SHERIFF APPEAL COURT

[2018] SAC (Civ) 13
ABE-B570-17
ABE-B571-17

Sheriff Principal M M Stephen QC
Sheriff Principal M W Lewis
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by APPEAL SHERIFF ROSS

in the cause

NR

Appellant

against

ROMA BRUCE-DAVIES, Scottish Children's Reporter's Administration

Respondent

Appellant: Kerrigan QC; Berlow Rahman, solicitors
Defender/Respondent: Scullion (sol adv); Anderson Strathern LLP

11 May 2018

[1] On 14 June 2017 a children's hearing made certain orders under the Children's Hearings (Scotland) Act 2011 (the "2011 Act") in relation to the appellant's children. She appealed unsuccessfully to the sheriff against that decision. She appeals further to this court. We have refused this appeal, for reasons discussed below. Three central points require to be reiterated, for this and other such appeals. These are:-

[2] That the bare fact of absence of evidence, such as a parenting report or an expert report, is insufficient to justify an appeal. It is necessary to show that the hearing decision

"can be characterised as one which could not, upon any reasonable view, be regarded as being justified." (*W* v *Schaffer* 2001 SLT (Sh Ct) 86 at 87K; 2011 Act section 156(1)). An appellant must consider what material was available for the hearing to consider and show, by careful analysis, that the absence of evidence resulted in an unjustified decision. Pointing out various defects in the evidence is not enough.

[3] That under the 2011 Act an appeal against a sheriff's decision on appeal from a children's hearing decision should be an exceptional event, because there is a right for the child or a relevant person to require a review of the original decision after three months (section 132). It is likely to take far longer to appeal than to ask for another decision by the children's hearing. It follows that a second appeal will rarely represent a sound use of public funds.

[4] That Convention rights under ECHR are not intended to provide a catch-all position to support an otherwise groundless argument. "Fighting on" is no justification for an appeal. The 2011 Act procedure is designed to be ECHR compliant. Any argument based on Convention rights must involve a careful analysis of law and fact, and demonstrate that those Convention rights have been breached. Mere assertion of breach is not enough.

The facts

[5] The facts received limited attention in this appeal. The following summary appears from the stated case:

[6] The appellant is the mother of LD, aged 5, and CD, aged 4. Their father has been actively involved to date, but is not an appellant. There is a long history of social work involvement. Grounds of referral were established for both children in August 2014, and they were removed to the care of foster carers. Supervised contact was allowed twice per

week for both parents. The children's hearing has accordingly been involved (and has become familiar) with each case for more than three years. A parenting assessment was completed in 2014. The local authority took various steps towards permanence, and by December 2015 were recommending adoption. The parents did not agree with this view, but their underlying domestic situation which led to the initial removal of the children did not change. After one failed placement, the children moved in about October 2016 to reside with their present carers.

[7] A children's hearing on 14 April 2016 reduced contact to once per month. The reason was that LD presented as anxious both before and after contact. Contact was further considered and varied by decision of 27 October 2016, and a twelve month compulsory supervision order made. However, the local authority suspended contact in April 2017 because of the children's presentation around contact. The last contact session was on 24 February 2017. A children's hearing on 25 May 2017 considered a report by the contact observer. Due to the absence of the father, and because the hearing was considering taking the serious step of terminating contact altogether, a decision was postponed to a further hearing on 14 June 2017 to accommodate him. Contact was suspended in the meantime.

[8] The hearing decided on 14 June 2017 to terminate contact. At that hearing, both parents were legally represented. There was, as the sheriff records, a substantial bundle of documents before the hearing, comprising a full history of social work involvement, and including relevant reports. The hearing continued the existing order for another year and terminated contact between parents and children.

[9] What information was available to the children's hearing? They heard oral evidence from three representatives of the social work department, together with the foster carer, a link worker for the foster carer, the parents and the parents' legal representatives. The

children's views were not taken due to their ages and maturity. All the social work professionals involved spoke to LD's emotional distress and behavioural problems for several days after each contact. Such behaviour had resolved now contact was terminated. Her behaviour had significantly improved. There was a written summary of contact observations, spoken to by the relevant worker. The evidence was that the parents had attended five of seven contact sessions, but appeared to prioritise their own concerns. Neither had ever acknowledged the problems which led to the children being accommodated, namely significant physical and emotional neglect and relationship difficulties. Neither parent had made use of the intensive supports which were offered. They had largely disengaged from ongoing contact with the social workers. A report prepared for the April 2017 hearing detailed the monitoring of LD's behaviour, queried the effectiveness and purpose of continued contact, and recommended termination. CD's behaviour was even more concerning than that of LD. The hearing had access to the full history of both children since 2014. It was not disputed that the children should be kept together. The information available was accordingly recent, comprehensive and given directly by social workers and the foster carer who had ongoing contact with the children.

