SHERIFF APPEAL COURT

[2017] SAC (Civ) 36
STI-B84-17

Sheriff Principal M M Stephen QC
Appeal Sheriff W Holligan
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal

by stated case

in terms of section 163 of the Children's Hearings (Scotland) Act 2011

by

SHONA SPENCE, Locality Reporter Manager, Stirling, The Scottish Children's Reporter Administration, Ochil House, Springkerse Business Park Stirling

Appellant:

in respect of

The Child "H" (D.O.B. 13 September 2009)

AM (Mother)

Respondent:

Appellant: Guy; Anderson Strathern
Respondent: Wild; Dalling Solicitors, Stirling

4 October 2017

[1] This is an appeal by the Locality Reporter Manager (Stirling) by way of stated case in terms of section 163 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). The appeal lies from the decision of the summary sheriff at Stirling to terminate a compulsory supervision order (CSO) which had been continued by the children's hearing on 18 April 2017 in respect of child 'H' in an appeal by the respondent under section 154 of the 2011 Act. In disposing of the appeal the sheriff in addition to terminating the CSO also remitted the case to the children's hearing to proceed as accords.

Background

[2] The child has been subject to compulsory measures of care in the form of a supervision requirement and then a compulsory supervision order since 4 February 2010, when she was five months old. 'H' lives with her maternal grandparents and has done so for most of her life. The respondent has been unable to care for 'H' in the past and that situation remains at this time and is likely to continue until her personal circumstances and tenancy are settled.

[3] The sheriff in his stated case at paragraph [3] highlights the consideration of contact by the children's hearing prior to 2017. The respondent has exercised contact with 'H' from time to time usually supervised by her parents with whom 'H' lives.

[4] The respondent and 'H's' maternal grandparents attended the hearing on 18 April 2017 along with 'H's' teacher and the allocated social worker. 'H' was excused attendance. The purpose of the hearing was to review the compulsory supervision order as it was due to expire.

[5] As we understand it, it was a matter of agreement between the solicitor for the reporter and counsel for the respondent that contact was discussed at the hearing and that no issue was taken in respect of the level of contact which was taking place. Nor is it suggested that the respondent requested that a specific direction regulating contact be included in the CSO. Those in attendance on 18 April, including the respondent, were in agreement with the plan for 'H' as stated in the reasons given by the hearing.

[6] The children's hearing recorded the following decision in respect of 'H' on 18 April:

> *Decision 1 – to excuse 'H', child, from attending section 73(3);*
>
> *Decision 2 – not to appoint a safeguarder s.30;*
>
> *Decision 3 – to continue the compulsory supervision order dated 20.04.2016 specifying Stirling Local Authority as the implementation Authority until and including 17 April 2018 s.138(3)(c);*
>
> *Decision 4 – the following measures are continued in the order:*
> *(i) 'H' is to reside with Mr & Mrs M, grandparents;*
> *(ii) The implementation authority will provide appropriate support and supervision to the child.*

The hearing gave the following reasons for decision 3:-

> *Decision 3: 'H' has lived with her grandparents for the majority of her life and is very settled, happy and thriving in their care. 'H' cannot live with her Mum at this time, 'H's' Mum has recently returned to live in the Stirling area with her partner however 'A' (mum) knows that she would need to have a long term tenancy and prove that her circumstances had changed significantly before a change of 'H's' living arrangements could be considered. Everyone was in agreement with the plan for 'H'.*

Appeal to the Sheriff

[7] The respondent appealed the decision of the children's hearing of 18 April 2017 to the sheriff on the ground that the decision was not justified as it is silent as to a condition of contact. By the time of the appeal hearing before the sheriff on 5 June 2017 there was a more substantive issue which 'H's' mother (the respondent) wished to raise with regard to contact.

Her solicitor made submissions to the effect that the sheriff should allow the appeal and that the sheriff should exercise his discretion to include a direction for contact, failing which he should remit the matter to the children's hearing to properly consider the issue of contact. In the event the sheriff considered that the omission by the hearing to make any reference to contact was sufficiently egregious to undermine the validity of the order. The sheriff terminated the order for the reasons given in the stated case notwithstanding that 'H's' mother had made no request for a specific contact requirement at the children's hearing.

