the definitions of parental responsibilities and parental rights in sections 1(1) and 2(1) of the Children (Scotland) Act 1995, as amended. Section 1(1) provides:

"(1) … a parent has in relation to his child the responsibility—

(a) to safeguard and promote the child's health, development and welfare;

(b) to provide, in a manner appropriate to the stage of development of the child—

(i) direction;

(ii) guidance,

to the child;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative,

but only in so far as compliance with this Section is practicable and in the interests of the child."

Section 2(1) provides:

"(1) … a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—

(a) to have the child living with him or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

> (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
>
> (d) to act as the child's legal representative."

11. Finally in this context, it is relevant to note the terms of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The argument

12. In the printed case, it was argued on behalf of the appellant that section 31(3)(d) was incompatible with the right of a parent to respect for her family life, as guaranteed by article 8. The provision applied only where neither section 31(4) nor section 31(5) applied: that is to say, where the court did *not* consider that the parent was unable satisfactorily to discharge her parental responsibilities or exercise her parental rights and was likely to continue to be unable to do so, or where the parent was *not* someone who was subject to an order removing parental responsibilities and rights and was unlikely to have such responsibilities or rights restored in the future. In other words, section 31(3)(d) was applicable only in circumstances in which the parent was able to fulfil her parental responsibilities satisfactorily or, if presently unable to do so, was not likely to continue to be unable to do so. In that situation, a provision which allowed a court to sever permanently the bond between parent and child, merely on the basis of an assessment of the child's welfare, failed to respect the rights of the parent under article 8. The dangers of a broad test of welfare had been identified by this court in *In re S-B (Children)(Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678, para 7.

13. Section 101(2) of the Scotland Act required a provision of an Act of the Scottish Parliament to be read as narrowly as was required for it to be within competence, if such a reading was possible. It was not however possible to read section 31(3)(d) of the 2007 Act as narrowly as was required in order for it to be compatible with the relevant case law of the European Court of Human Rights, as exemplified by *Neulinger v Switzerland* (2012) 54 EHRR 1087.

14. In the course of the hearing, counsel for the appellant recognized that this argument faced a number of difficulties, to which I shall return. Ultimately, the submission was that an order based on section 31(3)(d) would not be made "in accordance with the law", within the meaning of article 8(2). That was because the provision was lacking in precision and failed, in its terms, to reflect the requirements of article 8 as laid down in the case law of the European court.

The correct approach to interpretation

15. It sometimes seems that, whenever lawyers hear the words "compatibility with the Convention rights", they reach for section 3 of the Human Rights Act. That response is however a mistake: since the object of section 3 is to avoid, where possible, action by a public authority which would be incompatible with the Convention rights and therefore unlawful under section 6, it follows that the special interpretative duty imposed by section 3 arises only where the legislation, if read and given effect according to ordinary principles, would result in a breach of the Convention rights (*R (Hurst) v London Northern District Coroner* [2007] UKHL 13, [2007] 2 AC 189). That conclusion also follows on constitutional grounds: the courts endeavour to ascertain and give effect to the intention of Parliament (or, in this case, the Scottish Parliament) as expressed in legislation. It is only if that intention cannot be given effect, compatibly with the Convention rights, that the courts are authorized by Parliament, in terms of section 3, to read and give effect to legislation in a manner other than the one which Parliament had intended. Accordingly, as Lord Hope observed in *R (Wardle) v Crown Court at Leeds* [2002] 1 AC 754, para 79, before having recourse to section 3 one must first be satisfied that the ordinary construction of the provision gives rise to an incompatibility.

16. When an issue arises as to the compatibility of legislation with the Convention rights, it is therefore necessary to decide in the first place what the legislation means, applying ordinary principles of statutory interpretation. Those principles seek to give effect to the legislature's purpose. If language is used whose meaning is not immediately plain, the court does not throw up its hands in bafflement, but looks to the context in order to ascertain the meaning which was intended. The court will also apply the presumption, which long antedates the Human Rights Act, that legislation is not intended to place the United Kingdom in

breach of its international obligations. Those international obligations include those arising under the Convention.

17. If however the ordinary meaning of the legislation is incompatible with the Convention rights, it is then necessary to consider whether the incompatibility can be cured by interpreting the legislation in the manner required by section 3. Even if the legislation in question is an Act of the Scottish Parliament, it is section 3 which is relevant in the context of the Convention rights, rather than section 101 of the Scotland Act, for the reasons explained by Lord Hope in *DS v HM Advocate* [2007] UKPC 36, 2007 SC (PC) 1, paras 23-24. If the legislation can be construed in accordance with section 3 in a manner which is compatible with the Convention rights, then it will be within the competence of the Scottish Parliament so far as the Convention rights are concerned. If it cannot be so construed, then it will not be within competence.

The background to the legislation

18. In considering the interpretation of section 31(3)(d) of the 2007 Act, it may be helpful to begin by setting the provision in the context in which it was enacted. Under the previous law, set out in section 16 of the Adoption (Scotland) Act 1978 as amended, parental agreement to the making of an adoption order could be dispensed with on any of four grounds. The first was that the parent could not be found or was incapable of giving agreement: that ground corresponds to section 31(3)(b) of the 2007 Act. A second, put shortly, was that the parent had persistently failed, without reasonable cause, to fulfil specified parental responsibilities in relation to the child. A third ground, again put shortly, was that the parent had seriously ill-treated the child. The residual ground for dispensing with parental consent, under section 16(2)(b) of the 1978 Act, was that the parent was withholding consent unreasonably: a ground whose interpretation and application had given rise to a considerable amount of litigation.

