OUTER HOUSE, COURT OF SESSION

[2016] CSOH 27

P1055/15

OPINION OF LORD GLENNIE

In the cause

WF

Petitioner;

for judicial review of a decision of the Scottish Ministers to refuse to make a determination for legal aid under section 4(2)(c) of the Legal Aid (Scotland) Act 1986

Petitioner: Bain QC, C Mitchell; Drummond Miller LLP
Respondents: C O'Neill, solicitor advocate; Scottish Government Legal Directorate
Interveners (Rape Crisis Scotland): Kelly, Ewing, solicitor advocates; Balfour + Manson LLP

9 February 2016

Introduction

[1] This petition for judicial review arises in respect of criminal proceedings against an accused ("the accused") brought on indictment in the sheriff court in September 2014. The petitioner, a complainer in the criminal proceedings, has applied for legal aid so as to enable her to be represented at a hearing before the sheriff of the accused's petition for recovery of her medical records. She argues that recovery of such documents would infringe her Convention rights to private and family life. The Scottish Ministers have refused to make legal aid available for this purpose, arguing *inter alia* that she has no right to be heard or represented in front of the sheriff on that application.

[2] In this petition the petitioner seeks reduction of that decision. She also seeks declarator that the failure of the Scottish Ministers to promulgate such legislation as may be required to enable her to be represented before the sheriff in opposition to the application for recovery of her medical records is incompatible with, and a breach of, her Convention rights under Article 8 and/or Articles 6 and 14.

Outline facts

[3] There are seven charges on the indictment, all containing allegations of assault and domestic abuse in the period from 2008 to 2011. The petitioner in these judicial review proceedings is the complainer and, no doubt, the principal witness in respect of the first five charges. To avoid confusion which might arise from the fact that this petition for judicial review involves consideration of a separate petition procedure in the sheriff court, in which the present petitioner is an interested party, I shall refer to her throughout this Opinion as "the complainer".

[4] To assist with his defence to the charges brought against him, the accused seeks to recover from the NHS and other havers all medical, psychiatric and psychological records relating to the complainer from 2007 to 2014. In November 2014 the sheriff allowed his petition for commission and diligence – brought in terms of section 301A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") – to be received and authorised intimation thereof "on all interested parties". The petition sought an order for intimation on the Lord Advocate, the Procurator Fiscal, responsible officers within the NHS and other havers, and the complainer. The sheriff's order must be taken as authorising intimation to all of those parties. At all events, it is clear that the petition was in fact intimated on all of those parties, including the complainer. The sheriff assigned a date in December 2014 for a hearing on that petition.

[5] Following intimation of the petition on her, the complainer sought legal advice. An application was made on her behalf to the Scottish Legal Aid Board ("SLAB") for legal aid to enable her to be represented in the petition proceedings before the sheriff in opposition to the petition for recovery of her medical records based on her right to respect for her private and family life under Article 8 ECHR. SLAB refused to grant legal aid on the basis that there was no provision in the legal aid legislation and regulations for legal aid to be granted for such proceedings. That refusal on that ground is not challenged.

[6] Thereafter, in May 2015, the complainer applied to the Scottish Ministers in terms of section 4(2)(c) of the Legal Aid (Scotland) Act 1986 ("the 1986 Act"), which gives the Scottish Ministers the power to direct the grant of legal aid in circumstances not otherwise covered by the rules. That application was refused. By letter dated July 2015 the Scottish Ministers noted that, before any hearing took place before the sheriff, a preliminary issue required to be considered "as to whether your client has a locus to appear in relation to the specification of documents". The letter went on to say that the Scottish Ministers did not consider that it was appropriate to make a payment out of the Legal Aid Fund, and gave these reasons for that decision:

> "The court must be satisfied that the release of documents will serve a proper purpose and that it is in the interests of justice to grant an order for their release (*McLeod* v *HM Advocate* 1998 JC 67 at 80). The court requires to be satisfied that the material sought will be of material assistance in these circumstances. In considering this matter, the court will require to balance the interests of the accused with the right of the complainer to respect for private life – *DM* v *HM Advocate* [2015] HCJAC 4. The court will require to take account of relevant ECHR case law. For example, *Z* v *Finland* (case 22009/93), judgment of 25 February 1997 in relation to the process for taking account of the interests of the person whose article 8 rights may be affected by a disclosure of medical records.
>
> Scottish Ministers consider that the decision-making process in these types of cases enables the views of complainer or [*sic*] to be taken into account sufficiently and for their interest to be protected for the purposes of ECHR, including article 8, without the need for them to participate and be represented at the hearing to determine the matter. Scottish Ministers also consider that this applies in the specific circumstances of your client's case.
>
> In light of this consideration a determination to the Scottish Legal Aid Board to make legal aid available will not be provided."

That is the decision which is challenged in these judicial review proceedings.

[7] It is apparent from that letter that the refusal of legal aid is based upon the proposition that the complainer has no right to appear or be represented in the petition proceedings before the sheriff and does not need to appear or be represented in order for her Article 8 rights to be adequately protected. It is probably for that reason that no consideration appears to have been given to the question of the complainer's financial means or of her ability to appear and argue her case in person if she had a right to attend but was not able to obtain legal representation. I was shown documents which were submitted to the Scottish Ministers in support of the application for legal aid, including (a) a certificate from a medical practitioner stating that the complainer suffers from recurrent depression and should avoid stressful situations and (b) a note by counsel, based in part on her own observations of the complainer when they met outside court at a calling of the petition, speaking to the complainer's vulnerability, her lack of understanding of the legal process and of how to assert her Article 8 rights, and her inability to speak on her own behalf in a formal court setting. The letter of July 2015 makes no mention of these matters.

[8] The petition for recovery of the documents has called before the sheriff on at least 13 occasions. The next hearing is due to take place early in February 2016. The trial itself was originally fixed for October 2014 but the trial diet has been deserted more than once. It is presently due to take place late in February 2016, about two weeks after the hearing on the petition for recovery of documents. Whether it will in fact take place then must be open to doubt.

The main issue in the present proceedings

[9] Although the decision under review concerns the refusal of legal aid, the reasons for that refusal raise

the issue of whether the complainer has any *locus* to appear and be represented in the sheriff court petition procedure. That was the main issue focused in the submissions before me. I therefore propose to deal with that issue first before going on to consider (a) whether the determination not to grant legal aid should be reduced and (b) the more general question of whether legal aid should now be granted.

Submissions

[10] Ms Bain QC appeared for the complainer. Ms O'Neill appeared for the Scottish Ministers. Pursuant to leave granted by the court on an earlier occasion, Rape Crisis Scotland participated as Interveners. They did not appear by counsel but lodged detailed written submissions to which both parties made reference in the course of their own submissions. I am grateful to them all for their assistance.