[10] The parents appealed to the summary sheriff. They complained that the hearing had relied on the evidence of "unqualified persons", that the decision should have been deferred for further investigations by a psychologist, that the hearing did not have before them the children's views or the parents' views, and that too much weight had been placed on the decision of the social services.

[11] The summary sheriff refused the appeal. The appellant does not dispute that the summary sheriff applied the correct test. Her role was to consider whether the children's hearing decision of 14 June 2017 was justified, and in particular whether there had been any

irregularity in the hearing, whether the hearing had failed to give proper consideration to relevant factors or taken into account irrelevant factors, and if it was a decision which no reasonable children's hearing would take. She refused the appeal, referring amongst other factors to the large amount of relevant material which the hearing had considered, the breadth and depth of the social workers' knowledge of the children's circumstances, and the various failures by the parents to take remedial action. On the basis of the foregoing tests, she reached the view that the decision was justified.

[12] The mother, but not the father, has raised the present appeal against that decision.

The present appeal

[13] The three grounds of appeal can be summarised as follows:- First, the summary sheriff erred by "giving insufficient consideration to submissions on behalf of the appellant" that the local authority had failed properly to assess reasons for the children's behaviour, and that "it was the appellant's position that such an assessment should have been carried out by a child psychologist". Second, the summary sheriff had misdirected herself in holding that social workers were sufficiently qualified to provide the hearing with an opinion relating to such behaviour. Third, that the summary sheriff had erred and misdirected herself in holding that the appellant had a remedy in calling a further hearing.

[14] It is plain from the judgment that these grounds of appeal do not accurately reflect what the summary sheriff decided. They amount to an attempt to restate the same, rejected arguments while failing to recognise the reason for their earlier failure.

[15] Senior counsel who appeared for the appellant appeared to recognise this difficulty. He took a different tack, not foreshadowed in the grounds of appeal, which was to introduce an argument based on the appellant's ECHR rights. He recognised that section 163(9) of the

2011 Act restricted appeals to this court to a point of law or a procedural irregularity. He submitted that the summary sheriff had failed to recognise that the children's hearing had erred in law and in their procedures, and that there had been a breach of the appellant's Convention rights, namely Article 8 (right and respect for family life) and Article 6 (right to a fair trial). Procedurally, to have acted fairly, the children's hearing ought to have called for a current parenting assessment, refrained from varying contact to nil, and ought not to have acted without a report from a suitably qualified psychologist.

[16] Mr Scullion for the respondent conducted a comprehensive and succinct review of the factual material available to, and considered by, the children's hearing, and which was before the summary sheriff. This included: grounds established in the sheriff court in August 2014; observational contact records for six months (28 pages); contact summary report (8 pages); a children's assessment and plan for each child dated April 2017 (26 pages) which included very detailed investigation and analysis; three page email from the health visitor; and letters by class teachers. He demonstrated that the appellant was not correct to claim that the 2014 parenting review was the sole or main basis for the 2017 decision.

[17] He noted that the appellant has, as a matter of law, the right to request a review hearing of the compulsory supervision order after three months from the date it was made or continued (section 132). We note in passing that, had the appellant exercised that power, the present dispute could have been addressed many months before this appeal proceeded.

[18] Mr Scullion also pointed out that some of what the appellant sought of the summary sheriff was *ultra vires*. For example, neither this court nor a sheriff has the power to order a parenting assessment. Counsel for the appellant accepted that he did not now seek such a disposal.

The law

[19] Senior counsel for the appellant founded on a series of authorities relating to permanence and adoption proceedings, namely *KR* v *Stirling Council* 2016 SCLR 557, *In Re B (a child)* [2013] 1 WLR 1911; *S* v *L* 2013 SC (UKSC) 20; *YC* v *United Kingdom* [2012] Fam Law 932; *North Lanarkshire Council* v *KR* [2017] SAC (Civil) 38; *West Lothian Council* v *B* 2017 SLT 319; *City of Edinburgh Council* v *RO, RD* [2016] SAC (Civ) 15 and *MB* v *Hill* [2017] SAC (Civ) 10.

[20] Mr Scullion for the respondent submitted that the law was as set out in *W* v *Schaffer* 2001 SLT (Sh Ct) 86, approved in *CF* v *MF* 2017 SLT 945, reflected in *MB* v *Hill* [2017] SAC (Civ) 10, and that this had been correctly followed by the summary sheriff.

