SHERIFF APPEAL COURT

[2023] SAC (Civ) 12

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

PB

Pursuer and Appellant

against

LM

Defender and Respondent

Pursuer and Appellant: BCKM
Defender and Respondent: Thorley Stephenson Ltd

20 March 2023

[1] The parties were in a relationship between about October 2017 and February 2020, and have a daughter born in September 2008. The appellant resides in Scotland. The respondent is Polish, and wishes to return to live in Poland. The sheriff granted an order that the child reside with the respondent, and that the respondent be entitled to return with her to Poland. Provision was made for contact in Poland by the appellant. The appeal seeks to recall that permission to relocate the child, which failing to vary the contact arrangements.

[2] The sheriff issued a lengthy judgment which explained the findings and decision in considerable detail. The appellant does not challenge the principles applied, but submits

that the decision was plainly wrong, because the sheriff's discretion was exercised wrongly. In doing so he relies on twelve aspects of the sheriff's judgment, and examines these to demonstrate error in exercise of discretion.

The sheriff's decision

[3] The sheriff noted that the parties did not dispute that the child should reside with the respondent, who has always been the primary carer. The appellant previously had contact every weekend, and residential contact every third weekend. The sheriff set out the tests under section 11 of the Children (Scotland) Act 1995, and no issue is taken with these principles.

[4] The sheriff's findings in fact can be summarised, in part, briefly as follows: The respondent is 26 years old, born in Poland and a full-time mother to the child. She came to the UK at age 11, but returned to Poland aged 13. Her mother and sister remained in Scotland. The respondent returned in 2013 and found employment, then set up a business. She formed a relationship with the appellant in 2017. She quickly became pregnant with the child, and has not worked since the birth. She now wishes to return to employment to use her skills. She is currently on benefits. She is unable to find work in Scotland due to lack of support in child care.

[5] Her Polish heritage is important to her, and the child's first language is Polish. Her mother lives in Edinburgh and she has a very close relationship with her. She is otherwise socially isolated. The respondent has a large network of extended family and friends in Lublin. She is a very capable mother and the child is healthy, bright and happy. The respondent has no assistance with child care to allow her to return to work.

[6] The appellant is aged 30 years and lives with his family. He is in full-time employment. In January 2021 he was convicted of behaving in a threatening and abusive manner, aggravated by domestic abuse, against the respondent. There is a Non-Harassment Order in place until early 2025. The parties' relationship lasted for two and a half years and was characterised by domestic abuse. He struggled to cope with work together with looking after the child. He did not assist with changing, comforting or nurturing the child. His conduct towards the respondent was extremely abusive, and he has physically assaulted her, made repeated racially-offensive remarks, and coercively controlled her. He has caused acute fear, alarm and distress to the respondent. Contact has, however, developed well and there is a bond of affection between the appellant and the child. Contact is supported by the respondent and her family. He does not want the child to be relocated to Poland as this will result in a reduction in contact.

[7] The foregoing represents a brief reprise of the sheriff's findings in fact. The sheriff made 48 findings in fact, dealing with every aspect of the background of each of the parties, their relationship with each other and the child, the practical difficulties faced by each of the parties in their future relationships with each other and the child, and the needs of the child.

The grounds of appeal

[8] There are 12 grounds of appeal. These are as follows:-

1) The sheriff gave insufficient weight to the fact that the child was happy and settled in Scotland;

2) The sheriff gave insufficient weight to the effect of the reduction in contact with the appellant;

3) The sheriff took no account of the harmful effect of the drastic reduction in contact on the child, with the appellant and his parents. In addition, she paid insufficient consideration to the appellant's limitations in leave and meeting travel costs to Poland;

4) The sheriff gave too little weight to the quality of contact between the appellant and the child which has increased gradually by order of the court and has been on a residential basis;

5) The sheriff took no account of the potential adverse effect on the relationship between the appellant and the child;

6) The sheriff gave too much weight to the appellant's conviction for a domestically aggravated Section 38(1) which did not have a material bearing on the appellant's relationship with the child;

7) The sheriff took no account of the evidence of a Polish national, Paulina Easton, which supported the appellant's character, his lack of racial bias and his positive relationship with the child;

8) The sheriff gave too much weight to the respondent's historical allegations of domestic abuse which did not have a material bearing on the appellant's relationship with the child;

9) The sheriff gave too little weight to the benefits to the child of being enrolled in nursery and school in Scotland;

10) The sheriff gave too much weight to the child being unable to be taught the Polish language at school in Scotland;

11) The sheriff gave too much weight to the respondent's family and support network in Poland when said support network will be more limited in the event of the respondent's move to Poland;

12) The sheriff gave too little weight to the appellant's family and support network in Scotland, and their relationship with the child.