Complainer

[11] Ms Bain's submissions started with the uncontroversial proposition that the complainer's Article 8 rights (right to respect for private and family life) were engaged by the petition for recovery of her medical records. Medical records are highly sensitive and the person to whom they relate is entitled to seek to protect their privacy. She referred to *Murdoch and Reed, Human Rights Law in Scotland*, 3rd Edition, at para 6.116. It followed, she submitted, that the complainer was entitled to seek to vindicate those rights by appearing in court in opposition to their production. She referred to English authority in support of the proposition that a person whose rights were potentially affected in this way has a right to be heard: *R(B)* v *Crown Court at Stafford* [2007] 1 WLR 1524 and *M* v *Director of Legal Aid Casework* [2014] EWHC 1354 (Admin). The right to be heard did not depend upon the existence of a statutory provision or rule of court entitling the complainer to appear; it was inherent in her Article 8 rights which would be breached if she were not given the opportunity to be heard. The case of *X and Y* v *The Netherlands* 1985 EHRR 235 showed that Article 8 might in certain circumstances require the state to adopt measures designed to secure respect for private life: see particularly para 23. That was the case here. The decision of the ECHR in *Z* v *Finland* (1997) 25 EHRR 371 was to be distinguished, for the reasons explained in *Stafford Crown Court*. The petition had, quite properly, been intimated on the complainer; that gave her a right to be heard. Ms Bain rejected the argument, advanced by the Scottish Ministers, that the petition proceedings in the sheriff court were in some way to be regarded as part of the criminal proceedings against the accused. Section 301A of the Criminal Procedure (Scotland) Act 1995 made it clear that the recovery proceedings were proceedings "in connection with" the criminal proceedings, not part of them. She sought to distinguish two cases relied upon by the Scottish ministers, namely *Scottish Criminal Cases Review Commission* v *Swire* [2015] HCJAC 76 and *HMA* v *Porch* [2015] HCJAC 111. *Swire* turned on the construction of section 303A of the 1995 Act while *Porch* (distinguishing *Stafford Crown Court*) turned on the fact that the complainer was not a party to the proceedings.

[12] Turning to the Scottish Ministers' letter of July 2015 refusing legal aid, Ms Bain characterised the argument there made that the complainer could rely upon the court knowing the law and protecting her interests as "remarkable" and as displaying a lack of understanding of the adversarial system. Unlike in many continental systems (c.f. *Galbraith* v *HMA* 2002 JC 1 at para 21), it was not the job of the court to know the law and to give effect to the complainer's Article 8 rights in circumstances where she was not present to articulate her objections. The court was required to be satisfied that recovery of the documents would serve a proper purpose and that it would be in the interests of justice to grant the relevant order. As part of this exercise it was required to balance the interests of the accused in obtaining the medical records with the right of the complainer to respect for her private life under Article 8: *DM* v *HMA* [2015] HCJAC 4 at para [3]. But how was the court to do that effectively? How was the sheriff to know whether there were any particular sensitivities within the medical records which would weigh more heavily in the balance in this case as compared with other cases? Who was to exercise any right of appeal if the complainer was dissatisfied with the sheriff's decision? Nor was it the role of the procurator fiscal to represent the views of the complainer. The interests of the procurator fiscal in proceeding to a fair trial were not necessarily the same as those of the complainer. If an order was made for the recovery of her medical records without the complainer having an opportunity of making representations to the court, her Article 8 rights would be infringed. It was notable that the NHS, one of the havers on whom intimation was made, had made it clear that they did not intend to

appear or be represented at the hearing and did not intend to present any argument on behalf of the complainer in support of her objection to her medical records being produced.

[13] There was no authority as to how the discretion conferred on the Scottish Ministers under section 4(2)(c) of the 1986 Act was to be exercised. Ms Bain drew my attention to the position in England under comparable legislation as set out in the judgment of the Court of Appeal in *R (Gudanaviciene)* v *Director of Legal aid Casework* [2015] 1 WLR 2247 at para 72, disapproving in this respect what was said in *M* v *Director of Legal Aid Casework*. This guidance was helpful, though obviously not in any way binding. She also relied on the duty imposed on the Scottish Ministers, amongst others, in carrying out their functions in relation to a person who is or appears to be a victim or witness in relation to criminal proceedings, to ensure, in so far as appropriate, that the victim or witness should be able to participate "effectively" in the proceedings: Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act") section 1. I should note that is clear from section 1(1) of that Act that the term "victim" is intended to include someone who appears to be a victim, without pre-judging the issue of guilt. By a refusal of legal aid in these circumstances the Scottish Ministers were preventing the petitioner from participating effectively in a case where her own rights were involved.

Scottish Ministers

[14] For the respondents, the Scottish Ministers, Ms O'Neill emphasised that the petition before the court was directed towards a specific decision of the Scottish Ministers. Many other important matters were touched upon by Ms Bain, but they were not for decision here. Further, the petition assumed that the complainer had a right to be heard in the sheriff court in opposition to the application for disclosure of her medical records. The court was not, therefore, concerned with whether there ought to be a right if there was not one and, if so, what should be done about it.

[15] Ms O'Neill argued that section 4(2)(c) of the 1986 Act conferred on the Scottish Ministers "a very broad discretion". There was no "legislative flesh" around it. Unlike the position in England, there were here no detailed schemes or written ministerial statements to be used as a guide. It was necessary, therefore, to note the context in which legal aid was being sought in the present case. The accused's application in the sheriff court for recovery of documents was not a common law application. It was part of the criminal process. In this connection she referred to *HMA* v *Ashrif* 1988 SLT 567, in which it was held that (at that time) only the High Court had power to order recovery of documents required for use in a sheriff court trial: see at 570B-D. The effect of section 301A of the 1995 Act was to transfer that jurisdiction to the sheriff court. The right of appeal under section 301A(5) from the decision of the sheriff was to the High Court. It was all part of the criminal process in the criminal courts.

[16] Under reference to decisions of the Appeal Court in *Swire* and *Porch*, Ms O'Neill submitted that it was clear that the Scottish criminal justice system did not allow complainers or witnesses to participate in criminal proceedings other than as witnesses (or in limited other circumstances such as submitting victim impact statements in connection with sentencing). Article 8 did not require there to be a right of participation in the proceedings themselves; nor did it require the grant of legal aid. *Z* v *Finland* showed that there could be an adequate system safeguarding the rights of someone in the position of the complainer which did not involve them having a direct say in the proceedings. Individual states could find their own way of ensuring that a person's Article 8 rights were respected. The principles to be taken from *Z* v *Finland* were of more general application than its treatment in the *Stafford Crown Court* case might suggest. It was open to the complainer to make her views known to the court, either directly to the sheriff or through the procurator fiscal. The passage in *Murdoch and Reed* at para 6.116 supported the proposition that intimation to the complainer in such circumstances was sufficient since it informed the complainer of the application to be made and gave her notice of her right to make her views known to the court in this way. If the complainer was dissatisfied with the decision reached by the sheriff, it was always possible for her to judicially review his decision afterwards before it was acted upon.

[17] So far as concerned the 2014 Act, Ms O'Neill referred to the EU Directive 2012/29/EU from which it sprang. That showed, at Recital (20), that practice across the EU varied. In some countries the victim is a party to the criminal proceedings and may participate in them. In others the victim is entitled to participate albeit that he or she is not a party to the proceedings. In yet others, of which Scotland is an example, the victim is under a legal obligation, if requested, to participate actively, for example as a witness, but is not a

party. Nothing in the Directive required the introduction of procedural rules allowing any particular form of participation: see Article 10. Nor was there anything requiring the provision of legal aid except where the victim had the status of a party: see Article 13.