19. The 2007 Act had its roots in the work of the Adoption Policy Review Group, carried out between 2001 and 2005 under the chairmanship of Sheriff Principal Graham Cox QC. In its Phase II Report (*Adoption: Better Choices for our Children*), published in 2005, the Group noted that the current Scottish grounds for dispensing with agreement had been criticized as complicated and difficult to apply. It noted that, in England and Wales, the grounds for dispensing with the parents' agreement had been much the same as in Scotland, but had been radically changed by the Adoption and Children Act 2002. Section 52(1) of that Act provided only two grounds for dispensing with consent: that the parent or guardian could not be found or was incapable of giving consent, or that the child's welfare required the consent to be dispensed with. The Group stated (para 3.23):

> "The grounds being introduced in England and Wales under the 2002 Act have the attraction of simplicity. It is also desirable in an issue such as adoption that the approach taken on both sides of the border should be broadly similar. There is, however, an issue about whether the welfare test gives sufficient weight to birth parents' interests. The Group believed that the test must be more stringent than whether the prospective adopters would give the child a better life than the birth parents (sometimes known as 'a beauty parade'). The welfare of the child must require the birth parents' consent to be dispensed with. This test should be at least equivalent to that in article 8 of the European Convention on Human Rights (ECHR) which requires that any interference in private or family life must be in accordance with law and necessary to protect health or the rights and freedom of others. The Group considered that the test in the 2002 Act would be improved if it reflected article 8 more exactly."

20. That conclusion was reflected in the Group's recommendation (para 3.24):

> "The Group recommends that the current grounds for dispensing with the agreement of birth parents should be changed and that those in the 2002 Act should be adopted, amended to reflect the 'necessity test' in article 8. These grounds are clear and straightforward and give due consideration and protection to the rights of birth parents."

21. It is apparent therefore that the Group had article 8 of the Convention firmly in mind in making its recommendation. Its thinking was that the Scottish provision enabling the court to dispense with parental consent to the making of an adoption order should be based upon section 52(1) of the 2002 Act, subject to amendment designed to reflect more explicitly the requirements of article 8.

22. In its response, also published in 2005, the Scottish Executive stated that it supported the recommendation and proposed to implement it through legislation (*Secure and safe homes for our most vulnerable children: Scottish Executive Proposals for Action*, page 15). It did so in the Adoption and Children (Scotland) Bill, subsequently enacted as the 2007 Act. In the Bill as introduced, the relevant provision (section 33(2)(b)) replicated section 52(1) of the 2002 Act: consent could be dispensed with only where the parent could not be found or was incapable of giving consent, or where the welfare of the child required the consent to be dispensed with. The Policy Memorandum which accompanied the Bill explained (para 18):

> "The Bill introduces new grounds for dispensing with parental agreement to the child being placed for adoption. The existing grounds, set out at section 16(2) of the Adoption (Scotland) Act 1978, are considered to be too complicated and difficult to apply. The Bill will introduce simpler grounds based on the parent or guardian not being found or being incapable of giving consent, or the welfare of the child requiring that parental consent is dispensed with. This will make it a more straightforward process and will reinforce the fact that the welfare of the child is the paramount consideration when considering whether to dispense with the need for parental consent."

23. The relevant section was however amended during its passage through the Scottish Parliament, to an extent which compromised the aim of simplicity. The amendments made at Stage 2 permitted the court to dispense with parental consent on the ground that the welfare of the child required it only if, in addition, one of the conditions set out in what became section 31(4) or (5) was also satisfied. At Stage 3 the section was further amended so as to take the form in which it was enacted: that is to say, the power of the court to dispense with consent where the welfare of the child required it was made applicable only where the power based upon section 31(4) and (5) could not be exercised, rather than being an additional condition for the exercise of the latter power. Introducing the Stage 3 amendment, the Minister stated that it widened the grounds on which consent could be dispensed with while still applying an appropriate test that respected the rights of the parents. The amendment, he explained, was designed to reduce the risk that the making of an adoption order would be delayed or would not take place at all because neither of the grounds set out in what are now subsections (4) and (5) quite fitted (*Proceedings of the Scottish Parliament*, 7 December 2006, col 30248).

The interpretation and application of the legislation

24. Returning to section 31 of the 2007 Act, the first point to note is that it is premised on the general need for parents to consent to the making of an adoption order. The default position is that, absent parental consent, an adoption order cannot be made. Section 31(2)(b) however confers a power, exercisable only by a court, to dispense with the consent of a parent on the grounds specified in section 31(3).

25. The next point to note is that those grounds are specified in greater detail than in section 52(1) of the 2002 Act. As I have explained, that section provides only two grounds on which consent may be dispensed with, and the second of those grounds is expressed in general terms:

> "(a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent, or
>
> (b) the welfare of the child requires the consent to be dispensed with."

Section 52(1)(b) of the 2002 Act applies in any situation where section 52(1)(a) does not: in other words, in any situation where the parent's whereabouts are known and she is of full capacity.

26. Section 31(3)(b) of the 2007 Act replicates section 52(1)(a) of the 2002 Act. Section 31(3)(c) then identifies two other specific circumstances, described in detail in subsections (4) and (5), where consent may be dispensed with: namely, where the parent is unable to discharge her parental responsibilities or to exercise her parental rights, and is likely to continue to be unable to do so; and where the parent has, by virtue of a permanence order, no parental rights and responsibilities, and it is unlikely that such responsibilities or rights will be imposed upon, or given to, her.

27. Section 31(3)(d) then repeats the language of section 52(1)(b) of the 2002 Act. In its context, however, section 31(3)(d) has a narrower scope than the similarly worded English provision. It applies only where section 31(4) and (5) do not. It is therefore not, as in England and Wales, the general ground which the court has to consider when dealing with any parent whose whereabouts are known and who is of full capacity. Instead, it is relevant only when the court is dealing with a parent who, in addition to fulfilling those requirements, also falls within neither of the categories defined in section 31(4) and (5).

28. In practice, adoption proceedings will usually be brought without the agreement of a parent in situations where either a permanence order has been made, in which event section 31(5) or section 31(7) will apply, or where parental rights and responsibilities have been suspended by a supervision requirement, in which event a question will arise under section 31(4) as to whether the suspension is likely to be lifted following a review. This practical context reinforces the relatively limited scope of section 31(3)(d), when compared with section 52(1)(b) of the 2002 Act.

