EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 23
XA34/21

Lord Justice Clerk
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Application for leave to appeal under section 113 of the Courts Reform (Scotland) Act 2014

by

JK

Applicant

against

ARGYLL AND BUTE COUNCIL

Respondent

Applicant: Leighton, Advocate; Civil Legal Assistance Office
Respondent: Blair, Advocate; Brodies LLP

29 April 2022

Introduction

[1] Argyll and Bute Council had concerns about the applicant's mental health. It brought a summary application in the sheriff court to appoint its Chief Social Work Officer as her welfare guardian for a period of three years. It sought the order in terms of section 57(2) of the Adults with Incapacity (Scotland) Act 2000. The applicant opposed the

order on the ground that she did not have a mental disorder. Both her father and her primary carer, however, supported the application.

[2] A proof took place. On the evidence the sheriff concluded that the applicant suffered from a serious delusional disorder, which gave rise to concerns about her welfare. While recognising that a guardianship order would necessarily involve a degree of deprivation of her liberty, he concluded that it would be to her benefit. He restricted the term of the order to one year.

[3] The sheriff appeal court refused the applicant's appeal. It subsequently refused to grant her leave to appeal to this court. She now seeks leave direct from this court. The question arises about whether that is competent.

Legislation

[4] Two statutes require to be considered. The first is the Courts Reform (Scotland) Act 2014. Under the heading "Appeals to the Sheriff Appeal Court", it provides:

> **"109. Abolition of appeal from a sheriff to the sheriff principal**
>
> (1) No appeal may be taken to the sheriff principal against any decision of a sheriff in civil proceedings.
>
> (2) Subsection (3) applies to any provision of any pre-commencement enactment that—
>
> (a) provides for an appeal to the sheriff principal from any decision of a sheriff in civil proceedings, or
>
> (b) restricts or excludes any such appeal.
>
> (3) The provision has effect as if for the reference to the sheriff principal there were substituted a reference to the Sheriff Appeal Court.
>
> (4) In subsection (2), "pre-commencement enactment" means an enactment passed or made before this section comes into force".
>
> …

113 Appeal from the Sheriff Appeal Court to the Court of Session

(1) An appeal may be taken to the Court of Session against a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings, but only—

(a) with the permission of the Sheriff Appeal Court, or

(b) if that Court has refused permission, with the permission of the Court of Session.

(2) The Sheriff Appeal Court or the Court of Session may grant permission under subsection (1) only if the Court considers that—

(a) the appeal would raise an important point of principle or practice, or

(b) there is some other compelling reason for the Court of Session to hear the appeal.

(3) This section does not affect any other right of appeal against any decision of the Sheriff Appeal Court to the Court of Session under any other enactment.

(4) This section is subject to any provision of any other enactment that restricts or excludes a right of appeal from the Sheriff Appeal Court to the Court of Session".

[5] The second statute is the Adults with Incapacity (Scotland) Act 2000. It provides:

"2 Applications and other proceedings and appeals

(1) This section shall apply for the purposes of any application which may be made to and any other proceedings before the sheriff under this Act.

(2) An application to the sheriff under this Act shall be made by summary application.

(3) Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, him under this Act may be appealed to the sheriff principal, and the decision upon such appeal of the sheriff principal may be appealed, with the leave of the sheriff principal, to the Court of Session".

Procedure

[6] The applicant initially sought permission to appeal under section 113(1)(a) of the 2014 Act. The clerk of the sheriff appeal court advised her that such an application was

incompetent, and that any such application required to be made under section 2(3) of the 2000 Act. The applicant then lodged a fresh application under section 2, advancing the same substantive arguments. She contended that the appeal raised an important point of principle or practice in respect of orders authorising the deprivation of liberty of vulnerable adults.