[18] Referring to the English cases cited by Ms Bain, Ms O'Neill submitted that *they* did not support the requirement for a general entitlement to legal aid in all such cases (even if there was a right of representation before the sheriff). There was no systematic flaw in the Scottish Legal Aid regulations. The Scottish Ministers were given a discretion to be exercised on a case-by-case basis. It followed that there was no need for the Scottish Ministers to promulgate new legislation covering cases such as that in issue on this application for judicial review. *M* v *Director of Legal Aid Casework* was not authority for the proposition that the complainer's Article 8 rights would inevitably be infringed if she was not represented before the sheriff. *Stafford Crown Court* was not authority for there being in all cases the right to be represented. The court there was careful to confine its decision to the facts of the case before it.

[19] Ms O'Neill submitted that the court should not make any "declarator of incompatibility". That was a term of art found in section 4 of the Human Rights Act 1998 and was relevant only to legislation of the UK Parliament at Westminster. In any event, even if the complainer had a right to be heard before the sheriff on the petition for recovery of her medical records, there was no necessary incompatibility between the Scottish legal aid provisions and her Convention rights. The discretion given to Scottish Ministers under section 4(2)(c) to direct the grant of legal aid in circumstances not otherwise covered by the rules provided a framework within which the complainer could have effective representation, if representation was needed, at the public expense, if that was justified. If a decision was taken which was not Convention compliant, that decision would be susceptible of review – but it did not follow that the system itself was not compatible with the Convention.

Interveners

[20] I should note certain points from the written submission lodged by the Interveners. The purpose of their intervention was to give the court the benefit of their experience in matters not specifically addressed in the petition. In their experience there had been an increasing use of complainers' medical or other sensitive records within the context of sexual offence prosecutions, often to ascertain whether the complainer had a history of mental health issues. It was already well-known that women were deterred from making complaints about being raped by someone with whom they had had a relationship, because of the risk of humiliation by questions directed to their previous sexual history and the risk of further humiliation if the case resulted in an acquittal. Without adequate safeguards to protect them, the risk of disclosure of confidential medical and psychiatric records would be another reason why victims of sexual assaults would not report such assaults to the police. The Interveners had consistently advocated improvements in the position of complainers in sexual cases and had recently supported a proposed amendment to the Criminal Justice (Scotland) Bill seeking to provide for legal aid to be made available for complainers in sexual offence prosecutions so as to enable them to oppose applications to release their medical or other sensitive records. That amendment was not passed. The circumstances of the present petition illustrated the weaknesses of the present system for the protection of privacy rights of complainers in sexual offence prosecutions. I should note that the charges against the accused in the present case are not charges of sexual assault as that expression would normally be understood; but they are certainly charges of violent assault and domestic abuse to which the same considerations may be thought to apply.

[21] In section 5 of their Intervention, the Interveners say that requests by the defence for access to the medical records of complainers are now "relatively commonplace", particularly in prosecutions for sexual offences. This appears to build on the statement in section 3 that, in recent years, in their experience, there has been an increasing use of complainers' medical and other sensitive records within the context of sexual offence prosecutions. Counsel expressed some reservations about how commonplace this had become. I note that in *McDonald* v *HMA*, decided in 2008, Lord Rodger remarked, at para 66, that applications for commission and diligence had been "far from usual in criminal proceedings". The point may not matter, but it can sometimes be useful to assess the scale of any particular problem.

[22] Dealing in section 5 with the practice surrounding the recovery of personal or sensitive records in Scottish criminal procedure, the Interveners referred to the Crown's policy published in a document entitled

"Policy on Obtaining and Disclosing Sensitive Personal Records in the Investigation and Prosecution of Sexual Crime Cases" ("the Crown Policy") published originally in July 2011 and in its current form in April 2014. A copy of which was lodged in process by the Scottish Ministers. The "General Approach" is set out at paras 4 – 15. The Interveners quote from para 4, which describes the purpose of obtaining health, social work, educational or other sensitive personal records as being to consider whether the material contains information which supports or undermines the Crown case or supports the defence case. It goes on to say:

> "Sensitive personal records should be obtained by the Crown only were their recovery is necessary for the proper investigation and prosecution of crime."

That statement appears to assume that if the sensitive personal records are necessary for the proper investigation and prosecution of the crime, they will be obtained and, presumably, disclosed to the defence. The Interveners comment (in para 5.3) that that policy contains a presumption operating in favour of recovery in certain circumstances. Where the Crown holds the medical records of a complainer, the disclosure scheme set out in Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 applies. There is no requirement in that scheme for the views of the complainer to be sought before disclosure to the defence of her private medical records. However, para 48 of the Crown Policy does identify the need to keep the complainer fully informed and to ensure that her rights to privacy under Article 8 are given proper consideration, giving her an opportunity to express her views on the recovery of her sensitive records. The Interveners go on to say this (at paras 5.5 and 5.6):

> "5.5 The views of the complainer are obtained at a meeting with a representative from Victim Information and Advice (VIA) service of the Crown and Procurator Fiscal Service who will seek her consent for recovery. The Crown policy may be explicit in its aim of giving proper consideration to the complainer's right to privacy. Yet, in practice a complainer who does not wish her records recovered may be asked effectively to choose between consenting to their recovery, on the one hand, and undermining the prosecution on the other. Indeed, she faces the further possibility that the Crown will seek to recover her records against her wishes, under authority of the petition warrant. In most cases the complainer must take this decision without the benefit of legal advice. Further, she [has] no opportunity to formally challenge the assertion that her records are necessary for the prosecution, or complain that insufficient weight has been given to her privacy rights.
>
> 5.6 Once such records are obtained, the Crown may then hold information which triggers its duty of disclosure to the defence. That will be complied with by the sensitive material being handed over to the defence without further recourse to the complainer. It is not regulated in any way. …"

[23] In section 6 of the Intervention, the Interveners describe the petition for commission and diligence in the criminal context. They suggest that the procedure to be followed in such a case is "entirely unregulated". That is not quite right, since the matter is now covered by section 301A of the 1995 Act, but they are correct to point out that the procedures laid down (whether at common law or in terms of the Act) do not require intimation upon the person whose private information might be contained within the documents sought to be recovered. In the present case intimation was made both to the havers and to the complainer; and I was told by counsel that intimation is in fact routinely made to havers and those, such as the complainer, whose rights might be affected by disclosure of the documentation. The Interveners are, as I understand it, incorrect in stating that service upon the complainer is unusual. But they are correct to say that "it remains unclear what the scope of her rights are". While it might be presumed that with intimation comes the right to make substantive representations, the position "is not certain". And if the complainer does have a right to make substantive representations, the scope of that right is also uncertain. Does it extend to addressing the sufficiency of the reasons underlying the request for the documentation? Does it extend to addressing the relevance of the material sought to be recovered? Does it extend to making submissions on the applicability of section 274 of the 1995 Act?

