THE CHRISTIAN INSTITUTE
CHRISTIAN INFLUENCE IN A SECULAR WORLD

The Christian Institute and others (Appellants) *v* The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51

Summary of judgment

The United Kingdom Supreme Court has found the information-sharing provisions in Part 4 of the Children and Young People (Scotland) Act 2014 to be incompatible with the right to a private and family life and therefore "not within the legislative competence of the Scottish Parliament."[1] The judgment was unanimous.

The Court acknowledged *"that the sharing of personal data between relevant public authorities is **central** to the role of the named person"*.[2] (emphasis added)

The Court struck down the information-sharing provisions because there was no way to interpret the legislation to make it compatible with human rights. It is now up to the Scottish Government Ministers to decide if they want to try to pass new, much more limited, Named Person legislation which is human rights compatible and which addresses the "lack of safeguards" identified by the Court.

Basis of judgment

Part 4 of the 2014 Act sets out the terms on which personal data about children, young people and their families may be shared between named persons and relevant public authorities.

The Court noted that terms of the information-sharing provisions *"indicate an intention that the range of information to be shared will depend on the exercise of judgement by the information holder, and is potentially very wide".*[3]

The Court noted that the functions of the named person amount to promoting the "wellbeing" of the child or young person but that "wellbeing" is not defined in the 2014 Act. Instead, the legislation lists eight factors to which regard is to be had when assessing wellbeing. The factors, known under the acronym SHANARRI, are that the child or young person is: "safe, healthy, achieving, nurtured, active, respected, responsible, and included". The Court noted that these factors *"are not themselves defined, and in some cases are notably vague"*.[4] Given the SHANARRI indicators, the judges highlighted the *"very broad*

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[1] Para 106 of judgment
[2] Para 78
[3] Para 16
[4] Para 16

criteria which could trigger the sharing of information by a wide range of public bodies and also the initiation of intrusive enquiries into a child's wellbeing".[5]

The judges refer to the "logical puzzle" of seeking to read the information-sharing provisions in the 2014 Act against the higher threshold requirements of the Data Protection Act 1998. They say the powers and duties set out in the information-sharing provisions of the 2014 Act "cannot be taken at face value".

The Court considered the terms of the Named Person legislation in the light of the right to a private and family life in article 8 of the European Convention on Human Rights. Stressing the importance of article 8, the Court asserted:

> *"There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies…Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people.* ***The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way****."*[6] (emphasis added)

After in depth analysis of the information-sharing provisions of Part 4 of the Act, the Court concluded that those provisions:

- *"are incompatible with the rights of children, young persons and parents under article 8 of the European Convention on Human Rights because they are not "in accordance with the law" as that article requires"; and*
- *"may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents, through the sharing of private information"*[7]

As well as finding that the information-sharing provisions of the legislation are "not law", the Supreme Court considered the wider functions of the named person i.e. giving children or parents advice or helping them access a service. The Court said the these functions do not necessarily involve a breach of the right to a private and family life, but cautioned:

> *"there must be a risk that, in an individual case, parents will be given the impression that they must accept the advice or services which they are offered, especially in pursuance of a child's plan for targeted intervention under Part 5; and further, that their failure to co-operate with such a plan will be taken to be evidence of a risk of harm. An assertion of such compulsion, whether express or implied, and an*

[5] Para 72
[6] Para 73
[7] Para 106

assessment of non-cooperation as evidence of such a risk could well amount to an interference with the right to respect for family life which would require justification under article 8(2). Given the very wide scope of the concept of "wellbeing" and the SHANARRI factors, this might be difficult."[8]

If the Scottish Government does wish to bring forward new legislation and legally binding guidance to remedy the serious defects in the 2014 Act, this *"also provides an opportunity to minimise the risk of disproportionate interferences with the article 8 rights of children, young persons and parents"* more widely.[9]

Implications

1. It remains to be seen whether the Scottish Government will bring new legislation before the Parliament. But the existing scheme cannot go ahead. It is doubtful that any new legislation can deliver a named person scheme along the lines originally envisaged by the Scottish Government, given the "central" role of the information-sharing provisions to the scheme that have been struck down.

2. The Court's ruling has underlined the importance of family privacy. It has been known for some time that health and education professionals in Scotland have been sharing personal data, with scant regard for the privacy of parents and children, in the belief that the relevant part of the Children and Young People (Scotland) Act 2014 *would* be brought into force on 31 August 2016.

   Now that the data sharing provisions have been found to be incompatible with the right to a private and family life, many parents will want to know whether their family's data has been processed unlawfully. They should make Subject Access Requests to ascertain how their data has been processed. It is possible that this will lead to further litigation.

3. In Scotland and the rest of the UK public bodies – including schools, councils and health services – will want to reassess whether they are disproportionately, or without lawful basis, facilitating the flow of personal data.

4. As well as curbing intrusion by public authorities into family life, the stress in the judgment on the autonomy and diversity of the family should constrain politicians in the future when they are considering legislation affecting the family.

5. The emphasis in the judgment on the protection of the family as the central unit of society and the child not being a "mere creature of the state" is a reminder of how Christian teaching about parents and children has influenced our legal freedoms.

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[8] Para 95

[9] Para 107