The principles of appeals on findings in fact

[9] The test for an appeal founded on re-examining findings in fact, or the inferences based on those, is a high one:-

> 'It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.' (per Lord Greene MR in *Yuill* v *Yuill*, approved in *McGraddie* v *McGraddie* 2014 SC (UKSC) 12).

[10] An appeal court should not simply re-examine facts for itself:-

> "In an appeal which seeks to challenge findings in fact, an appellate court must have due regard to the limitations of an appeal process, with its '[narrow focus] on particular issues as opposed to viewing the case as a whole' …When considering reversing a first instance judge's findings in fact, therefore the appellate court should confine itself to situations where it can categorise the findings as incapable of being reasonably explained or justified in terms of the dicta quoted in *Henderson* v *Foxworth Investments Ltd* (paras 63–65)." (*HS* v *FS*, 2015 S.C 519, para. 23, approved in *McCulloch* v *Fife Health Board* 2021 SLT 695.)

[11] It is not sufficient for a party to rely on a textual analysis to find apparent deficiencies:-

> 'The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. . . . An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.' (*Piglowska* v *Piglowski* (p 1372 per Lord Hoffmann, approved in *McGraddie* v *McGraddie*, above).

[12] The reason is that:-

> 'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.' Canadian Supreme Court in *Housen* v *Nikolaisen* (para 14), approved in *McGraddie* v *McGraddie*, above).

[13] An appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. (*G* v *G (Minors: Custody Appeal)* 1985 1 WLR 647 at 652). The court must not intervene unless satisfied either that the sheriff must have exercised their discretion upon a wrong principle, or that, the judge's decision being so plainly wrong, they must have exercised their discretion wrongly (*M* v *M* [2011] CSIH 65 at page 8).

[14] An appeal court should adopt a flexible and undogmatic approach, and an appellate court may interfere with the trial judge's decision on issues of fact for a range of reasons beyond the test of being "plainly wrong" (*AW* v *Greater Glasgow Health Board* [2017] CSIH 58). However, it is nonetheless absolutely necessary for an appellant to clearly explain, and then demonstrate by reference to the whole of the evidence, why the court's decision was not justifiable on the evidence.

The present appeal

[15] With regard to the 12 grounds in the present appeal, it is immediately apparent that none of these is more than assertion. Each is meaningless in isolation. The formulae of "too much" or "too little" are comparatives, and only make sense when directly contrasted to the whole of the evidence. An appeal will not succeed simply because some factual challenges

are raised. Final decisions in contested cases, by their very nature, require the judge to make difficult decisions. In most cases, a rational argument can be made, at least to some extent, for either party. It does not follow that the losing side can elect to re-litigate the point on appeal. To challenge a decision based on selected pieces of evidence amounts to no more than reopening a dispute already decided.

[16] This appeal is purportedly supported by excerpts from the transcripts of evidence, and these are lodged and referred to. The twelve grounds of appeal are divided into three subject areas, namely grounds (a) to (e), (f) to (h) and (i) to (l). The appellant's written submissions add further specification of what is described by the grounds of appeal. They do not, however, carry out any comparative exercise with what the sheriff's decision actually was, nor do they explain why the sheriff's decision was not justified on the facts upon which it was based.

Decision

[17] It will already be evident that this appeal cannot succeed. The twelve grounds of appeal amount only to alternative suggestions. They fail to explain, and not merely assert, why the sheriff could not properly reach the conclusions she did, on the evidence she saw and heard.

[18] Furthermore, even if there were merit in the appeal, the grounds of appeal do not adequately support the proposition that the sheriff was plainly wrong, or even wrong to any degree. These can be examined as follows:-

Grounds (a) to (e)

[19] In relation to grounds (a) to (e), these allege insufficient weight given to the child being happy and settled in Scotland, the effect of reduction of contact with the appellant, the limitation on contact caused by relocation, the increasing quality of contact with the appellant and the potentially adverse effect on the relationship between appellant and child.

[20] The appellant refers to successful contact on a three-week cycle, that residential contact was successful, and that the evidence showed a steady increase from supervised to unsupervised contact. The contact reports were positive, and demonstrated that the sheriff had attached far too little weight to the positive experience of contact for the child. The decision removed the opportunity for contact to develop and increase, for residential contact, for a developed relationship. It is submitted that the child's occasional reluctance to attend contact simply reflected her age.