[24] After discussing what is in issue at the hearing of a petition for recovery of documents, which I need not set out in any detail, the Interveners go on to pose the question whether the interests of the complainer can be protected by some means other than independent representation before the sheriff. The idea that the

haver has an interest or role in presenting submissions on the complainer's behalf is rejected. The Interveners discuss the potential role of the court in protecting the complainer's Article 8 rights but reject it on essentially two grounds: first, because of doubts about how the court, balancing the interests of the parties to the petition, could at the same time robustly advocate the privacy interests of the complainer; and, second, because of uncertainty as to how the views of the complainer could be made known to the court, absent some opportunity to address the court and, in the case of a vulnerable complainer or a complainer requiring additional support, a right to representation. As to the role of the Crown, the Interveners noted that the Crown prosecutes in the public interest and has a duty to ensure that the accused's fair trial rights are respected. It is thus faced with a potential conflict between those obligations and any obligation it might otherwise have to represent the complainer's legitimate interest in non-disclosure. They quote Professor Raitt as saying that the balancing of the multiple interests for which the Crown has responsibility "invariably gives primacy to the accused's right to a fair trial". Professor Raitt adds that "it cannot be otherwise". She goes on to say that the difficulty with that position is that there is no opportunity for the complainer's legitimate privacy interests to be canvassed forcefully and competitively against other interests by an independent legal representative with all the entitlements of partiality that that entails. (I should note that Ms O'Neill said that the Crown does not accept that its balancing of those interests "invariably" gives primacy to the accused's right to a fair trial; the Crown would always be concerned to balance competing interests.) The Interveners go on to say that in most cases the Crown will not have had sight of the complainer's medical records prior to the hearing of the petition for their recovery; and, accordingly, it may well not be in a position to oppose the application by reference to the content and specific sensitivity of the records. There are many circumstances where the significance of the information to the complainer, and the corresponding damage to her privacy were it to be revealed, will be unknown to the Crown. While such information could probably be obtained by the Crown, there was no formal requirement nor any mechanism for resolving disputes between the Crown and the complainer on the relevancy or significance of the records.

[25] In a short comparative survey, the Interveners say that they found a high level of independent legal representation for complainers within EU states but a more limited provision throughout common law jurisdictions. In Canada there was now an entitlement to representation for a complainer when her sensitive records were sought to be recovered. In the Republic of Ireland complainers now have a right to be represented where an application is made equivalent to one in Scotland under section 275 of the 1995 Act. In England the relevant criminal procedure rules now require service on the complainer or other person whose rights are affected of any application for recovery of confidential records; and they also provide an opportunity for that person to object.

[26] So far as concerns the availability of legal aid, the Interveners refer to *Steel and Morris* v *United Kingdom* (2005) 41 EHRR 403 and *P, C and S* v *United Kingdom* (2002) 35 EHRR 31 in support of the proposition that the question whether legal aid is necessary for a fair hearing must be determined on the facts of the particular case. However, in certain circumstances Article 8 may require the provision of legal aid. They also refer to the test set out in para [72] of the judgment in *Gudanaviciene* and note that the Court of Appeal in that case disapproved the more limited approach of Coulson J in *M* v *Director of Legal Aid Casework*.

Discussion and Decision

A right to be heard?

[27] Article 8 ECHR is concerned with the right to respect for private and family life. It provides, in para 1, that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence."

Para 2 sets out the qualifications or exceptions to this right. It provides as follows:

> "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."

Although the introductory wording of para 2 is directed towards interference by a public authority, it is clear that Article 8 does not merely compel the state itself to abstain from such interference but, in addition, may place a positive obligation on the state to adopt measures designed to secure respect for private life even in the sphere of relations between individuals: *X and Y* v *The Netherlands* 1985 EHRR 235 at para 23.

[28] There is no doubt that the potential disclosure to any third party of medical records pertaining to the complainer engages the complainer's Article 8 rights. Medical records are likely to contain highly sensitive information about an individual. Any disclosure to a third party requires to be justified. The matter is discussed in *Reed and Murdoch* at paras 6.112-6.116. Respecting the confidentiality of health data is a vital principle in the legal system of all contracting parties to the Convention, not only for protection of privacy of the patient also to preserve his or her confidence in the medical profession and in the health services in general: *Z* v *Finland* at para 95

[29] The need to take account of the Article 8 rights of a person whose medical records are sought to be recovered in criminal proceedings has been recognised in Scotland in the context of an application by an accused for commission and diligence. The governing principles applicable to such applications are set out in *McLeod* v *HMA* 1998 JC 67: the court will only grant an application by an accused person for commission and diligence for the recovery of documents if it is satisfied that the recovery of such documents will serve a proper purpose and is in the interests of justice, in the sense that the documents are likely to be of material assistance to the proper preparation or presentation of the defence. In *DM* v *HMA* the Appeal Court upheld the decision of the sheriff to refuse an application by the accused for the recovery of a psychiatric report relating to his wife. The accused had already obtained his wife's medical records. At para [3], the court summarised the sheriff's approach to the application in this way:

> "… The sheriff had regard to the test in *McLeod* v *HMA* 1998 JC (LJG (Rodger) at p 80), to the effect that a party seeking the recovery of documents requires to explain why he wants them. The court will not grant an order for recovery unless it is satisfied that that recovery will serve a proper purpose and that it is in the interests of justice to grant the relevant order. The court requires to be satisfied that the materials sought will be of material assistance in the proper preparation or presentation of the defence. The sheriff noted that the appellant had already obtained the medical records and determined that it had not been shown that recovery was likely to be of material assistance in these circumstances. He balanced the interest of the appellant with the right of the complainer to respect for her private life under Article 8 of the European Convention. He had regard to the specific purpose for which the report had been obtained. He did not consider that the interests of justice required recovery."

At para [5] the court said that the sheriff "applied to the correct test and did so in a satisfactory manner." It is clear that the Appeal Court approved the carrying out of the balancing exercise in terms of which the interests of the appellant were balanced with the right of the complainer to respect for her private life under Article 8. Strictly speaking, this point did not arise, since the sheriff had already determined that the accused had failed to show that recovery was likely to be of material assistance to his defence. Nonetheless the approval by the Appeal Court of the sheriff conducting this balancing exercise is important. It is an exercise which requires to be carried out in every case where an application is made by an accused person for recovery of such records; and it requires to be carried out in particular in a case where, unlike in *DM* v *HMA*, the court is persuaded that recovery of the documents is likely to be of material assistance to the preparation or presentation of the defence. It is in those circumstances that the point becomes critical.

[30] I was not shown any case in which the court had in fact decided that the documents sought were likely to be of material assistance to the defence and had also, whether at the same time or at a second stage in its reasoning process, considered the Article 8 rights of the complainer (it will usually be the complainer, though the point no doubt arise in respect of medical records pertaining to others). No doubt this does happen but is not reported. It does raise a potential problem as to the scope of the balancing exercise to be conducted by the court if it has already formed the view that the documents sought are potentially of

material assistance in the proper preparation or presentation of the defence. The Article 8 right to respect for private life is not, of course, unqualified. Disclosure can be justified in a number of circumstances, such as it being necessary in a democratic society in the interests of the prevention of crime. But it cannot be assumed that such interests will always outweigh the right to respect for privacy. Much may depend on the individual circumstances, including the seriousness of the offence and the importance and sensitivity of the records whose production is sought. It may be that measures can be taken (limited disclosure, redaction, etc.) to minimise the risk of detriment to the complainer while protecting the right to a fair trial. However, the requirement for a balancing exercise to be carried out must presuppose the possibility that the court, having decided that the documents are potentially relevant, will nonetheless refuse the application for recovery on grounds of the complainer's Article 8 rights.