[21] We did not find the appellant's authorities to be of assistance. Permanence orders and adoption orders involve a different exercise from the present case. They arise from court proceedings, not children's hearings. Unlike the present proceedings they lead, as the name suggests, to permanent orders which may change the status of a child, sever the relationship between parent and child, and remove parental rights and responsibilities. The case law therefore addresses issues which do not yet arise in the present proceedings. Those authorities do not purport to regulate children's hearings or compulsory supervision orders which, by contrast, tend to involve a series of temporary, reversible decisions which are reviewed regularly by the same decision-making body, in a forum designed to minimise legal formality, and with the parents' ongoing participation. The tests for making permanence orders and adoption orders on one hand, and for the judicial challenge of children's hearings on the other, are quite different, and are creations of different statutes.

[22] The grounds upon which a decision of the children's hearing can be made, or challenged, are limited to those set out in the 2011 Act, principally in section 25(2) (the

overall test of welfare), section 29 (for the children's hearing), section 156 (for the sheriff court) and section 163 (on further appeal). Section 25(2) requires every forum to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration. Section 156 requires the sheriff to determine whether the children's hearing decision was "justified". Section 163 allows an appeal against the resulting decision only the basis of a point of law or a procedural irregularity.

Decision

[23] The appeal must be refused. The grounds as presented appear to be no more than a dispute on the facts, misdescribed as an error of law. The law has been correctly set out in the respondent's case.

[24] Senior counsel relied on three alleged failures, namely a failure to obtain a parenting assessment, not refraining from varying the order to nil, and a failure to engage a child psychologist. These are not by themselves errors of law. There is no requirement in law for a children's hearing to obtain either a parenting assessment or a psychologist's report. The requirement is for them to act to safeguard to promote the welfare of the child. The summary sheriff found that they did so. Her reasoning is not attacked on any ground which might amount to an error in law. The decisions of both the hearing and of the summary sheriff appear to be amply justified, as there was a considerable amount of material before the hearing on which to base their decision. Counsel did not address us on this. It would require a detailed submission to demonstrate why the panel's decision could not stand as a matter of logic or fairness. We were not presented with one. The appellant simply contends that some evidence was not gathered. She does not explain what the missing material

would have demonstrated, or how it would have compelled a different decision, or that such a decision would be in the children's best interests, rather than simply her own.

[25] Convention rights can be breached by fundamental failures in procedures or decisions. No such failures were identified, and none suggest themselves. The appellant seeks to substitute her own views for the careful exercise undertaken by the children's hearing and endorsed by the summary sheriff. She does not and cannot allege that she has not had a fair hearing. She does not allege that the interference with a right to family life, implicit in a compulsory supervision order, is not in accordance with the law, or is not necessary for the protection of the rights and freedoms of her children. The appellant seeks to identify further evidence which was not available to the hearing, and to portray its absence as amounting to a fundamental breach of her Convention rights. That approach is inadequate to justify a challenge. It would mean that no proceedings would be immune from appeal. Children's hearings would become over-complicated and legalistic, requiring to anticipate every conceivable objection and to obtain every possible piece of evidence, to avoid later criticism. The procedure would become expensive, time-consuming and unduly burdensome. Such an approach would undermine the effective working of the children's hearing system, and hinder efforts to safeguard and promote the welfare of children. Convention rights are not designed as a licence to sidestep statutory grounds of appeal, or as an incantation to justify endless dispute on the facts.

[26] For completeness, we note that the appellant was found by the hearing to have taken few or no steps to remedy the underlying lack of care which led to the original compulsory supervision order. She has not welcomed or facilitated the supports available to her. Her grounds of appeal completely fail to address the evidence upon which the children's hearing made the decision to vary contact, and on which the summary sheriff held the decision to be

justified. The variation of contact to nil was as a result of observed distress and upset to the children. The grounds of appeal do not address that matter at all. Even if there were merit in any of the criticisms of the hearing, there is no reason to anticipate that the decision would be reversed.

[27] We would add that we would expect this type of appeal, namely an appeal from an earlier appeal to a sheriff, to be a rare procedure. That is because any "relevant person" has an entitlement to request a review of a compulsory supervision order, or variation thereof, after three months (section 132(3)). We observe that such a review, by way of a further children's hearing, could have been heard at least seven months ago. Future appeals should receive robust and careful consideration by lawyers and funders alike.

[28] Accordingly we answer the question in the stated case in the affirmative, refuse the appeal and remit the cause to the summary sheriff in Aberdeen to proceed as accords.