[21] The sheriff is criticised as approaching the appellant's "plight" by minimising his concerns about having sufficient leave and resources to travel to Poland regularly and to maintain the relationship at a distance. The limitations on his financial ability were "side-lined" and "essentially minimised". There was a detailed discussion of the respondent's finances.

[22] Reliance is placed on the respondent's evidence at pages 45 to 56 of the transcript of cross-examination. She spoke to the increase in contact over time. In July 2020 contact was every Sunday from 2pm to 4pm, under support of a third party. The child was less than 2 years old. By 28 September 2020 the third party would allow unsupervised contact for part of every visit. On 10 November 2020 it was increased to unsupervised contact from 1pm to 4pm, on Sundays. Regular contact was increased on 7 May 2021 to six hours between 10am and 4pm. On 19 July 2021 residential contact was started, with an overnight visit on

successive months, together with longer hours of non-residential contact, from 11am to 5pm. The present regular three-weekly cycle was put in place in November 2021.

[23] The next extract is between pages 7 and 10 of the appellant's evidence. He speaks of debts of £1,400 and £1,000. He pays maintenance of approximately £170 per month, fluctuating. He pays rent to his mother of £250 per month, and also makes food contributions. This evidence is relatively brief.

[24] The next extract is between pages 100 to 138 of the appellant's evidence. He describes his desire to take the child swimming, the high quality of contact, and the bond of reassurance between them. He had never been to Poland. He would no longer see her every week, and an infrequent extended period of contact would not be the same. He could not fathom not having weekly contact. It would break him if he could only see her at holidays. He would have to plan all of his holidays around seeing the child. The sheriff was careful to draw from the witness what he meant in his evidence about "unworkability", as he described it. He meant that he did not have enough leave to see her as often as he wished, that it would breach the child's relationship with both him and his family in Scotland. He accepted that the arrangement would work in purely practical terms, but that he should be seeing a lot more of her. It was clear the appellant was deeply emotionally attached to the child.

[25] Against this, it is submitted that the sheriff attached little to no weight to the impact on the appellant of his having to travel to see the child in Poland. The first, and most obvious, observation, is that the sheriff's statutory task was not to assess the impact on the appellant. It was to assess the best interests of the child (*SM* v *CM* [2011] CSIH 65). She did that.

[26] The next submission is that the sheriff asked questions which indicated her approach was minimising his concerns about the feasibility of his paying to travel abroad. That analysis is unsupportable. The sheriff, on at least two occasions, stated that she was trying to understand the appellant's evidence, and in particular what he meant by the word "unworkable", and how many days' leave he had. The questions give rise to no indication of anything other than a need to be clear, and fully informed, on the evidence. The appellant's agent was free thereafter to develop any line of questioning he saw fit.

[27] From this, it is submitted that the appellant's financial constraints were minimised and sidelined in the judgment in favour of the respondent's "wishes". That submission seems to suggest that the sheriff failed to decide the case on the correct basis, namely the best interests of the child. That is plainly, on the face of the judgment, wrong and unsupportable. If it is intended to submit that the sheriff placed unequal weight on the evidence, regard must be had to what the sheriff actually did say. The appeal does not do that.

[28] The sheriff's judgment extends to 34 pages. It represents a painstaking and detailed discussion of every aspect of the case. It analysed the parties' individual circumstances, the history and nature of the relationship, the proposed relocation and the practical details of accommodation, finances, child care and extended family in Poland, the history of contact, the reasonableness of relocation and proceeds to a decision which is fully explained.

[29] The principal question is the best interests of the child. The sheriff explained, at considerable length and detail, why those interests are best met by allowing the relocation to Poland. It is difficult to summarise these without repeating the bulk of the lengthy judgment. None of it is challenged. The child's life in Poland will be fully supported, financed and offers the best future for her.

[30] The sheriff expressly stated at paragraph [49] "The primary factor, which mitigates against relocation, is the diminution in the quantity and possibly the quality of [the child's] contact with her father." It is difficult to reconcile this statement with the appeal point that she failed to properly balance the appellant's interests. The sheriff expressly recognised that it is in the child's best interests that the relationship be nurtured and maintained. The difficulties created by relocation were recognised. The sheriff then recognised that this is not the only factor. Paragraphs [50] and [51] set out why other factors outweigh the appellant's interests, not least because of his own history of violence and racial abuse towards the respondent.