[31] The relevance of Article 8 to an application for recovery of medical records has been noted also in a number of English cases. The English case law is summarised in *Stafford Crown Court* at paras 16-19, a case to which I shall refer in some detail below.

[32] Given that the complainer's Article 8 rights are engaged whenever there is an application by the accused for records of this kind, the question arises as to how her interests are to be protected. Must she have the right to appear and argue her case in opposition to the application for recovery of her records; or are her rights sufficiently protected without that? That question has not been answered in Scotland. But it has been addressed in England and Wales in the case to which I have just referred.

[33] The facts of the *Stafford Crown Court* are stark. The claimant was a 14-year-old girl who was to be the main prosecution witness in the trial of a defendant on a charge of sexually abusing her. She was in the position of the complainer in a Scottish trial. In the period leading up to the trial she received psychiatric treatment; and she had taken overdoses of prescription drugs on three occasions. The accused sought to recover her medical and hospital records. He argued that they were relevant to her credibility. The hospital trust opposed that application, arguing that confidentiality was essential, particularly when dealing with child abuse victims, and that the confidentiality belong to the patient, not the trust. The judge held that the defendant's right to a fair trial took precedence over confidentiality issues and ordered disclosure of the psychiatric records. The Official Solicitor became involved. She notified the defendant's solicitors that she now represented the claimant in connection with a possible infringement of her Article 8 rights. The judge was asked to state a case for the consideration of the High Court. Concerned that it would delay the trial, the judge invited the claimant to attend court to see that she understood the implications of her actions in terms of delaying the trial. The claimant attended court, unrepresented, and reluctantly agreed to disclosure of the records because she did not want to see the trial delayed. Subsequently the claimant brought judicial review proceedings against the Crown Court, seeking declarations that she had been entitled to have defendant's application for her medical records served on her and, further, that she had the right to make representations to the court on what order should be made on that application. She argued that the Crown Court had acted unlawfully in proceeding with the hearing of the application without securing those entitlements. Her claim succeeded. The court held *inter alia* that there ought to be rules requiring the application to be notified to someone in the position of the complainer; and that procedural fairness in the light of Article 8 required that the claimant should have been given notice of the application as well as the opportunity to make representations before the order for disclosure was made.

[34] In giving judgment, May LJ, with whom Forbes J agreed, noted at para 16 that medical records, and in particular psychiatric records, were confidential between the medical practitioner and the patient. The patient undoubtedly had a right of privacy within Article 8 of the Convention. The Crown Court was a public authority and it was unlawful for a public authority to act in a way which was incompatible with a Convention right: see section 6(1) of the Human Rights Act 1998. It followed, therefore, that:

> "[if], therefore, the court was to consider ordering disclosure in breach of confidentiality of B's medical records, it could only do so if this was proportionate, in accordance with the law and necessary, I suppose, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In simple terms, it required a balance between B's rights of privacy and confidentiality and W's right to have his defence informed of the content of her medical records."

See para 20. He noted at paragraph 21 that it would be wrong to approach the question with a predisposition to suppose that applications for disclosure of medical records of a prosecution witness will usually succeed even in the face of Article 8 objections. He then dealt in para 22 with the point that the existing legislation and rules did not expressly oblige the court to give notice of the application to a person in a position of the complainer. In this context he referred to the overriding objective set out in the English Criminal Procedure Rules "that criminal cases are dealt with justly" which, he observed, included respecting the interests of witnesses, victims and jurors. Against this background he expressed the view that the rules ought to have required notice of the accused's application to be given to the complainer:

> "The court was being invited to trample on B's rights of privacy and confidentiality. B was both a witness and a victim of the then alleged crime. The court was obliged to respect her interests and these were some of them."

He went on in paras 23-28 to say this:

> "23. More generally, although article 8 contains no explicit procedural requirements, the court will have regard to the decision-making process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by article 8. The process must be such as to secure that the views of those whose rights are in issue are made known and duly taken account of. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the person whose rights are in issue has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will be a failure to respect their family life and privacy and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of article 8.
>
> …
>
> 25. In my judgment, procedural fairness in the light of article 8 undoubtedly required in the present case that B should have been given notice of the application for the witness summons, and given the opportunity to make representations before the order was made. Since the rules did not require this of the person applying for the summons, the requirement was on the court as a public authority, not on W, the defendant. B was not given due notice or that opportunity, so the interference with her rights was not capable of being necessary within article 8(2). Her rights were infringed and the court acted unlawfully in a way which was incompatible with her Convention rights. This in substance is what the requested two declarations seek and I would grant them.
>
> 26. Mr Fordham, B's counsel, explains that the first draft declaration was framed with a view to a right to make oral representations; for that is what the person to whom the summons will be directed, if he seeks to be heard, is entitled to under the present rules. In the light of the present rules, that seems to me to be correct in the present case."

I should explain that that last paragraph is a reference to the fact that, under the rules as they then existed, the person who had the documents and to whom the application was directed (in our language, the haver) had a right to be heard. As I understand it, May LJ is there saying that the complainer should also have a right to be heard. He went on to say this:

> "27. I would firmly reject the suggestion that it would have been sufficient for the interest of B to be represented only by the NHS trust. The confidence is hers, not theirs. Their interests are different. They have a wider public interest in patient
>
> confidentiality generally and may have particular interests relating to her care which could conflict with hers. Mr Lock [who appeared for the NHS trust] submits that the trust should be able to advance these wider public interest submissions against disclosure without having the role cast on it

> of acting also as an advocate for the patient's confidentiality. I agree. I agree also that the trust should not be saddled with the heavy burden of making enquiries of the patient, finding reasons why he or she might object and putting those reasons before the court. Further, there may be material in the notes which the trust can legitimately withhold from the patient under [Data Protection legislation].
>
> 28. In my view, the burden of protecting B's privacy should not be placed on the trust. The burden resides with the court and she herself was entitled to notice and proper opportunity for representation."

May LJ went on in his judgment to consider what changes ought to be made to the rules. He was aware that the Rule Committee was consulting and that the court should not usurp its functions. Among the potential difficulties in framing new rules, he identified at para 30(d) the question whether the person with Article 8 rights should be entitled to make oral representations. He comments that he had supposed that they would be so entitled under the present rules since the person to whom the summons was directed (i.e. the haver) presently had that opportunity. He cast some doubt upon the adequacy of the draft rules circulated as part of the consultation exercise. He returned to the issue in the case before him in para 35:

> "35. I end by reiterating that my decision is limited to the facts of this case. It would not be right to pre-empt the more general decisions that the Rule Committee may make. I am quite clear, however, that in the present case B should have been given notice of the application and given the opportunity to make representations, orally if she had wished. It was not sufficient for the court to delegate her representation to the NHS trust alone. In fact, her independent views were not received in any form before the order was made. There was an oral hearing, but she was not given the opportunity to attend it. …"

I shall come back later in this Opinion to his discussion of the case of *Z* v *Finland*.

