SHERIFF APPEAL COURT

[2024] SAC (Civ) 26
HAM-A136-19

Sheriff Principal A Y Anwar
Sheriff Principal D C W Pyle
Appeal Sheriff A M Cubie

NOTE

by SHERIFF PRINCIPAL A Y ANWAR

in application for permission to appeal to the Court of Session
in terms of section 113(2) of the Courts Reform (Scotland) Act 2014

by

BARRY SCOTT

Pursuer and Applicant

against

KATE FRAME, POLICE INVESTIGATIONS & REVIEW COMMISSIONER

Defender and Respondent

Pursuer and Applicant: Dean of Faculty (Dunlop KC), E. Campbell; PBW Law Solicitors
Defender and Respondent: Hood KC; Anderson Strathern LLP

19 March 2024

Introduction

[1] The applicant seeks permission to appeal a decision of this court delivered on 31 January 2024. The respondent opposes the grant of permission.

[2] The applicant is a serving police officer. He and four other officers were arrested and kept in police custody in May 2018 following an investigation by the respondent's

investigators. The applicant raised proceedings in March 2019 alleging that his arrest and detention in police custody had been unlawful. Following a proof before answer, the sheriff granted decree of absolvitor. On 31 January 2024, the Sheriff Appeal Court ("SAC") refused the applicant's appeal.

[3] The application for permission to appeal to the Court of Session proceeded by way of written submissions.

The proposed grounds of appeal

[4] The applicant seeks permission to appeal on the following five grounds:

(i) The SAC erred in holding that the onus falls on an arrested person to prove that their arrest and continued detention is unlawful;

(ii) While the SAC correctly held that an arrest required to be necessary in order to be lawful, the SAC erred in holding that on the sheriff's findings in fact, the arrest of the applicant was necessary;

(iii) The SAC erred in holding that in determining necessity the test is "whether no reasonable constable would have concluded that an arrest was necessary";

(iv) The SAC erred in holding that the tests in section 7 and 14 of the Criminal Justice (Scotland) Act 2016 ("the 2016 Act") had been met; and

(v) That if the foregoing grounds of appeal are accepted, a contravention of Article 5 of the European Convention of Human Rights ("ECHR") had occurred.

Submissions

[5] The applicant submitted that the proposed appeal raises important points of principle and practice being the first case in which the test for arrest and detention under the

2016 Act has been considered by the court. The SAC decision (at paragraphs [54] to [63]) had exposed a misrepresentation by the respondent regarding the circumstances in which a person can be arrested. The outcome of the proposed appeal had the potential to effect the respondent's daily practice and was likely to provide important guidance upon the correct approach under the 2016 Act. Were the SAC decision not appealed, it would result in there being a different approach in Scotland, compared to the rest of the UK, on the question of upon whom the onus lies to establish the lawfulness of arrest.

[6] The respondent submitted that (a) the SAC discussion on the onus of proof was *obiter* and the proposed first ground of appeal had no prospects of success; (b) the second proposed ground of appeal related to the SAC's application of the law to the facts of the case and as such, it raised no important point of principle or practice; (c) the third proposed ground of appeal challenged one of seven factors which the SAC considered to be relevant to an assessment of whether an arrest is necessary without warrant in terms of the 2016 Act, as such, it was misconceived and had no prospects of success; and (d) the proposed fourth ground of appeal amounted to a disagreement with the decision of the SAC and was not a suitable subject matter for a second appeal.

Decision

[7] Section 113(2) of the Courts Reform (Scotland) Act 2014 provides:

> "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."

[8] Commonly referred to as "the second appeals test", the purpose of section 113(2) is to restrict the scope for a second appeal. The approach to be taken to applications under section 113(2) has been considered in a number of cases, most notably by the Inner House in *Politakis* v *Spencely* 2018 SC 184. Applying the dicta in *Uphill* v *BRB (Residuary) Ltd* [2005] 1 WLR 2070, the First Division provided the following guidance (per Lord President (Carloway) at paragraphs [21] – [22]):