29. The provision is nevertheless of practical importance. In particular, it is possible to conceive of cases where a parent may have limited parental responsibilities and rights which he or she is capable of discharging and exercising, and where section 31(4) and (5) will therefore not apply. In *Principal*

Reporter v K [2010] UKSC 56, 2011 SC (UKSC) 91, for example, a parent was granted parental rights and responsibilities only to the extent of becoming a relevant person in the children's referral relating to the child. In *NJDB v JEG* [2012] UKSC 21 a parent continued to have parental rights and responsibilities, notwithstanding the withdrawal of contact with the child. A parent in those situations does not fall within the scope of section 31(4) or (5), but it is nonetheless possible that his or her consent to the making of an adoption order should be dispensed with, where the welfare of the child so requires. Equally, there may be cases where it is difficult for a court to determine whether a parent who is presently unable to discharge parental responsibilities or exercise parental rights will continue to be unable to do so, at least within the maximum period of time during which, in the child's interests, his or her future can reasonably be left in limbo: if, for example, the parent is a drug addict or alcoholic who is undergoing rehabilitation. In such a case, the test imposed by section 31(4) might not be met, but the welfare of the child could nevertheless require that an adoption order should be made. In that situation, section 31(3)(d) provides a basis upon which the court can properly dispense with parental consent.

30. Section 31(3)(d) is a more complex provision than it might appear. In the first place, the word "welfare" has to be read in the context of section 14(3), which applies where a court is coming to a decision relating to the adoption of a child: section 14(1). The decision whether to dispense with parental consent is plainly a decision relating to the adoption of a child. In reaching its decision under section 31(3)(d), therefore, the court must regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration, as required by section 14(3).

31. Secondly, since a decision whether to dispense with parental consent falls within the scope of section 14(1), the court must have regard to the specific matters listed in section 14(4), so far as is reasonably practicable. As I have explained, those matters are (a) the value of a stable family unit in the child's development, (b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity), (c) the child's religious persuasion, racial origin and cultural and linguistic background, and (d) the likely effect on the child, throughout the child's life, of the making of an adoption order.

32. Thirdly, section 31(3)(d) empowers the court to dispense with the parent's consent only if it is satisfied that the welfare of the child "requires" it. The word "requires" imposes a high test. That is so as a matter of ordinary English: to say that something is required means that it is not merely desirable or reasonable, but that it is necessary. That ordinary meaning is appropriate in the context of section 31(3)(d), for several reasons.

33. First, the making of an adoption order against the wishes of a parent is a very serious intervention by the state in family relationships. It follows that the court will not lightly authorize such intervention. It did not require the Convention to teach us that. The point was made in *Axa General Insurance Ltd, Petitioners* [2011] UKSC 46, 2011 SLT 1061, para 153, that legislation has to be construed bearing in mind the societal values which Parliament can be taken to have intended it to embody. As Lord Hoffmann stated in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, the courts presume that even the most general words were intended to be subject to the basic rights of the individual. This point is also reflected in the observations made by this court in *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678, paras 6-7:

> "In this country we take the removal of children from their families extremely seriously … it is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society."

34. It follows that legislation authorizing the severing of family ties between parents and their children will not readily be construed as setting anything less than a test of necessity. Section 31(3)(d), in stipulating that the welfare of the child must "require" that parental consent be dispensed with, is consistent with such a test. There must, in other words, be an overriding requirement that the adoption proceed for the sake of the child's welfare, which remains the paramount consideration. The court must be satisfied that the interference with the rights of the parents is proportionate: in other words, that nothing less than adoption will suffice. If the child's welfare can be equally well secured by a less drastic intervention, then it cannot be said that the child's welfare "requires" that consent to adoption should be dispensed with. That requirement is consistent with section 28(2), which prohibits the court from making an adoption order unless it considers that it would be better for the child that the order be made than not. As the Court of Appeal observed in relation to section 52(1)(b) of the 2002 Act in *In re P (Children) (Adoption: Parental Consent)* [2008] EWCA Civ 535, [2009] PTSR 150 (para 126):

> **"**What is also important to appreciate is the statutory context in which the word 'requires' is here being used, for, like all words, it will take its colour from the particular context. Section 52(1) is concerned with adoption … and what therefore has to be shown is that the child's welfare 'requires' *adoption* as opposed to something short of adoption. A child's circumstances may 'require' statutory intervention, perhaps may even 'require' the indefinite or long-term removal of the child from the family and his or her placement with

> strangers, but that is not to say that the same circumstances will necessarily 'require' that the child be adopted. They may or they may not. The question, at the end of the day, is whether what is 'required' is adoption."

35. Secondly, the 2007 Act was intended to operate in the context of the Convention rights established by the Human Rights Act, and the duty of courts and other public authorities, under section 6 of that Act, not to act in a way which is incompatible with those rights. It must therefore have been intended that section 31(3)(d) of the 2007 Act would be construed and given effect by the courts in a manner which complied with the Convention right of parents to respect for their family life. That intention entails that the word "requires" should be construed in the manner which I have described, since that construction reflects the requirements of the Convention as established in the jurisprudence of the European court. Indeed, the use of the word "requires" in section 52(1)(b) of the 2002 Act, from which it was borrowed for section 31(3)(d) of the 2007 Act, echoes the language used by the European court, as the Court of Appeal explained in *In re P (Children) (Adoption: Parental Consent)* (paras 124-125):

> **"**In assessing what is proportionate, the court has, of course, always to bear in mind that adoption without parental consent is an extreme - indeed the most extreme - interference with family life. Cogent justification must therefore exist if parental consent is to be dispensed with in accordance with section 52(1)(b). Hence the observations of the Strasbourg court in *Johansen v Norway* (1996) 23 EHRR 33 ... That was a case where the court had to consider a permanent placement with a view to adoption. It said, at para 78:
>
> > 'These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests.'
>
> This is the context in which the critical word 'requires' is used in section 52(1)(b). It is a word which was plainly chosen as best conveying, as in our judgment it does, the essence of the Strasbourg jurisprudence. And viewed from that perspective 'requires' does indeed have the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable."

36. The formulation used by the European court at para 78 of its *Johansen v Norway* judgment ("an overriding requirement pertaining to the child's best interests") is one which it has repeated in identical or similar language in subsequent judgments. A recent example is *R and H v United Kingdom* (2011) 54 EHRR 28, concerned with the law of adoption in Northern Ireland.