[35] Ms Bain naturally relied upon this judgment as a very strong expression of the need for a person in the position of the complainer, whose medical records are sought to be obtained by the accused, to be given the opportunity of addressing the court in person. Ms O'Neill, as was to be expected, emphasised the fact that May LJ expressly stated that his decision was limited to the facts of the particular case. That is, of course, true, but he was saying that in the context of emphasising that he should not be dictating to the Rule Committee what form the revised rules should take. At all events, in stating that his decision was limited to the facts of the case, May LJ clearly did not mean that it was influenced in any way by the precise name, age or characteristics of the particular complainer. He must have intended his decision to apply at least to anyone in the position of a complainer or witness in respect of that type of charge who was not, for whatever reason, able, through age or other vulnerability, adequately to make her views known in a cogent and coherent way. He may have had in mind that there will be cases where a person in that position does not object to her medical records being disclosed. In such a case there might be no need for that person to be heard in person at any hearing of the application. But he could not have had in mind that a person who wished to object should not have the opportunity to be heard in opposition to the application. His comments about the impossibility of her interests being properly represented by the NHS trust (the haver) make it clear that the court was not going to be informed of her views through this means. Nor could he have had in mind the possibility that her views would simply be made known to the court by the prosecution. He does not mention that possibility at all. In those circumstances, although he does emphasise that the decision is a decision on the facts of the particular case, it is difficult to see why it should not be regarded as one of wider application.

[36] This is how that decision was treated by Coulson J in *M* v *Director of Legal Aid Casework*. That case was principally about whether M, who was in the position of a complainer to a charge of rape, should be granted legal aid to oppose an application by the Crown Prosecution Service for recovery from a charity of records of her counselling sessions with that charity. By the time that case came before the courts, the new rules mentioned by May LJ had come into force. Those rules required the party applying for a witness summons (i.e. a summons requiring the haver of a document to produce it) to serve the application not only

on the haver but also on any person to whom the proposed evidence related; and stated that the court must not issue a witness summons unless everyone served with the application had had at least 14 days within which to make representations and the court was satisfied that it had been able to take adequate account of the rights, including rights of confidentiality, of any such person. That, therefore, was how the Rule Committee interpreted May LJ's judgment in *Stafford Crown Court*. Coulson J said that the new rules gave the complainer "a clear and unequivocal entitlement to be heard on a witness summons which seeks to go behind the confidentiality of her medical records": see at paras 16 and 17. But in paragraph 15, in introducing extensive quotes from May LJ and then the new rules, Coulson J referred to May LJ's judgment as "[setting] out in detail how and why a complainant was entitled to have the summons served on him or her, and was entitled to make representations about the disclosure." It is clear from that that he had no doubt that the remarks in *Stafford Crown Court* were intended to be of general application.

[37] Ms O'Neill relied on the decision of the Strasbourg court in *Z* v *Finland* in support of her argument that Article 8 did not necessarily involve the person whose medical history was to be disclosed being afforded an opportunity of being heard directly by the court before it made an order. That was a case in which the applicant, Z, was the wife of an accused person, X, who was on trial for counts of attempted manslaughter allegedly committed by him by sexually assaulting a number of females whilst he was HIV positive. A critical question was whether at the relevant times X knew that he was HIV positive. Z invoked her right not to give evidence at his trial. Faced with this difficulty, the prosecutor sought and obtained orders from the court of obliging the medical advisors treating both X and Z to give evidence. At the same time, the police seized medical records concerning Z. X was convicted on three counts by the first instance court and on two further counts by the Court of Appeal. Z complained that her Article 8 rights had been violated *inter alia* by the orders obliging her medical advisors to disclose information about her and by the seizure of her medical records and their inclusion in the investigation file. On these two issues the Strasbourg court held that there had been no violation of her Article 8 rights. The relevant passage for present purposes begins at para 94 of the court's judgment. The court held that in determining whether the impugned measures were necessary in a democratic society, the court would consider whether, in the light of the case as a whole, the reasons adduced to justify those measures were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued. The court emphasised the fundamental importance of a person's medical records both to that person's enjoyment of her right to respect for private and family life and also to the preservation of confidence in the medical profession, ensuring that those in need of medical assistance should not be deterred from revealing personal and intimate information to medical practitioners when they sought medical assistance. That was so particularly in the case of information about a person's HIV infection. Any measures compelling disclosure of such information without the consent of the patient called for the most careful scrutiny on the part of the court. However, the court accepted that the interests of a patient in protecting the confidentiality of her medical records might be outweighed by the interest in investigating and prosecuting the crime and also by the interests in the court proceedings being public. It emphasised that in weighing all these factors a margin of appreciation should be left to the national authorities. It examined the issues in light of those considerations. It then said this, at para 101:

> "101. Before broaching these issues, the Court observes at the outset that, although the applicant may not have had an opportunity to be heard directly by the competent authorities before they took the measures, they had been made aware of her views and interests in these matters.
>
> All her medical advisors had objected to the various orders to testify and had thus actively sought to protect her interests in maintaining the confidentiality of her medical data. At an early stage, her letter to senior doctor L, urging him not to testify and stating her reasons, had been read out to the City Court.
>
> In the aforementioned letter, it was implicit, to say the least, that she would for the same reasons object also to the communication of her medical data by means of seizure of her medical records and their inclusion in the investigation file, which occurred a few days later. According to the applicant

> [i.e. Z] her lawyer had done all he could to draw the public prosecutor's attention to her objections to her medical data being used in the proceedings.
> …
>
> In these circumstances, the Court is satisfied that the decision-making process leading to the measures in question was such as to take her views sufficiently into account for the purposes of Article 8 of the Convention. Thus, the procedure followed did not as such give rise to a breach of that Article.
>
> In this connection, the Court takes note of the fact that, according to the Government's submissions to the Court, it would have been possible for the applicant to challenge the seizure before the City Court. …"

[38] It is correct to say, as Ms O'Neill does say, that in that judgment the Strasbourg court found that there had been no breach of Article 8 by the disclosure of the applicant's medical history (by oral evidence from her doctors and by recovery of her medical records) without the applicant herself having had the opportunity to be heard directly in opposition to that disclosure. But the unusual nature of that case is then spelt out by the court. The court had been made aware of her views. Her medical advisors had objected to the orders to testify and had actively sought to protect her interests in maintaining the confidentiality of her medical data. Her letter urging her doctor not to testify had been read to the court. Her lawyer had done all he could to draw her objections to the attention of the public prosecutor. And she had had the right to apply to the court to challenge the seizure of her medical records. Those various matters led May LJ in the *Stafford Crown Court* case, at para 34, to describe *Z* v *Finland* as

> "a decision on its facts, which cannot be used to support a general position either that a person whose article 8 rights are in issue need not be notified; or that representations by medical advisors alone are sufficient; or that oral representation is unnecessary."