> "Raising an important point of principle or practice is a reference to one which has not yet been established (*Uphill,* para 18). It does not include a question of whether an established principle or practice has been correctly applied. …The existence of some other compelling reason presupposes that no important point of practice or principle has been raised… when considering whether some other compelling reason existed, it was important to emphasise the 'truly exceptional nature of the jurisdiction' in relation to second appeals. 'Compelling' is a 'very strong word'…"

[9] In *EBA* v *Advocate General for Scotland* 2012 SC (UKSC) 1, delivering the judgment of the Supreme Court, Lord Hope observed (at paragraph [48]) that underlying the first of the criterion in section 113(2) is the idea that the issue would require to be one of general importance, not one confined to the applicant's own facts and circumstances. The second criterion would include circumstances where it was clear that the decision was perverse or plainly wrong or where, due to some procedural irregularity, the applicant had not had a fair hearing at all. As observed by Lord Brodie in *Explore Learning Ltd* [2019] CSIH 53 *(*at paragraph [7]), while satisfaction of either section 113(2)(a) or (b) is a necessary condition for the grant of permission, the SAC retains a discretion as to whether to grant the application;

> "Satisfaction of either criterion only means that the relevant court (the SAC or the Court of Session) *may* grant permission. In considering the exercise of its power in that situation it accordingly appears to me that the court must have regard to the prospects of success in the proposed appeal and the suitability of the particular case as a vehicle with which to advance such point as it is intended to make (in so far as such a requirement is not already implicit within the statutory criteria). I would see that as illustrated in the court's approach in *Politakis* and *Aldabe."*

[10] Lord Brodie's observations were echoed recently by Lord Docherty in *The Royal Bank of Scotland v Mohammad Aslam* [2023] CSIH 42 (at paragraph [27]).

[11] Applying these principles to the various grounds of appeal advanced by the applicant, the application falls to be refused.

Proposed ground of appeal one

[12] We accept that the question of which party bears the onus of proving that an arrest is unlawful might be regarded as an important point of principle or practice in terms of section 113(2)(a). The SAC discussion of the issue of onus is, however, *obiter* (see paragraphs [44] to [53]). The question of which party bore the onus of proof was immaterial and of no consequence to the sheriff's analysis of the evidence in the present case. The applicant does not seek to persuade the Court of Session that the SAC was incorrect in its assessment that "The present case is not one of those rare cases in which the onus of proof is decisive" (paragraph [43] of the opinion of the SAC). Absent such a challenge, whether the first proposed ground of appeal is upheld or refused is academic and will be of no practical effect. Parties should not be put to the expense of litigating such issues. This ground of appeal has poor prospects of success; this case is an unsuitable vehicle with which to advance the argument the applicant wishes to make.

Proposed ground of appeal two

[13] The applicant successfully argued before the SAC that for an arrest to be lawful in terms of section 1(1) of the 2016 Act, it must be necessary. That was one of the central issues in the appeal. The applicant correctly submits that this is the first case in which the terms of

the 2016 Act have been judicially considered. The respondent does not challenge the SAC's decision on the correct interpretation of section 1(1) of the 2016 Act.

[14] At paragraphs [64] to [81] the SAC considered whether, having regard to the findings in fact made by the sheriff, the applicant's arrest without warrant was necessary. In doing so, the SAC made reference to witness statements to which it had been referred, at length, by both parties during the submissions in the appeal. The SAC noted that the sheriff had identified the background as "largely uncontroversial" and that "The sheriff noted that his decision turned 'not on witnesses' recollection of the facts but on whether the steps taken by [the respondent's investigators] were justified and lawful'" (see paragraph [72] of the SAC opinion). The evidence before the sheriff included an excerpt from the management policy file setting out the reasons for the respondent's investigator's decision to arrest the applicant without a warrant (referred to in the sheriff's finding in fact [23]). The respondent's investigator (SI Little) had been aware that the applicant had offered to attend voluntarily for interview (the sheriff's findings in fact [32] and [33]).

[15] The applicant correctly identifies that "Whether the arrest was necessary is a matter of law having regard to the relevant circumstances" (paragraph 6 of the application). The SAC did not require to make a finding in fact to this effect. The applicant refers in the application to controversial evidence (at paragraph 5); however, he does not provide any further specification as to what evidence was controversial, how that might have affected the SAC's decision and, absent the extended notes of evidence, what the SAC was to make of any such controversy.