Case Stated by the Summary Sheriff

[8] The stated case, as adjusted, poses five questions for the opinion of this court.

(1) Was the Compulsory Supervision Order granted by the Children's Hearing defective in law?

(2) Was it correct in law to infer from the context and circumstances of the present case that the Children's Hearing had duly considered whether to make a requirement for contact in terms of section 29A of the 2011 Act?

(3) Did I err in terminating the Compulsory Supervision Order dated 18 April 2017?

(4) In terminating the Compulsory Supervision Order dated 18 April 2017, did I act in accordance with the welfare of the child?

(5) Have I provided proper and adequate reasons for my decision?

[9] The questions follow and abbreviate the points of law or questions proposed by the appellant in her application for a stated case. The appeal to this court is brought in terms of section 163 of the 2011 Act. Section 163(9) provides:-

"(9) An appeal under this section may be made-
(a) on a point of law, or
(b) in respect of any procedural irregularity.

Therefore, the scope of any appeal is limited to an issue of law or indeed procedural irregularity. In this respect the 2011 Act follows its predecessor legislation (The Social Work (Scotland) Act 1968 ("the 1968 Act") and the Children (Scotland) Act 1995 ("the 1995 Act)). Accordingly, the advice on the framing of questions in a stated case given in *C* v *Miller* 2003 SLT 1379 (at paragraph 80) approved and followed in *JM v Taylor* [2014] CSIH 62 (at paragraph [24]) remains in point. Specific and relevant questions must be posed which define precisely the legal issue to be raised for the opinion of the appeal court.

[10] The appellant's submissions ultimately focussed on questions 3, 4 and 5 in the stated case. Mr Guy indicated that the reporter, in the context of this appeal, conceded that the children's hearing had given inadequate reasons by failing to record their consideration of contact which led to a procedural irregularity. He did however point out that contact had been discussed by the children's hearing with parties on 18 April 2017. As a matter of fact the respondent did not invite the hearing to make a direction in respect of contact. As we have stated we understand this to be accepted by the respondent. Therefore, Mr Guy indicated that he was not insisting on questions 1 and 2 and invited us to answer these questions in an appropriate manner presumably by answering question 1 in the affirmative and question 2 in the negative.

[11] Before we answer these questions we observe that the first question as drafted is unusual and fails to follow the statutory test which the sheriff must address in an appeal in terms of section 156 which is whether he was satisfied that the decision of the 'children's hearing' was 'justified'. A specific question directed to the sheriff's decision to allow the respondent's appeal should be posed such as – Did I err in law in finding that the decision of the children's hearing of 18 April 2017 was not justified? or alternatively, and more concisely, "*Was the compulsory supervision order granted by the children's hearing justified?*" We

allowed the first question in law to be deleted and substituted the question in italics which we answer in the negative. It follows that question 2 in the form drafted is superfluous and we decline to answer that question as unnecessary.

[12] The remaining questions 3, 4 and 5 are the focus of parties' submissions however we take the view that question 5 is both incomplete and unnecessary. Had the sheriff intended that this relate to an issue of law in connection with his decision it fails to differentiate between firstly his reasoning in determining that the decision of the children's hearing is not justified and secondly, his rationale in taking the step of terminating the CSO as his disposal in terms of section 156(2)(b). Questions 3 and 4 address questions of law as to the sheriff's disposal of the appeal. Question 1 has already been addressed and answered. In these circumstances question 5 is an incomplete and unnecessary question which we decline to answer.

Submissions

[13] The solicitor for the appellant adopted his written note of argument and invited us to answer question 3 in the affirmative and question 4 in the negative. He pointed out that neither the respondent nor her solicitor had invited the sheriff to terminate the CSO which had been in place for more than seven years. The child was settled and getting on well in the care of her grandparents. The children's hearing had correctly recorded that all were in agreement with the plan for 'H'.

[14] The issue with which the appeal to the sheriff was concerned and therefore which we also require to address is whether the failure on the part of the children's hearing to refer to their consideration of contact as required by section 29A of the 2011 Act was such as to justify termination of the CSO.