37. Thirdly, the 2007 Act is also to be construed, as I have explained, in accordance with the presumption that it is not intended to place the United Kingdom in breach of its international obligations. The relevant international obligations include those arising under the Convention. That is therefore a further reason for interpreting the test imposed by section 31(3)(d) as one which calls for an overriding requirement: a test, in other words, of necessity and proportionality. It is also in accordance with international law that the welfare of the child should be the paramount consideration. That appears, for example, from article 21 of the United Nations Convention on the Rights of Child: "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration". It is also reflected in the preamble to the European Convention on the Adoption of Children (Revised, 2008) ("Recognising that the best interests of the child shall be of paramount consideration"). The same principle is also implicit in article 8 of the European Convention on Human Rights, as the European court has made clear on many occasions. In the recent adoption case of *Pontes v Portugal* (Application No 19554/09) (unreported) given 10 April 2012, for example, the court stated (para 94):

> "La Cour le répète avec force, dans les affaires de ce type, l'intérêt de l'enfant doit passer avant toute autre considération."

Compatibility with the Convention rights

38. It is necessary next to consider whether, so construed on the basis of ordinary principles of statutory interpretation, section 31(3)(d) of the 2007 Act is incompatible with the Convention rights. That assessment calls for an examination of the relevant case law both of domestic courts and of the European court.

39. The requirements of the Convention in relation to dispensing with parental consent to the making of an adoption order were fully considered by the Court of Appeal, in relation to section 52(1)(b) of the 2002 Act, in *In re P (Children) (Adoption: Parental Consent)*. The judgment of the court was extensively cited by the Lord President when delivering the opinion of the Inner House in the present case, and I shall follow his example: it is a judgment which merits such citation. The court stated (paras 119-123):

"**119** Plainly article 8 is engaged; and it is elementary that, if article 8 is not to be breached, any … adoption order made without parental consent in accordance with section 52(1)(b) of the 2002 Act, must be proportionate to the legitimate aim of protecting the welfare and interests of the child. As Hale LJ said in *In re C and B (Care Order: Future Harm)* [2001] 1 FLR 611, para 33:

> 'under article 8 of the Convention both the children and the parents have the right to respect for their family and private life. If the state is to interfere with that there are three requirements: first, that it be in accordance with the law; secondly, that it be for a legitimate aim (in this case the protection of the welfare and interests of the children); and thirdly, that it be "necessary in a democratic society".'

120 'Necessary' takes its colour from the context but in the Strasbourg jurisprudence has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand. It implies the existence of what the Strasbourg jurisprudence calls a 'pressing social need.' Hale LJ continued, at para 34:

> 'There is a long line of European Court of Human Rights jurisprudence on that third requirement, which emphasises that the intervention has to be proportionate to the legitimate aim. Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child.'

121 She reiterated that in *In re O (Supervision Order)* [2001] 1 FLR 923 , adding, at para 28, that 'Proportionality, therefore, is the key'…

122 To the same effect is the judgment of Thorpe LJ in *In re B (Care: Interference with Family Life)* [2003] 2 FLR 813, para 34:

> ‘where the application is for a care order empowering the local authority to remove a child or children from the family, the judge in modern times may not make such an order without considering the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 article 8 rights of the adult members of the family and of the children of the family. Accordingly he must not sanction such an interference with family life unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children.’

> **123** That last observation reflects the well established principle … that, particularly in the context of public law proceedings, the court should adopt the ‘least interventionist’ approach. As Hale J said in *In re O (Care or Supervision Order)* [1996] 2 FLR 755, 760:

> > ‘the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary.’”

40. More recently, the European court has itself considered the compatibility with article 8 of a decision to dispense with parental consent, taken under section 52(1)(b) of the 2002 Act. In *YC v United Kingdom* (Application No 4547/10) (unreported) given 13 March 2012, the court collated at para 134 a number of different ways in which, in its previous judgments, it had sought to explain the requirements of necessity and proportionality in relation to adoption orders made against the wishes of the parents:

> “The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount (see *Johansen v. Norway* (1996) 23 EHRR 33, para 78; *Kearns v. France* (2008) 50 EHRR 33, para 79; and *R and H v United Kingdom* (2011) 54 EHRR 28, paras 73 and 81). In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment (see *Neulinger v Switzerland* (2010)

> 54 EHRR 1087, para 136; and *R and H,* cited above, paras 73-74). It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family (see *Neulinger,* cited above, para 136; and *R and H,* cited above, para 73). It is not enough to show that a child could be placed in a more beneficial environment for his upbringing (see *K and T v Finland* (2001) 36 EHRR 18, para 173; and *TS and DS v United Kingdom* (Application No 61540/09) (unreported) given 19 January 2010). However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained (see *Neulinger,* cited above, para 136; and *R and H,* cited above, para 73)."

41. In its *YC* judgment, the European court attached particular significance to the list of factors to which courts and adoption agencies must have regard when exercising their powers under section 52(1)(b) of the 2002 Act, as set out in section 1(4) of the Act. In that regard, the court stated (para 135):

> "The identification of the child's best interests and the assessment of the overall proportionality of any given measure will require courts to weigh a number of factors in the balance. The court has not previously set out an exhaustive list of such factors, which may vary depending on the circumstances of the case in question. However, it observes that the considerations listed in section 1 of the 2002 Act … broadly reflect the various elements inherent in assessing the necessity under article 8 of a measure placing a child for adoption. In particular, it considers that in seeking to identify the best interests of a child and in assessing the necessity of any proposed measure in the context of placement proceedings, the domestic court must demonstrate that it has had regard to, *inter alia*, the age, maturity and ascertained wishes of the child, the likely effect on the child of ceasing to be a member of his original family and the relationship the child has with relatives."

42. The decision with which the case of *YC* was concerned, taken in accordance with section 52(1)(b) of the 2002 Act, was held to be compatible with article 8.