He went on to say this:

> "It was a strong combination of factors, not present in B's case, which contributed to the result. It is one thing to find that, in a combination of particular circumstances, there has been no breach of article 8; quite another to frame rules on an assumption that those circumstances will always arise in combination in every case."

I respectfully agree. To my mind *Z* v *Finland* simply confirms that there will not inevitably be a breach of a complainer's Article 8 rights if an order for recovery of her medical records is made without her having had the opportunity to be heard in opposition to it. There might be exceptional circumstances justifying that course. But it does not support for the proposition that giving the complainer (or other person whose rights may be affected by the disclosure of the medical records) a right to be heard is generally unnecessary. For the reasons given by May LJ in the *Stafford Crown Court* case, I consider that intimation to the complainer and the provision of an opportunity to be heard before an order for recovery of her medical records is made is required if there is not to be a breach of the complainer's Article 8 rights.

[39] There are good practical as well as legal reasons for this. If the complainer is not given the opportunity to be heard, how is the court to carry out the balancing exercise required of it? The defence cannot be expected to argue, on her behalf, her likely objections to their own application for recovery of the documents. Nor, for the reasons given by May LJ at para 27 of his judgment in the *Stafford Crown Court* case (and supported in this case by the submissions of the Interveners), would it be adequate for her interests to be represented by the NHS or other haver. Without enquiry of the complainer, they would not necessarily be aware of any particular concerns which she might have. The interests of the NHS as havers might be different from those of the complainer. And, as is evident from the material lodged in this case, the NHS will usually be content to leave the decision to the court without wishing to be heard. What about the court itself? Of course, as the Scottish Ministers say in their July letter, the court will be expected to be aware that its decision has to take into account the Article 8 rights of the complainer. But how is the court to know

whether there are any particular sensitivities to be taken into account in making its decision, unless it gets this information from the complainer or her representatives. It is not enough, in my opinion, and does not satisfy the requirements of Article 8, for the court to treat every case in the same way, balancing the accused's interest in obtaining the medical records against a typical complainer's Article 8 privacy rights. But that is what it would have to do if it did not give the complainer in every case an opportunity to be heard.

[40] This does not mean that there would have to be a hearing in every case attended by the complainer or her representatives. It would be adequate, in my view, for rules to be introduced along the lines of those in England and Wales, in terms of which: intimation is given to the havers and to the complainer (and any other person to whom the records relate) of the petition for commission and diligence; they are given a short period, say 14 days, within which to indicate whether they wish to be heard in opposition to the petition; and there can then be a hearing on the petition, with or without appearance by the havers and/or the complainer depending upon whether, within that period, they have indicated that they wish to be heard.

[41] There are at present no rules requiring either intimation on any such persons or affording them a right to be heard. The matter is covered by section 301A of the 1995 Act. This provides, so far as material, as follows:

"301A Recovery of documents

1. It is competent for the sheriff court to make, in connection with any criminal proceedings mentioned in subsection (2) below, the orders mentioned in subsection (3) below.

2. The proceedings are –

    a. solemn proceedings in that sheriff court;

    b. summary proceedings –

        i. in that sheriff court;

        ii. in any JP court in that sheriff court's district.

3. The orders are –

    a. an order granting commission and diligence for the recovery of documents;

    b. an order for the production of documents.

4. An application for the purpose may not be made –

    a. in connection with solemn proceedings, until the indictment has been served on the accused or the accused has been cited …;

    b. In connection with summary proceedings, until the accused has answered the complaint.

5. A decision of the Sheriff on an application for an order under subsection (1) above may be appealed to the appropriate Appeal Court.

6. …

7. The prosecutor is entitled to be heard in any –

    a. application for an order under subsection (1) above;

    b. appeal under subsection (5) above,

    even if the prosecutor is not a party to the application or (as the case may be) appeal.

8. The competence of the High Court to make, in connection with criminal proceedings, the orders mentioned in subsection (3) above is restricted to making them in connection with proceedings in that court.…"

That section contains no obligation to intimate the petition on any havers or anyone whose Convention rights may be affected by recovery or production of the documents. It does, however, impliedly require intimation on the prosecutor; and it expressly entitles the prosecutor to be heard on the application. On the strength of this Ms O'Neill argued that the complainer had no present right to be heard. That is wrong. There may be no express provision in any statute or any rule requiring intimation to be made on the complainer or requiring her to be given an opportunity to be heard. But she has that right by virtue of Article 8, and the absence of any specific provision in a statute or in court rules cannot take away that right. What is required is for the lack of any specific provision to be addressed by the appropriate rule-making body.

[42] Ms O'Neill referred to the decisions of the Appeal Court in *Swire* and *Porch* as demonstrating that no one who was not a party to the criminal proceedings could participate in any part of those proceedings. I do not understand the Appeal Court to have been going that far. Certainly in *Swire*, which concerned the right of relatives of two of the victims of the Lockerbie bombing to apply to the Scottish Criminal Cases Review Commission for a review of the conviction for that crime, the appeal Court stated that:

> "the Scottish criminal justice system does not, at present, allow victims or relatives of victims to be direct participants in criminal proceedings".

However, as the court noted at para [18], the decision turned on a short point of statutory interpretation, viz section 303A of the 1995 Act. *Porch* concerned the right of a complainer to be heard in opposition to a bail condition imposed upon her partner, pending his trial for assaulting her, that he should not approach or contact her. Again, the decision turned upon the construction of the relevant statutory provision. At para [33], the court said this:

> "A compatibility issue does not arise simply because the article 8 rights of another may be affected by a decision taken in a criminal process not relating to that person. The consequence of this argument is that every complainer, indeed every family member who might be affected by the bail decision, would be entitled to independent representation at every stage of the bail process, and that

> would be so whether or not he or she contested the imposition of the conditions, which would impose an impossible or disproportionate burden on the system."

The court held that the complainer had no right to participate in the proceedings. The fact that the proceedings were intimated on her did not make her a party. And her views were made known to the court by the Crown. But that decision, again, turned on the particular circumstances. In para [35] the court distinguished between, on the one hand, a person who was entitled to participate in a court process for the purpose of obtaining an order or determination in their favour and, on the other, an individual who was not so entitled. It distinguished the case before it from cases such as the *Stafford Crown Court* case, the latter being a case of someone who was entitled to participate. In the same way, so it seems to me, the position in *Porch* is distinguishable from the present case. In the present case, just as in *Stafford Crown Court*, the complainer is entitled to participate, notwithstanding the absence of a particular rule or statutory provision entitling her to do so, and not because the petition proceedings in the sheriff court were intimated on her, but because her Article 8 rights entitle her to be heard.