[15] It is now accepted that contact had been discussed at the hearing on 18 April. The respondent did not seek an order regulating contact or invite the hearing to make a direction in respect of contact. Nevertheless it is accepted that the decision of the children's hearing makes no mention of contact and ought to have done so in order to demonstrate compliance with the terms of section 29A. The hearing, and the sheriff, required to have regard to the welfare principle (section 25) and no order principle (section 29) whilst taking account of the children's views (section 27).

[16] Mr Guy argued that section 29A is directory but not a pre-condition to the making or continuation of a CSO. In this respect the sheriff misdirects himself in paragraph [28] of the stated case when he expresses himself in these terms:

> "[28] Section 29A of the 2011 Act is mandatory in its terms. The children's hearing must, when making, varying or continuing a compulsory supervision order in relation to a child, consider whether to include a measure regulating contact. This is in accordance with the overarching paramountcy of consideration of the child's welfare in proceedings under the 2011 Act. That is to say, consideration of *inter alia* whether a requirement for contact should be made, is a condition precedent to the granting or refusal of a compulsory supervision order."

The final sentence discloses a clear error of law on the part of the sheriff.

[17] The purpose of section 29A is that consideration of contact by the hearing is a material statutory requirement but failure to comply with this requirement to the letter should not have the effect of undoing an order which is *ex facie* valid and conducive to the child's welfare. This is a procedural irregularity but not of such seriousness that it is "damaging to the proceedings" (*C* v *Miller* (*supra*)); *JM* v *Taylor* (*supra*) also considered the question of procedural irregularity in the context of how the hearing expressed the views of the children. In *JM* the court held that there was no error of law or procedural irregularity in the statement by the children's hearing in recording its reasons for continuing the contact

direction. The omission to record the views expressed by the children to the hearing did not amount to a procedural irregularity.

[18] Mr Guy accepted that one of the measures open to the sheriff in terms of section 156(3) was termination of the order however in the circumstances of this case the sheriff erred in so doing. No reasonable sheriff giving proper weight to the welfare test would have terminated an order which was clearly operating in the interests of the child. The sheriff's interlocutor disposing of the appeal by terminating the order and remitting to the principal reporter for a children's hearing to be assigned is an incompetent disposal. Having terminated the CSO there was nothing for the hearing to review. We were referred to the 3rd Edition of "*Children's Hearings in Scotland*" by Kenneth Norrie (Chapter 14). At 14.21 the author sets out the steps which the sheriff must take before deciding on the measures open to him if satisfied that the decision of the hearing was not justified. The learned author notes at 14.23 that termination of a compulsory supervision order will be an unusual decision for a sheriff to make.

[19] In a brief response counsel for the respondent invited us to refuse the appeal. The sheriff had been correct to take the view that the decision of the hearing could not be justified due to its omission of a mandatory consideration. Under reference to *Kennedy* v *M* 1995 SLT 717 it would be sufficient for the hearing to have mentioned the matter of contact. In this case nothing was recorded by the hearing and in that regard the sheriff was correct to come to the view he did. Counsel accepted that contact was discussed before the hearing, however, the respondent had attended personally and was not represented and was unable to express herself adequately before the hearing.

[20] Counsel considered that the sheriff was correct to express himself in the manner he did in paragraph [28]. There had been a material error and flaw in the children's hearing

order. Counsel appeared to accept that the sheriff's interlocutor disposing of the appeal was flawed in its expression but not incompetent *per se*. She had no instruction to concede that the interlocutor was incompetent or that the sheriff had erred in terminating the compulsory supervision order nevertheless she accepted that the sheriff's order had caused a vacuum in the continuing supervision and regulation of the child's care.

Discussion and disposal

[21] The children's hearing is a lay tribunal which makes important decisions for children in Scotland who require to be looked after or are in need of supervision. The key statutory provisions and principles which the children's hearing must apply are set out in Part 3 of the 2011 Act. The children's hearing must not only have these provisions in mind but must apply them when coming to decisions and giving their reasons about children. Thus the hearing must not only operate in accordance with the statutory principles but make it clear they have done so in the statement of reasons explaining their decisions. Clearly the children's hearing must proceed with the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration (section 25 of the 2011 Act). This welfare principle informs the decision making and reasoning of the children's hearing when coming to a decision about any matter relating to a child. The children's hearing and indeed, the court, must be engaged with this paramount consideration throughout proceedings. In reaching its decisions the hearing must also have regard to any views expressed by the child (section 27 of the 2011 Act). In this case the qualified derogation provided in section 26 does not apply.