43. Decisions taken in accordance with section 31(3)(d) of the 2007 Act, construed and applied as I have explained, should be no less compatible. Such decisions have a legitimate aim, namely to protect the welfare of children. If the provision is interpreted in the manner I have explained, such decisions also meet the requirements of necessity and proportionality. They will be made only where

the court is satisfied that there is an overriding requirement that the adoption should proceed, for the sake of the child's welfare, and that nothing less than adoption will suffice. In considering the child's welfare, and in assessing the overall proportionality of an order under section 31(3)(d), the court will apply section 14(2) and (3), and will have regard in particular to the matters listed in section 14(4). Two of those matters correspond to factors which are listed in section 1(4) of the 2002 Act and were mentioned by the European court: the age, maturity and ascertained wishes of the child are covered by section 14(4)(b), and the likely effect on the child of ceasing to be a member of his original family is covered by section 14(4)(d). One would equally expect a court exercising powers under section 31(3)(d) of the 2007 Act to take into account the remaining matter mentioned by the European court, namely the relationship the child has with relatives, since that is one of the circumstances of the case, and it is plainly relevant to the likely effect on the child of the making of an adoption order. It is therefore a matter which falls within the ambit of section 14(2) and (4)(d).

44. Emphasis was placed by counsel for the appellant upon the European court's statement that family ties may only be severed in very exceptional circumstances. That is not a legal test, but an observation about the rarity of the circumstances in which the compulsory severing of family ties will be in accordance with article 8. The Scottish population statistics for 2010 indicate that there were then 911,794 children aged under 16 (General Register Office for Scotland, *Mid-2010 Population Estimates Scotland*). Information provided to the court by the Scottish Executive indicates that 406 adoption orders were made that year. There are no statistics available for the number of cases where a court made an order dispensing with parental consent. Such cases might include a number where the parent in question had died or was incapable of giving consent. They would also include an appreciable number where the parent could not be found: where, for example, a child who had lost all contact with one biological parent was adopted by a step-parent. Most of the cases where parental consent was dispensed with under section 31(3)(c) or (d) are likely to have been amongst the cases where children were adopted from care, which totalled 218 in 2009/10. Even if parental consent had been dispensed with in all 218 cases, the number would amount to 0.02% of children: in other words, one child in 5000. In reality, the number can be expected to have been lower than that. It appears therefore that orders dispensing with consent to the making of an adoption order, against the wishes of a parent, are indeed made only in exceptional circumstances.

45. It remains to consider the contention that an order made under section 31(3)(d) is not "in accordance with the law", within the meaning of article 8(2), because the provision is so imprecisely expressed that it lacks legal certainty.

46. This contention must be rejected. It is important to recognize at the outset that the meaning of statutory language involves more than simply the bare words

of the provision in question. In the first place, the language used in section 31(3)(d) has to be interpreted in the light of its statutory context. Section 14, in particular, clarifies the meaning of the word "welfare" as used in section 31(3)(d). It indicates the matters to which the court must in particular have regard when applying section 31(3)(d), and the consideration which the court must treat as paramount. Section 28(2) further clarifies the circumstances in which an adoption order may be made. The wider context of the legislation, including the duty of courts and other public authorities to act compatibly with Convention rights under the Human Rights Act, is a further aid to its interpretation, as I have explained. Furthermore, section 31(3)(d) must be construed, like all other legislation in this country, in accordance with well-established principles of statutory interpretation. I have discussed the relevant principles, including the presumption that legislation is not intended to conflict with the values of our society, including respect for basic individual rights, or with the United Kingdom's international obligations. The application of those principles makes it plain, if there were otherwise any doubt about the matter, that the word "requires" in section 31(3)(d) is to be understood as meaning that there must be an overriding requirement, for the sake of the child's welfare over his or her lifetime, that the consent of the parent be dispensed with, and that the child's welfare requires nothing less than the making of an adoption order: a test, in other words, of necessity.

47. All that said, section 31(3)(d) leaves much to the judgment of the sheriff hearing the individual case. He is not as tightly constrained, in his appreciation of the circumstances of the case, as a court may be in some other contexts where legislation has been drafted with greater specificity. That however reflects the nature of the subject-matter of the provision. It is impossible to spell out exhaustively the particular circumstances in which an order dispensing with parental consent may be necessary. A number of specific circumstances are described in section 31(3)(a) and (b), and in subsections (4) and (5). Section 31(3)(d) is intended to confer a residual power which can be used in such other circumstances as may arise: it is, in effect, a safety net. It is unrealistic to expect that a provision of that nature will spell out the precise circumstances in which it may appropriately be employed.

48. The use of general language in such a context is not inconsistent with the Convention rights. The approach adopted by the European court is illustrated by the case of *Kuijper v Netherlands* (2005) 41 EHRR SE 266, which concerned the adoption of a child against the wishes of one of her parents. One of the complaints made was that the adoption was not in accordance with the law, as the relevant legislation was lacking in legal certainty. In rejecting the complaint, the court stated at page 277:

> "As regards the applicant's argument that the Arts 1:228 and 3.13 of the Civil Code and their application in practice fell short of the

> requirement of foreseeability, the Court considers that it is a logical consequence of the principle that laws must be of general application that the wording of statutory provisions is not always precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. However clearly drafted a legal provision may be, its application in practice involves an inevitable element of judicial interpretation and assessment of facts, which do not by itself make a legal provision unforeseeable in its application. On many occasions and in very different spheres the Court has held that it is in the first place for the national authorities, and in particular the courts, to construe and apply the domestic law (see, for example, *Winterwerp v Netherlands* (1979) 2 EHRR 387 at [46]; *Iglesias Gil v Spain* (2003) 40 EHRR 3 at [61]; and *Slivenko v Latvia*: (2003) 39 EHRR 24 at [105]).
>
> Accordingly, an issue of foreseeability could only arise under the Convention if the national courts' assessment of the facts or domestic law was manifestly unreasonable or arbitrary."

49. Applying that approach in the context of section 31(3)(d) of the 2007 Act, I have explained why that provision is inevitably couched in terms which are to some extent imprecise. Interpreted and applied in the manner which I have explained, however, it is not unforeseeable in its application. An issue of foreseeability should not therefore arise, provided the court interprets the provision correctly and bases its decision upon a reasonable assessment of the facts.