[43] In this connection, it should be borne in mind that there is no question of the complainer participating in the criminal trial itself other than as a witness. As the wording of section 301A(1) makes clear, the petition proceedings before the sheriff for commission and diligence are not part of the criminal proceedings against the accused. Rather they are petition proceedings brought "in connection with" the solemn proceedings in the sheriff court. Before that section was introduced in 2007, only the High Court had power to order recovery of documents required for use in a sheriff court trial*: HMA* v *Ashrif*. Those proceedings in the High Court were obviously separate from the solemn proceedings in the sheriff court. The effect of section 301A is to allow the application for recovery of documents to be made in the sheriff court; but that application is still made in separate proceedings. Intimating those proceedings for recovery of documents on the havers and on someone in the position of the complainer whose rights may be affected by an order for recovery, and giving them the opportunity to be heard before any such order is made, does not make any substantial inroad into the general principle enunciated in cases such as *Swire* and *Porch* that the Scottish criminal justice system does not, at present, allow victims to be direct participants in criminal proceedings. Insofar as the petition proceedings for commission and diligence are indeed criminal proceedings, and I do not think that it was suggested that they were not criminal proceedings, they are wholly separate from the substantive criminal proceedings against the accused and are focused entirely upon an issue, viz the recovery of medical records, in which persons such as the complainer have a direct interest.

[44] In *McDonald* v *HMA* 2010 SC (PC) 1 Lord Rodger described the use of commission and diligence both in civil and criminal procedure in terms which appear to recognise that the principles governing the application in each case are the same: see paras 65-67. If that is right, and I see no reason why it should not be, that too provides a reason for saying that a person whose rights are potentially affected by the making of an order should have the opportunity of being heard before the documents are made available to the party seeking their recovery. In civil procedure the motion for commission and diligence will be intimated on the other party to the proceedings. They will usually be the only parties represented at the hearing of the motion. If an order is made, the haver will be required to produce the documents. However, if he wishes to insist on rights of confidentiality (e.g. legal professional privilege, commercial sensitivity, etc.) he may produce the documents under reservation of his right to argue the point before they are handed over. Typically this is done by putting the documents in respect of which confidentiality is claimed into an envelope which is not to be opened until the court has ruled on the question, but there are other ways in which the matter can be dealt with. And the same process applies where the documents sought to be recovered raise issues of confidentiality not in the haver but in a third party. To afford the haver or the complainer an opportunity to be heard when the documents are sought to be recovered in connection with criminal proceedings simply applies the same principle in this different setting.

[45] I conclude, therefore, that a haver and any person whose Article 8 rights may be infringed by an order for recovery of medical records and other sensitive documents must have the application for recovery intimated to them and must be given the opportunity to be heard in opposition to the application before an order is made or, at least, before the documents are handed over to the party seeking them. I put it in this way because there may be many stages at which that person may be heard. It may be that they should be

heard on every application. It may be that they should only be heard if, having had the application intimated on them and been given the opportunity of objecting, they indicate that they wish to be heard. Or it may be that they should only be heard once the court has determined that the documents pass the test of relevancy and should be recovered subject to any objection on Article 8 grounds. In this connection it may be possible to devise rules applying to applications in the criminal process a procedure similar to that which exists in civil proceedings. That is a matter for the framers of any new rules to determine. In the meantime it will be a matter for a sheriff hearing the application to determine how best to ensure that a party seeking to vindicate his or her Convention rights is heard before medical and other sensitive records are allowed to be released.

Legal aid?

[46] If the complainer has a right to be heard, whether initially at some later stage, it must follow that she is entitled to legal representation. That raises the question of whether she is entitled to be publicly funded for such representation.

[47] It is common ground that the case does not fall within any of the categories for which legal aid is available according to the current regulations. That is why the complainer has made an application to the Scottish Ministers under section 4(2)(c) of the 1986 Act. That provides, reading short, that there shall be paid out of the Scottish Legal Aid Fund ("the Fund") "such other payments as the [Scottish Ministers] may determine". That section, therefore, gives the Scottish Ministers a wide discretion as to whether or not to direct the grant of legal aid to someone in the position of the complainer. The Act is silent as to how that discretion should be exercised. That is a matter, in the first instance at least, for the Scottish Ministers. But of course its exercise is subject to review by the courts.

[48] The letter of July 2015 refusing to direct the grant of legal aid focused entirely on the question of whether the complainer had a right to be heard and represented in the proceedings for recovery of her medical records. Although material was presented to the Scottish Ministers concerning the complainer's means and her ability to represent herself, those matters were not addressed by the Scottish Ministers in the letter. In those circumstances the appropriate course for this court is simply to reduce the decision, founded as it is on an error of law as to the complainer's right to be heard, leaving the Scottish Ministers to make a new decision on a correct legal basis. I propose to take that course.

[49] I should, however, make two points which the Scottish Ministers may find of assistance in coming to any new decision about the matter.

[50] The first is that as a matter of Convention jurisprudence, the complainer is entitled to have her ECHR rights protected effectively. This is reinforced by the obligations placed on Scottish Ministers by section 1(3)(d) of the Victims and Witnesses (Scotland) Act 2014 which provides that "in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the … proceedings." I have already explained that the reference to a "victim" must mean someone who is alleged to have been a victim, otherwise it would prejudge the question of guilt. I do not suggest that that section gives a victim or witness a right to participate in the trial other than as a witness if called to give evidence. But it does lend support to the proposition that in so far as the complainer has a direct right to be heard on an application for recovery of her medical records, that right must be made effective. If the grant of legal aid – both for representation in court and, perhaps, also at the earlier stage of taking advice on the petition for commission and diligence so as to understand its potential consequences – is necessary to make that right effective, that is a factor which must be taken into account in arriving at a decision.

[51] The second point is that the Scottish ministers may wish to have regard to the approach set out by the Court of Appeal in *Gudanaviciene* at para 72, disapproving the more demanding test suggested by Coulson J in *M* v *Director of Legal Aid Casework* :

> "Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity."

That, of course, was said having regard to the provisions in England and Wales governing legal aid, but it seems to me to have equal application in Scotland. That is consistent with the Strasbourg decisions cited by the Interveners. I would just add that the decision must obviously take into account not only the individual's age and mental capacity but also his vulnerability and continuing distress insofar as this too may affect his or her ability to represent himself. If, as the material presented to Scottish Ministers appears to show, the complainer here is vulnerable and terrified by the whole court process so that she cannot be expected to speak up for herself in court and present her arguments coherently and forcefully, that will be a strong reason for the application for legal aid to be favourably regarded.

[52] I should note two final points. First, in addition to relying upon Article 8, Ms Bain also referred briefly to Articles 6 and 14. In light of my decision, I do not need to say anything about these Articles. The points will be available to be argued should the case go further. Secondly, in light of my decision, I do not consider it necessary at this stage to make any declarator about the compatibility of the current rules (or lack of them) regulating the ability of someone in the position of the complainer to be heard in defence of her Convention rights and to be granted legal aid for that purpose. There is a right to be heard, and there is a discretion as to whether to grant legal aid for representation at any such hearing. The absence of rules, though they would be desirable, does not make the current system incompatible with the complainer's Convention rights. That is not to say that circumstances will never arise in which it is appropriate for the court to make some general declaration as to the compatibility of the existing legislation and/or the interpretation of it by the Scottish Ministers with the Convention, but the question does not arise on the present application.

Disposal

[53] I shall pronounce an interlocutor reducing the decision of the Scottish Ministers, in their letter of July 2015, to refuse to make a determination for legal aid under section 4(2)(c) of the Legal Aid (Scotland) Act 1986.

[54] I shall reserve all questions of expenses.