[22] When the children's hearing is considering whether to continue a CSO, as here, they must apply what the statute describes as a precondition set out in section 28(2) of the 2011

Act namely, the "order/no order" principle. In other words the hearing must direct its mind to the question whether it would be better for the child if the order was continued or not. This is the sole statutory precondition to the making or, as here, the continuation of an order.

[23] Given it is now a matter of agreement that contact was discussed at the hearing, this appeal is concerned with the hearing's failure to record compliance with the provisions of section 29A of the 2011 Act. It is beyond doubt that the decision of the children's hearing on 18 April 2017 made no mention of contact nor did the reasons appended to the decision. Section 29A is in the following terms:

> "**Duty to consider including contact direction**
>
> **29A**.-(1) A children's hearing must, when making, varying or continuing a compulsory supervision order in relation to a child, consider whether to include in the order a measure of the type mentioned in section 83(2)(g)."
>
> "**Meaning of "compulsory supervision order"**
>
> 83.-(1) In this Act, "compulsory supervision order", in relation to a child, means an order-
> (a) including any of the measures mentioned in subsection (2),
> (b) specifying a local authority which is to be responsible for giving effect to the measures included in the order (the "implementation authority"),
> and
> (c) having effect for the relevant period.
> (2) The measures are –
> ……..
> (g) a direction regulating contact between the child and a specified person or class of person".

[24] It is therefore for us to consider the legal consequences of the hearing's failure to record compliance with the terms of section 29A. It is the appellant's contention that the hearing's omission to mention their consideration of contact although a procedural irregularity was not so serious or damaging to justify revocation of the order itself in a case

where contact had been taking place and the hearing was not invited to make a direction as to contact in terms of section 83.

[25] The sheriff required to interpret section 29A of the 2011 Act set out above. Section 29A appears not to have been the subject of judicial scrutiny until now. Section 29A was inserted into the 2011 Act by SSI: (Children's Hearings (Scotland) Act 2011 (Modification of Primary Legislation) Order 2013 (SSI 2013/211)). As is clear from *Kennedy* v *M* (*supra*) the 1968 Act had no equivalent measure. In a more limited form, the 1995 Act did make express provision directing a children's hearing to consider matters of contact (section 70(2) and 70(5)(b)). Section 29A is more extensive. In considering whether an order regulating contact should be made a children's hearing (and court) is bound by the terms of section 25: the fundamental question is whether it is in the interests of the child that an order regulating contact should be made and, if so, on what terms. Section 29A imposes upon the children's hearing, and not the local authority, the duty to consider contact and the power to regulate it. However, in clear contrast to the precondition in Section 28(2), consideration of contact is not expressed to be a precondition as to the making, variation or continuation of a CSO. In concluding otherwise the sheriff was plainly in error.

[26] Section 29A does not say in terms that a children's hearing must record that it has discharged its duty to consider contact but if it fails to do so then, as here, it leaves itself open to challenge that it did not do so. In the present case, the appellant concedes that the failure to record consideration of contact is a procedural irregularity. A children's hearing ought to record consideration of matters of contact if for no other reason than to avoid the situation which has arisen in the present case. However we are conscious that children's hearings comprise lay persons whose principal and most important function is to come to decisions which affect the lives and welfare of children. (We have in mind the observation

of Lord Mayfield in *Kennedy* at page 724). It is important that the children's hearing is allowed to focus on their substantive decision making function in these difficult and sensitive cases. They should not be overburdened with the requirement of strict and technical compliance with legislative requirements. They must come to their decision in accordance with the overarching principles laid down by the 2011 Act. We would be concerned that a narrow approach as applied by the sheriff in this case might have the effect of impeding the children's hearing from discharging its important public function for the benefit of children. Appeals taken solely on the basis that consideration of contact has not been recorded ought not to be encouraged. A procedural irregularity must be of such seriousness that it is "damaging to proceedings" *C* v *Miller* (*supra*) at paragraph [71]. It is difficult to understand the sheriff's conclusion that the omission by the panel to mention either their consideration of contact or whether they considered contact at all is sufficiently serious and fundamental to vitiate the order itself especially when he, as decision maker, is required to have regard to the welfare of the child as the principal or overarching consideration. Given we are dealing with a failure to record reasons rather than a failure to consider contact, the sheriff's comments as to section 29A being mandatory on one view do not arise. However, we do say this. In *R* v *Soneji* [2006] 1 AC 340 the House of Lords considered that the rigid distinction between mandatory and directory provisions had outlived its usefulness. The emphasis ought to be on the consequences of non-compliance by posing the question whether Parliament can fairly be taken to have intended total invalidity. The court considered the proper approach to be one of statutory construction. Applying that test to the circumstances in this case, would Parliament have intended that the effect of the hearing's failure to narrate its consideration of contact, in a case where the issue of contact appears not to have been controversial, would lead to the total invalidity of

