All England Reporter/2016/July/*The Christian Institute and others v The Lord Advocate - [2016] All ER (D) 156 (Jul)

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*The Christian Institute and others v The Lord Advocate

[2016] UKSC 51

Supreme Court

Lady Hale DP, Lord Wilson, Lord Reed, Lord Hughes and Lord Hodge SCJJ

28 July 2016

Human rights – Right to respect for private and family life – Four charities challenging legislation relating to information sharing on children and young people designed to promote childrens' wellbeing – Whether information sharing provisions being disproportionate interference with children's right to private and family life – European Convention on Human Rights, art 8.

Children and young persons – Sharing of information – Arrangements to safeguard and promote welfare – Four charities challenging legislation relating to information sharing on children and young people designed to promote children's wellbeing – Whether information-sharing provisions within legislative competence of Scottish Parliament – Children and Young People (Scotland) Act 2014, 23, 26, 27.

Data protection – Processing of information – Personal data – Four charities challenging legislation relation to information sharing on children and young people designed to enable promote children's' wellbeing – Whether information-sharing provisions within legislative competence of Scottish Parliament – Children and Young People (Scotland) Act 2014 ss 23, 26, 27.

Abstract

Human rights – Right to respect for private and family life. The Supreme Court held that the information-sharing provisions of Pt 4 of the Children and Young People (Scotland) Act 2014 were not within the legislative competence of the Scottish Parliament owing to the fact that in practice they might result in a disproportionate interference with the rights of many children, young persons and their parents, under art 8 of the European Convention on Human Rights through the sharing of private information.

Digest

The judgment is available at: [2016] UKSC 51

Sections 23, 26 and 27 of the Children and Young People (Scotland) Act 2014 (the 2014 Act) were under Pt

4 of the 2014 Act and altered the existing law in relation to the sharing of information about children and young people. The alteration was so as to enable information about concerns about their wellbeing held by individual bodies to be pooled in the hands of named persons and shared with other bodies, with the ultimate aim of promoting the children's wellbeing by the compulsory appointment of a named person. The 2014 Act was supplemented by revised statutory guidance (the RDSG), which was still in draft. Section 29(1) of the Scotland Act 1998 (the Scotland Act) provided that an Act of the Scottish Parliament was not law so far as any provision of the Act was outside its legislative competence. In terms of s 29(2), a provision was outside its competence if under para (b) the provision 'related to reserved matters' or under para (d) if the provision 'is incompatible with any of the Convention rights or with EU law'. The appellants were four registered charities with an interest in family matters. They challenged the lawfulness of the data sharing and retention provisions in Pt 4 of the 2014 Act on the ground that they related to 'reserved matters' in s 29(2)(b) of the Scotland Act. Under s 29(3) of the Scotland Act, the question whether a provision related to a reserved matter was to be determined 'by reference to the purpose of the provision, having regard to its effect in all the circumstances'. 'Reserved matters' were defined. Amongst the matters listed in the definition were data protection under the Data Protection Act 1998 (DPA), and Council Directive (EC) 95/46 (protection of individuals with regard to the processing of personal data and on the free movement of such data). The Directive was designed to harmonise the laws of the member states relating to the protection of individuals' interests in relation to the use of their personal data. The DPA was designed to implement the Directive. The DPA envisaged in s 35(1), read with s 70(1), that the disclosure of personal data might be required by an enactment comprised in an Act of the Scottish Parliament. Whether a provision 'relates to' a reserved matter was determined by reference to the purpose of the provision in question. That purpose was to be ascertained having regard to the effect of the provision, amongst other relevant matters. The appellants' challenges were dismissed in both the Outer House and the Inner House of the Court of Session. They appealed to the Supreme Court.

The main issues were: (i) whether any of the provisions of the 2014 Act related to the subject-matter of the DPA and the Directive; (ii) whether the compulsory appointment of a named person was a breach of the rights of parents of children under art 8 of the European Convention on Human Rights. In relation to issue (ii) four issues arose: (a) what were the interests which art 8 of protected in the context, (b) whether, and in what respects, the operation of the 2014 Act interfered with the art 8 rights of parents or of children and young people, (c) whether that interference was in accordance with the law, having regard to the 2014 Act and the RDSG and (d) whether that interference was proportionate, having regard to the legitimate aim pursued.

The appeal would be allowed.

(1) Having regard to established law, the provisions of Pt 4 did not relate to the subject-matter of the DPA and the Directive. The fact that a provision of an Act of the Scottish Parliament required or authorised the disclosure of personal data had not itself meant that the provision was outside legislative competence. In view of s 35(1) of the DPA read with s 70(1), the Scotland Act could not sensibly be interpreted as meaning that an enactment 'relates to' the subject-matter of the DPA, and was therefore outside the powers of the Scottish Parliament, merely because it required or authorised the disclosure of personal data. Although the objective of Pt 4 was to promote the wellbeing of children, the more specific objective was to alter the institutional arrangements, and the legal structure of powers and duties, governing cooperation between the different agencies which dealt with children and young people, so that they worked collaboratively, with the named person playing a coordinating role. Accordingly, although Pt 4 contained provisions whose objective was to ensure that information relating to children and young people was shared, that objective was not truly distinct from the overall purpose of promoting their wellbeing, but could be regarded as consequential upon it (see [63]-[66] of the judgment).

Martin v HM Advocate (Scotland); Miller v HM Advocate (Scotland) [2010] All ER (D) 30 (Mar) applied; *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61 applied.

(2) (a) The concept of 'private life' in art 8 covered the disclosure of personal data, such as information about

a person's health, criminal offending, sexual activities or other personal matters. The notion of personal autonomy was an important principle underlying the guarantees of the Convention. Article 8 protected confidential information as an aspect of human autonomy and dignity; (b) the operation of the information-sharing provisions of Pt 4 (in particular, ss 23, 26 and 27) resulted in interferences with rights protected by art 8 of the Convention; (c) the information-sharing provisions of P 4 of the Act did not meet the art 8 criterion of being 'in accordance with the law'; (d) in practice it might result in a disproportionate interference with the article 8 rights of many children, young persons and their parents, through the sharing of private information. The 2014 Act did not point towards a fair balance in relation to the disclosure of such confidential information in the performance of duties under ss 23(2), 26(1) and 26(3). The central problems were the lack of any requirement to obtain the consent of the child, young person, or his or her parents to the disclosure, the lack of any requirement to inform them about the possibility of such disclosure at the time when the information was obtained from them, and the lack of any requirement to inform them about such disclosure after it had taken place. Such requirements could not be absolute: reasonable exceptions could be made where, for example, the child was unable to give consent, or the circumstances were such that it would be inappropriate for the parents' consent to be sought, or the child's best interests might be harmed. Without such safeguards, the overriding of confidentiality was likely often to be disproportionate (see [75], [76], [78], [83]-[85], [100] of the judgment).

The information-sharing provisions of Pt 4 of the 2014 Act were not within the legislative competence of the Scottish Parliament (see [106] of the judgment).

Decision of [2015] CSIH 64 Reversed.

Aidan O'Neill QC and Laura-Anne van der Westhuizen (Instructed by Balfour & Manson) for the appellants.

W James Wolffe QC and Christine O'Neill (instructed by Solicitor to the Scottish Ministers) for the respondents.

Ailsa Carmichael QC (instructed by Community Law Advice Network) for the intervener (Community Law Advice Network).

Tara Psaila Barrister.