The procedure in the present case

50. I have not yet said anything about the circumstances of the present case, as they have no bearing on the issue of law which the court has to decide. It would not however be appropriate to part with this case without making some observations about the procedure followed. I should emphasise at the outset that my observations are not intended to be critical of the sheriff who heard the case. It is clear that in making the reference he acted in the manner which he thought was likely to minimize delay. It also appears from the reference that he received no encouragement from the parties, other than the Lord Advocate, to adopt a different course. With the benefit of hindsight, however, it is apparent that there are lessons to be learned from this case about how devolution issues should be handled when they arise in the course of proceedings of this kind. More generally, considering this appeal soon after the case of *NJDB v JEG* [2012] UKSC 21, where this court was critical of the procedure followed in a dispute over contact, it is difficult to

avoid the impression that further efforts require to be made to encourage active and firm judicial case management of family proceedings in the Sheriff Court.

51. These adoption proceedings began in November 2009, when the child was 2 years old. He is now 5 years old, and the proceedings have not yet reached their conclusion. That is a very unfortunate state of affairs. He has been living with the respondents throughout that period. His mother, the appellant, has had no contact with him, and has been unable to fulfil the role of his mother. Equally, unless and until the proceedings are concluded in their favour, the respondents have to hold back from treating him fully as their son: he is not their child, and they do not know whether he ever will be. He has only one childhood, and it is rapidly passing. The appellant and the respondents have only one opportunity to fulfil the role of parents towards this child during his childhood. The delay can only be causing anguish to all the individuals involved.

52. The damaging consequences of delay in the determination of adoption proceedings have long been well-known. The longer the proceedings unfold, the stronger the attachments which the child is likely to form with the prospective adopters, and they with the child. The child may identify wholly with the new family. It may be profoundly damaging to the child if the court does not endorse that new identity. The protracted uncertainty may itself be damaging and distressing. In the interests of the welfare of the child, and out of common humanity towards all the individuals involved, it is imperative that unnecessary delay should be avoided. The duty to avoid undue delay in the determination of disputes of this nature, in order to comply with the obligations imposed by article 8, has also been made clear many times by the European court. As is obvious, undue delay in the determination of adoption proceedings may have irreversible effects upon the child, and may in any event bring about the de facto determination of the issue. Parliament recognized, in section 25A of the 1978 Act, the need to avoid delay in particular when it is sought to dispense with parental consent to the making of an adoption order: the court was required under that provision, "with a view to determining the question without delay", to draw up a timetable for the proceedings and to give directions designed to ensure that the timetable was adhered to. There is no equivalent provision in the 2007 Act, but the importance of avoiding delay is instead reflected, as I shall explain, in Practice Notes and rules of court.

53. The importance of avoiding delay was one of the points emphasised by the Adoption Policy Review Group in their Phase II Report. They stated in particular that it was essential that as little time as possible should elapse between a formal decision by an adoption agency that a child should be adopted, and the decision of the court to grant or refuse the application for an adoption order (para 7.4). One of their consequent recommendations was that all sheriffdoms should have a Practice Note with guidance for sheriffs and practitioners (para 7.2). That recommendation

resulted in the promulgation of Practice Notes on the application of the 2007 Act, designed to ensure that proceedings under the Act were conducted expeditiously. In relation to proceedings in the Court of Session, the provisions of chapter 67 of the Rules of Court have a similar objective.

54. Since the present case has been dealt with at Dumbarton Sheriff Court, the applicable Practice Note is that issued by the Sheriff Principal of North Strathclyde (*Practice Note No 1, 2009: Adoption and Children (Scotland)Act 2007: Guidance for Sheriffs and Practitioners*). It states at para 3:

> *"Minimum of delay*
>
> 3. It shall be the duty of the court to secure that all applications and other proceedings under the Act are dealt with as expeditiously as possible and with the minimum of delay. Such applications and proceedings require the co-operation of all concerned and active and firm case management by the sheriff throughout their course."

55. In the present case, as I have said, the adoption petition was lodged in November 2009. A proof was held during September and October 2010. Fourteen days of evidence were led. I would observe in passing that it is difficult to understand why fourteen days of evidence should have been necessary, if the guidance given in the Practice Note was followed. That guidance includes, for example, the following:

> "20. … The parties should therefore apply their minds to the question whether any evidence might be appropriately presented in the form of an affidavit or other document and the sheriff should encourage them to decide that question at the pre-proof hearing. The sheriff should also encourage the use of affidavits to cover non-contentious (or indeed contentious) issues where that would save the time of witnesses and the court. …
>
> 21. Where the author of a report or the maker of a statement which has been or is to be lodged is to be called as a witness, the sheriff may order that the report or statement is to be held to be equivalent to the witness's examination-in-chief, unless for special reasons he or she otherwise directs.

> 22. The sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the sheriff should encourage the joint instruction of a single expert by all parties. …
>
> …
>
> 24. At a proof it should be borne in mind that 'there is a heavy responsibility on the parties' representatives to exercise all reasonable economy and restraint in the presentation of the evidence and in their submissions to the court' (*Lothian Regional Council v A* 1992 SLT 858 at 862B). The sheriff may therefore exercise his or her existing common law power to intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision."

56. That guidance is particularly important in cases where it is sought to dispense with parental consent under section 31(3)(c) or (d). In such cases, courts may be presented with voluminous social work notes, with allegations of alleged failures by the birth parents going back over several years, and with competing assessments of their future prospects. There may also be expert evidence. In the absence of firm judicial control, following the guidance in the Practice Note, there may be very extensive examination and cross-examination. The consequence is likely to be protracted proceedings focused primarily upon the past history of the parents rather than the future of the child.