the compulsory supervision measures which have been in place? We consider that the question must be answered in the negative. Given the primacy which the 2011 Act and, indeed, the 1995 Act ascribes to the welfare of the child, in our opinion it follows that such omission by the children's hearing should not have the effect of undermining an order which is conducive to the welfare of the child and has operated in her interest for many years.

[27] The sheriff takes the view that the failure by the children's hearing to record its consideration of contact is not only a deficiency and a clear failure to comply with their duty under section 29A but that it also vitiates the compulsory supervision order itself. By evacuating the compulsory supervision order the sheriff's decision leaves a vacuum. When he allows the appeal the sheriff has come to the view that he is not satisfied that the decision being appealed against is justified. No issue is now taken by parties to the sheriff's conclusion on that aspect. In allowing the appeal the sheriff may take one or, indeed, more than one of the steps listed in section 156(3) of the 2011 Act - in particular he may *"(a) require the reporter to arrange a children's hearing for any purpose for which a hearing can be arranged under the 2011 Act"*. He may *"(b) continue, vary or terminate any order, interim variation or warrant which is in effect*". If he chooses to do so the sheriff may replace the hearing's decision with one of his own however he may continue the order. Termination of a compulsory supervision order would, of course, have a dramatic effect on the welfare of a child who has been subject to such an order for most of its life, as with 'H'. The sheriff's decision to terminate the order is not only unusual but raises the welfare question set out in section 25.

[28] The sheriff goes on to express the view that even if the question of contact was uncontroversial this did not permit the children's hearing to omit a statutory requirement that is intrinsic to the welfare of the child. Of course, the paramountcy of the child's welfare

throughout its childhood is the principal consideration which not only the children's hearing but the sheriff must have regard to when coming to a decision about any matter relating to a child. The sheriff, in effect, construes the children's hearing's omission to mention their consideration of contact not only against them but also against the child without giving adequate consideration to the overarching test of whether the order is conducive to the child's welfare. Child 'H' had been subject to compulsory measures of one sort or another since she was only a few months old. There appears to be no suggestion that she is other than settled and happy in her current placement with her maternal grandparents. The termination of the compulsory supervision order places that established arrangement at some risk and leaves the question of the child's day to day care unregulated. In the absence of material indicating what alternative arrangements are in place to meet 'H's' needs and everyday care support and nurture we have little difficulty in coming to the conclusion that the sheriff failed to have proper regard to the essential welfare consideration. Furthermore, the sheriff's order then to remit the case to the children's hearing is, in our view, incompetent. There is nothing to remit back to the children's hearing. In effect the principal reporter would have to decide whether to start anew with a grounds referral which, if accepted, would bring the child's circumstances back before the children's hearing but if not accepted there would require to be a referral to the sheriff to find whether or not the grounds are established. It is not at all clear to us that the sheriff has given any consideration to the practical consequences of his order. Accordingly, there are substantial reasons for coming to the conclusion that the sheriff erred in his construction of section 29A and in terminating the order without first giving adequate consideration and weight to the section 25 welfare test. Had he done so he would not have brought the order to an end.

[29] We made the following orders after hearing submissions in this appeal. Question 1 was deleted and substituted with the question *"Was the Compulsory Supervision Order granted by the children's hearing justified"?* Following the concession made by the appellant as to procedural irregularity arising from the decision of the children's hearing on 18 August 2017 we answered that question in the negative. We answered question 3 in the affirmative; question 4 in the negative and declined to answer questions 2 and 5 as unnecessary.