[7] The sheriff appeal court determined (a) that the 2000 Act applied, and (b) that the test for granting leave under that provision differed from the 'second appeals test' introduced by section 113(2). The relevant test is less stringent. It is akin to the test for an appeal from a sheriff to the sheriff appeal court , namely that there was "a substantial and arguable point of law on which the [SAC] might reasonably and on identifiable grounds take a different view to his own, or if there is a conflict of judicial opinion on some important matter of principle": Macphail, *Sheriff Court Practice*, 4th edition, paragraph 18.152; see also *KM* v *AKG* (SAC, unreported, 20 January 2021) at paras 23 and 24. In relation to a further motion regarding the application of section 113 of the 2014 Act, the sheriff appeal court considered that the appellant could not "ride two horses". It refused the application on the basis that the section 2 test had not been met.

Submissions

Applicant

[8] The applicant submitted that the sheriff appeal court erred in concluding that the question of leave fell to be determined under section 2(3) of the 2000 Act. It had misread section 109 of the 2014 Act, which applied only to appeals *to*, not *from*, the sheriff appeal court. Section 113 applied to the current proceedings. The carve out in section 113(4) did not apply, as there was no other provision providing for a right of appeal to the Court of Session.

Council

[9] The council invited the court to dismiss the motion as incompetent. It argued that summary applications under the 2000 Act are wholly shrieval in nature. Parliament had considered that a special process was needed to deal with such matters. Any right of appeal to the Court of Session should be restricted to the circumstances provided for by section 2(3). It provided that a right of appeal to the Court of Session depended upon leave being granted by the sheriff appeal court. Section 109(2)(b) simply made provision to preserve the pre-commencement jurisdiction of the sheriff principal, and allocate it to the sheriff appeal court. In any event, if this primary argument were wrong, the application having been made under section 2 of the 2000 Act, not section 113(1)(a) of the 2014 Act, no application under section 113(1)(b) would be competent.

Analysis and decision

[10] The 2014 Act transferred the former appellate jurisdiction of the sheriff principal to the sheriff appeal court. Section 109 did that and no more. An appeal to the Court of Session may only be exercised with the leave of the sheriff appeal court, or, such leave having been refused, by the Court of Session: section 113. Importantly, however, where statute already provides a right of appeal, the relevant restrictions continue to apply: sections 113(3) and (4).

[11] Put short that means that no section 113 appeal to the Court of Session can be made if there is another statutory route. Section 2(3) of the 2000 Act clearly falls into that category. The effect of subsections 109(2) and (3) of the 2014 Act is that the latter part of section 2(3) of the 2000 Act reads "--- and the decision upon such appeal of the Sheriff Appeal Court may be appealed, with the leave of the Sheriff Appeal Court, to the Court of Session." Section

113(4) makes it clear that this remains the only route for an appeal to this court in cases under the 2000 Act. There is no opportunity to obtain leave direct from the Court of Session, and the course sought by the applicant is incompetent.

[12] As to the section 2 test, the sheriff appeal court correctly identified that it is the general test for leave to appeal, not the second appeals test**.** That the legislative intention behind section 113 was to maintain existing statutory restrictions applying to the possibility of appeal to the Court of Session is consistent with the rationale of the reforms introduced by the 2014 Act. One aim in creating the Sheriff Appeal Court was to limit the number of cases proceeding to the Court of Session. The intention was not to expand existing rights of appeal. In fact, as noted in MacPhail, *supra*, at 18.167:

> "The automatic rights of appeal to the Court of Session which previously existed were swept away by the 2014 Act."

[13] It follows that we refuse the application as incompetent. In the course of his submissions counsel for the applicant submitted that leave should be granted because of the importance of the substantive issue to which the application relates. That would be a relevant issue to address were the application competent in the first place. However, an issue may be important without raising an arguable point of appeal. The sheriff appeal court however considered that the case concerned "the application of existing legal principle, well established under existing authority, both domestic and ECHR. The Inner House is not being asked to determine a matter where there is no authority or the law is plainly unclear or the decision is plainly wrong." It refused leave because the applicant had "singularly failed to set out why or how the sheriff and this Court erred in law in reaching their respective decisions."

Postscript

[14] In the course of argument, counsel referred to *JM* v *Aberdeenshire Council* 2018 SC 118. That case is not an authority for the propositions made on behalf of the applicant. A single judge granted leave at a procedural hearing without being addressed on the competency point. It was therefore decided *per incuriam*.