57. Following the fourteen days of evidence, in November 2010 the sheriff began to hear the submissions of the parties' representatives. According to the agreed chronology, counsel for the appellant intimated her intention to raise a devolution issue on the third day of submissions (a period of time which again seems surprisingly long, particularly bearing in mind the encouragement given in the Practice Note, at para 25, to the advance submission of draft findings in fact and skeleton arguments). A minute setting out the devolution issue was lodged three days later. The sheriff allowed it to be received, and referred the issue to the Inner House. We are informed that he did so without having completed the hearing of parties' submissions on the evidence led at the proof, and without making any findings on the evidence or reaching any decision. It is common ground that, once the reference has been determined, the case will have to return to the sheriff. He will then have to receive further evidence – albeit perhaps very limited - on developments since 2010, hear the parties' submissions, and issue his judgment. It is impossible to predict when the question of the child's possible adoption will be finally determined.

58. If a devolution issue was to be raised as to the compatibility of section 31(3)(d) of the 2007 Act with the Convention rights, that should have been done far earlier than it was. The relevant procedure is governed by the Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) 1999 (SI 1999/1347). Article 4 provides:

> "It shall not be competent for a party to any proceedings to raise a devolution issue after proof is commenced, unless the sheriff, on cause shown, otherwise determines."

59. It is also relevant to note what is stated in the Practice Note at para 19:

> *"Legal issues*
>
> At a pre-proof hearing the sheriff should ask the parties if there are any questions of admissibility of evidence or any other legal issues, including any questions under the European Convention on Human Rights, that are likely to arise at the proof. If so, the sheriff should consider whether they could with advantage be determined at this hearing rather than at the proof. Alternatively, the sheriff may adjourn the pre-proof hearing to another date in order to enable any such issue to be argued and determined. If a legal issue is not raised at the pre-proof hearing, the sheriff may refuse to allow it to be raised at the proof except on cause shown."

60. The issue not having been raised at the proper time, the sheriff was under no obligation to allow it to be raised on the seventeenth day of the proof. It is not apparent from the terms of his reference whether he understood that cause had to be shown for permitting the issue to be raised late, or gave any consideration to the question whether such cause had in fact been shown. The reference appears to proceed on the basis that the devolution issue having been raised, it had to be determined, and that the only procedural question which the sheriff had to decide was whether he should refer the issue to the Inner House or determine it himself.

61. Given the stage at which the issue was raised, and having regard to the Act of Sederunt and to the guidance given in the Practice Note, notably in paragraphs 3 and 19, the sheriff could appropriately have refused to allow the issue to be raised: indeed, it is difficult to see how he could appropriately have done otherwise, given the nature of the proceedings and the stage which they had reached. He would then have allowed parties to complete their submissions, and would have issued his determination. He might then have refused the application, or granted it on the

basis that parental consent could be dispensed with under section 31(3)(c) of the 2007 Act. In either event the issue sought to be raised would have become academic. If alternatively he had granted the application on the basis that consent could be dispensed with under section 31(3)(d), the appellant might then have sought to raise the devolution issue on appeal. She might not have been permitted to do so. If however she had been, and if (contrary to what in fact occurred) she had succeeded in persuading the appellate court that section 31(3)(d) was not law, then the sheriff's decision would have been quashed. One way or another, the application would in all likelihood have been determined by now.

62. Having however allowed the devolution issue to be raised, the sheriff could then have determined it himself. If he was minded to refer it to the Inner House, he could have asked to be addressed on it before deciding whether it raised a point of real substance which merited a reference. If he had done so, I find it difficult to imagine that a reference would have been made. The minute raising the devolution issue was based on the proposition that welfare was not a Convention-compliant ground for dispensing with parental consent to adoption, since it was vague and did not call for exceptional circumstances. No significance was attached to the word "requires", in section 31(3)(d), or to the provisions of sections 14 and 28. No mention was made in the minute of the duty of courts to act compatibly with Convention rights under section 6 of the Human Rights Act, or of the interpretative duty arising (if need be) under section 3 of that Act. The submissions lodged by the Lord Advocate in response to the minute referred (among other authorities) to the judgment of the Court of Appeal in *In re P (Children) (Adoption: Parental Consent)* [2008] EWCA Civ 535, [2009] PTSR 150, in which the relevant issues were fully addressed. It is difficult to believe that, if the contentions advanced in the minute had been tested, they could have survived scrutiny.

LORD HOPE

63. I agree, for all the reasons that Lord Reed gives, that the appeal should be dismissed. I am grateful too to Lord Carnwath for his helpful comments on the use of judgments of the Strasbourg court.

64. It is disappointing to find, despite repeated directions in rules of court and practice notes that adoption proceedings are to be conducted as expeditiously as possible, there are still cases in which this fundamental principle is not being applied in practice. It needs to be stressed that the responsibility for conducting the proceedings as expeditiously as possible rests on the parties' representatives as well as on the sheriff or the presiding judge. Effective case management is not a process that can be conducted in a vacuum. It is the duty of the court to manage cases of this kind actively from the outset, by encouraging the taking of steps that

will minimise delay and by giving directions as to how the proceedings are to be conducted. But it is the duty of the parties too, and their legal advisers, to do everything they can to help the court to secure its objective. Not sitting back and waiting for the other party to act, co-operating with each other where possible, giving positive assistance in the setting of timetables and limiting the opportunity for delay both between each stage in the process and during the hearings themselves are just some examples of steps that they may take to assist the court.

65. I would like therefore to add my own strong endorsement of the point that Lord Reed makes in para 50 of his judgment that this case indicates that further efforts require to be made to strengthen the practice of case management of family proceedings in the Sheriff Court. While the primary responsibility rests, of course, on the judiciary, practitioners too at all levels should be brought into this process. Experience has shown that it is not enough to make rules and to give directions. Advice and training as to how they should be implemented may be just as important if they are to be applied effectively.

LORD CARNWATH (WITH WHOM LORD WILSON AGREES)

66. I agree that the appeal should be dismissed for the reasons given by Lord Reed. I only wish to add a short comment on the use made in argument of authorities from the European Court of Human Rights.

67. We were referred to numerous cases dating back over more than twenty years, dealing with the rights of children and parents in similar contexts. They offer slightly different formulations and different shades of emphasis. Many of the cases contain summaries of the previous case-law, but again there are differences in the way they are presented. In general little help is likely to be gained by detailed comparative or historical analysis. In the present case, as Lord Reed has shown, the relevant Strasbourg principles are readily apparent from the most recent cases, and the leading UK authorities, as cited in his judgment.