[16] Properly understood, this ground of appeal amounts to a disagreement with the decision of the SAC. No error of law is identified. The issue of whether an arrest requires to be necessary to be lawful in terms of section 1(1) of the 2016 Act is an important point of

principle or practice. That issue was resolved in favour of the applicant; the Court of Session is not invited to review it. Proposed ground of appeal two seeks to challenge the SAC's application of the law to the facts of this particular case. As Lord Hope observed in *EBA,* underlying the first criterion in section 113(2) is the idea that the issue would require to be one of general importance, not one confined to the applicant's own facts and circumstances. The first part of the test in section 113(2) is not met.

Proposed ground of appeal three

[17] The applicant has misunderstood the opinion of the SAC. Having considered the authorities (including that referred at paragraph 6 of the application), the SAC set out at paragraph [70] seven factors ((a) to (g)) which it considered to be relevant to an assessment of whether an arrest is necessary without warrant in terms of the 2016 Act. Whether "no reasonable constable would have concluded that an arrest was necessary" was one of those factors (f). The factors set out at paragraph [70] are not exhaustive. Factor (f) was not in fact relevant in the present case, there having been no evidence before the sheriff as to what a reasonable constable would have decided in the circumstances. Factor (f) was not referred to by the SAC in its assessment of the facts of this case (see paragraph [78] of the opinion).

[18] Again, whether the third proposed ground of appeal is upheld or refused is academic and will be of no practical effect to the outcome in this case. Parties should not be put to the expense of litigating such issues. This ground of appeal has poor prospects of success and is an unsuitable vehicle with which to advance the argument the applicant wishes to make.

Proposed ground of appeal four

[19] This ground of appeal does not in our view raise an important point of principle or practice. It amounts, in essence, to a disagreement with the application of the tests sets out in sections 7 and 14 of the 2016 Act (the terms of which were uncontroversial) to the facts of the present case.

[20] The SAC was not in receipt of extended notes of evidence, was not in a position to accept the applicant's summary of matters spoken to by DSI Robertson, the authorising officer, (paragraph [84] to [85]) and was not invited to make any additional findings in fact. While the SAC noted at paragraph [86] that the sheriff had appeared to focus on the evidence of SI Little rather than that of DSI Robertson, it concluded that the sheriff had nonetheless been entitled to find in law that the respondent had acted lawfully in keeping the applicant in custody. The sheriff noted at paragraph [33] that DSI Robertson had "applied his mind to the test in section 14, as he was obliged to do, and decided that it had been met". The relevant excerpt from the management policy file noted DSI Robertson's decision. The nature of the offence alleged to have been committed by the applicant and the need to interview the applicant under audio and visual conditions were noted in the management policy file. In considering what is necessary and proportionate for the purposes of authorising the detention of a person in custody, the sheriff considered the matters set out in section 14(2) of the 2016 Act, noting that one factor alone might suffice. He held that the nature and seriousness of the offence would suffice. The SAC agreed with that assessment.

Article 5 ECHR

[21] The applicant acknowledges that that this proposed ground of appeal is contingent upon the success of the other proposed grounds.

General observations

[22] The applicant submitted that the SAC decision had exposed "a major misinterpretation by the respondent regarding the circumstances in which a person can be arrested". As the SAC observed at paragraph [60] the legal arguments advanced on behalf of the respondent appeared to be at odds with the terms of the "Criminal Justice (Scotland) Act 2016 (Arrest Process) Standard Operating Procedure version 1.00 dated 23 January 2018" issued by Police Scotland. It provides instruction and guidance to all police officers in relation to criminal justice processes and procedures in respect of arrest and custody and it correctly recognises that the test of necessity falls to be applied at the time of arrest, in terms of section 1(1) of the 2016 Act. Accordingly, we do not agree that the outcome of this case has the potential to effect daily practice for Police Scotland; that practice accords with the SAC's interpretation of the test in section 1(1) of the 2016 which the applicant does not challenge in this appeal.

[23] The applicant has advanced no other compelling reason for the Court of Session to hear the appeal. We have been unable to identify one.

[24] For these reasons permission to appeal to the Court of Session is refused. The applicant is found liable to the respondent in the expenses occasioned by the application.