[31] These grounds of appeal do not set out why the sheriff's reasoning is defective. They do not state why the decision is not supportable. The decision is plainly rational and carefully explained. The selected points relied upon by the appellant were all recognised by the sheriff and subsumed in a general recognition of the practical difficulty facing the appellant. The sheriff expressly recognised this difficulty, and explained why it is not the most important factor in relation to the child's wellbeing. Further, the grounds are not supported by the extracts of evidence referred to, which do not demonstrate any judicial attitude beyond elementary fact-finding, and do not demonstrate any material which was omitted. It is not necessary for a judgment to expressly discuss every adminicle of evidence (*Piglowska* v *Piglowski*, above). The appeal on these grounds fails.

In relation to grounds (f) to (l)

[32] The appellant was convicted of a serious domestic offence against the respondent. The grounds assert that the sheriff gave too much weight to this, which did not have relevance to the child; that the evidence of a supporting witness of lack of racial bias was not

taken account; and that she gave too much weight to historical accusations of domestic abuse.

[33] These observations are not placed in any context, and no attempt is made to show that the sheriff's overall decision was plainly wrong. No specific reference is made to any passage of the judgment.

[34] The sheriff's task was to hear and assess evidence. She accepted the respondent's evidence of extreme, racist, violent, controlling abuse by the appellant, leading to a criminal conviction. She discussed this at paragraphs [5] to [13]. She discussed also the appellant's minimisation and superficial remorse. The consequences were identified as, amongst other things, an inability to co-operate directly when arranging contact.

[35] It is not explained what "too much weight" means. The sheriff took the parties' history into account in identifying that the respondent had suffered adverse mental health and required support. This support is all but absent in Scotland, but is available in Poland. The history of abuse meant that the appellant's relationship with child was inevitably constrained (para [28]). There is no indication that the history of abuse played any other role in the sheriff's decision. The advantages of relocation are many (para [42]). For these grounds of appeal to be accepted it would be necessary to show that all of these positive characteristics were overshadowed. There is no support in the judgment for such a submission, and none is made.

[36] Reliance is placed on a passage of the respondent's evidence at pages 5 to 8. The grounds question the respondent's demeanour. They then proceed to suggest the sheriff was not entitled to conclude that the appellant had entrenched racist views about Polish people. The sheriff made no such finding. She concluded that the appellant had racially

abused the respondent. Such was the respondent's evidence. This ground of appeal misrepresents the sheriff's findings.

[37] The sheriff is criticised for failing to take into account the evidence of the appellant's witness that he is not a racist. To the extent that this is an attempt to prove a negative, it is extremely weak evidence. It says nothing about the appellant's prior conduct towards the respondent. There is no finding in fact which this evidence would have affected. The evidence is irrelevant. In any event, there is no reason to state that the sheriff did not take it into account, because that cannot be either demonstrated or inferred, and the appellant does not attempt to do so. The appeal on these grounds must fail also.

Grounds (i) to (l)

[38] In relation to grounds (i) to (l), the sheriff is said to have given too little weight to the benefits of current nursery enrolment in Scotland, and the support network in Scotland, and too much weight to being unable to learn Polish in Scotland, and to the support network in Poland.

[39] Again, these are comparative assertions, and no comparison is attempted. They are assertion only.

[40] In any event, these grounds are not supported by the sheriff's judgment. The sheriff discussed all of the relevant factors at length. The support network in Scotland is necessarily limited by the limitations on contact with the appellant himself. The respondent suffers from considerable social isolation in Scotland, with inevitable consequential effects on the child's development. There are considerable benefits to both mother and child in returning to Poland. The appeal does not seek to dispute that. As for the other grounds, these submissions, taken at their highest, simply assert that the appellant's case has some

positive factors which were not given weight. There is no attempt by the appellant to demonstrate from the judgment that this is true. The judgement itself shows these assertions to be partial at best, and a misrepresentation at worst. These grounds also fail.

[41] The starting point for an appeal based on a wrongful approach by the judge, must be to examine what the judge actually did. Merely mentioning the result is not sufficient. An appeal must explain why the judge reached the wrong conclusion on the evidence led. Otherwise an appeal is not justified. This applies in the present case.

Disposal

[42] The appeal is refused, and the court will adhere to the decision of the sheriff. Parties are both legally aided. Expenses are not sought by the respondent. Accordingly no award of expenses is made.