68. The risks are well illustrated by reference to the judgment on which Lord Davidson principally relied, *Neulinger and Shuruk v Switzerland* (2011) 54 EHRR 1087. The critical passage reads as follows:

> "134. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington*, cited above, § 62), bearing in mind, however, that

the child's best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, Application No. 40031/98, § 59, ECHR 2000 IX), as is indeed apparent from the Preamble to the Hague Convention, which provides that 'the interests of children are of paramount importance in matters relating to their custody'. The child's best interests may, depending on their nature and seriousness, override those of the parents (see *Sahin v Germany* [GC], Application No. 30943/96, § 66, ECHR 2003 VIII). The parents' interests, especially in having regular contact with their child, nevertheless remain a factor when balancing the various interests at stake (ibid, and see also *Haase v. Germany*, Application No. 11057/02, § 89, ECHR 2004 III (extracts), or *Kutzner v. Germany*, Application No. 46544/99, § 58, ECHR 2002 I, with the numerous authorities cited).

135. The court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see the numerous references in paragraphs 49-56 above, and in particular Article 24 § (2) of the European Union's Charter of Fundamental Rights). As indicated, for example, in the Charter, "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

136. The child's interest comprises two limbs. On the one hand, it *dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit*. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family (see *Gnahoré*, cited above, § 59). On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and *a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development* (see, among many other authorities, *Elsholz v Germany* [GC], Application No. 25735/94, § 50, ECHR 2000 VIII, and *Maršálek v the Czech Republic*, Application No. 8153/04, § 71, 4 April 2006)." (emphasis added)

69. The essence of Lord Davidson's argument was that the Scottish statute did not properly incorporate the tests laid down in that judgment, particularly the "two limbs" described in the two italicised passages in paragraph 136. With the

assistance of his Junior, Miss Maria Clarke, he proposed two alternative versions of sub-section (3)(d) of section 31 designed to remedy that deficiency.

70. The statutory version (see Lord Reed para 6) reads:

> "(d) that, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with."

The proposed alternatives were:

> "(d) that… neither of those subsections applies and..., notwithstanding the non application of (4) and (5), the parent is particularly unfit or harm will result to the child's health and development by the exercise of parental responsibilities or parental rights in relation to the child.
>
> or
>
> (d) that… neither (4) nor (5) applies but the parent is particularly unfit or would cause harm to the child in the event of residence or contact. "

The only significant difference appears to be in the relative of simplicity of the latter. As I understand it, both suggested drafts are designed to bring the "precision" said to be lacking in the statute (see Lord Reed para 45ff). The wording reflects the apparently mandatory and exclusive character implied by the word "dictates".

71. I cannot accept this approach. For the reasons given by Lord Reed the search for undue precision in this area of the law is inappropriate, as indeed recognised by the European court (Lord Reed para 48). In this case, it also gives unjustified weight to the detailed drafting of the passage in question.

72. This can be illustrated by reference to the preceding paragraphs, dealing with the primacy of the interests of the child. Thus, paragraph 134 begins by asserting that "the child's best interests must be the primary consideration", which proposition is equated with the words of the Hague Convention ("the interests of the children are of paramount importance in matters relating to their custody"). However, this is followed by a statement that "the child's best interests may,

depending on their nature and seriousness, override those of the parents…" There is an apparent difference of emphasis between saying that the child's interests are of "paramount importance", and saying that they merely "may, depending on their nature and seriousness" override those of the parents.

73. The authority referred to for the latter proposition is *Sahin v Germany* (2003) 36 EHRR 43, a case decided in October 2001. The particular paragraph (42) is in the following terms:

> "The Court further recalls that a fair balance must be struck between the interests of the child and those of the parent and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular the parent cannot be entitled under article 8 of the Convention to have such measures taken as would harm the child's health and development."

The context was that the finding of a violation of the father's rights when he was refused contact, principally because of the profound dislike of him developed by the mother, and without anyone seeking the views of the child. In that context one can understand why the legal test was put as it was, but it may not fit readily into the analysis in *Neulinger*.

74. For the purposes of the present case it is unnecessary to go further into that debate. As Lord Reed has shown (para 37), the most recent Strasbourg cases leave no material room for ambiguity. Thus, *R (H) v UK* (2011) 54 EHRR 2 (a decision given in May 2011) confirms that "in all decisions concerning children their best interests must be paramount"; or in *Pontes v Portugal* (10th April 2012, cited by Lord Reed) the interest of the child "doit passer avant tout autre consideration".

75. Similarly, the apparently mandatory nature of the paragraph 136 tests is not supported by comparison with more recent authority. In *YC v UK*, (13 March 2012, cited by Lord Reed at para 40), the same two factors are referred to citing *Neulinger*, but they are described no longer as "tests dictated" but as "considerations to be borne in mind". Yet again, in *Uyanik v Turquie* (Application No. 60328/09, decision 3 May 2012 para 52) the various aspects ("les intérêts concurrent en jeu") are brought together, again citing *Neulinger*, but leaving no doubt as to their relative weight:

> "l'intérêt supérieur de l'enfant devant toutefois constituer la consideration déterminante… Cela étant, l'intérêt des parents,

> notamment à bénéficier d'un contact régulier avec l'enfant, reste un facteur dans la balance des différents intérêts en jeu."

76. I cite these various examples not by way of criticism of the Strasbourg Court. Such variations are unsurprising bearing in mind that the judgments may be given by different chambers of the Strasbourg Court. Their primary task is to outline the main principles and apply them to the facts of the case before them, not to establish any new proposition of law, or even to offer authoritative restatement of existing law. There are many decisions of the Court of Appeal in England or the Court of Sessions in Scotland, of which the same could be said. *Neulinger*, unlike the others, was a Grand Chamber decision and to that extent would normally be treated as having greater authority. However, the passages relied on were largely designed to summarise earlier authority, and on examination, and in the light of their treatment in later cases, cannot bear the formulaic significance attributed to them by the appellant's submissions.