SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT STIRLING

[2023] SC STI 22

STI-B129-21 & STI-B130-21

NOTE BY SUMMARY SHERIFF J MACDONALD, ADVOCATE

in the appeals by

LD

First Appellant

and

MD

Second Appellant

against

AUTHORITY REPORTER, Scottish Children's Reporter Authority, Stirling

Respondent

First Appellant: Berrill
Second Appellant: Allen
Respondent: Hughes

Stirling, 11 January 2022

Introduction

[1] The present case involves appeals by both natural parents under section 154 of the Children's Hearings (Scotland) Act 2011 and relate to a Compulsory Supervision Order ("CSO") granted by, and more particularly, ancillary decisions thereto taken by, a children's hearing which was convened on 19 November 2021. The appeals concern BD, born 23 January 2020 ("the child"). The child has been accommodated in foster care since birth.

[2] I heard submissions on 20 December 2021. I adjourned the appeal hearing to consider my decision until 11 January 2022.

The grounds of appeal

[3] Neither appeal in the present case takes issue with the principle of the granting of a CSO. The grounds of appeal relate solely to issues concerning the extent to which the appellants should exercise contact with the child.

[4] These appeals are based on the following common grounds:

[5] That the decisions reached by the children's hearing at decisions 7 (in respect of the first appellant) and 8 (re the second appellant) were not justified as a result of an error of law, namely a misconceived assumption that it was inevitable that the child would be permanently accommodated, whereby the role of contact by the natural parents should be and was, reduced in importance to being part of a "coherent life story" for the child.

[6] Whether in any event the decision of the children's hearing to suspend both appellants' contact with the child for a period of 8 weeks at decision 9 was not justified.

Background

[7] There was no material factual dispute as to what had occurred at the children's hearing on 19 November 2021. Indeed all parties to the appeal founded upon the written decisions and reasons produced by the children's hearing pertaining to the above date.

[8] At the hearing on 19 November 2021 the panel members supported a plan proposed to them by social workers to work towards an application for permanency. A new foster placement had been identified that the social work department intended to be a permanent one. This was supported by a recent parenting assessment undertaken which recommended that the child should not be placed in the permanent care of either parent (decision 4). In any event, the child has not in fact ever lived with either of the appellants.

[9] The social work proposal did not however end there. The proposed placement of the child with a new foster family was said to be a permanent arrangement, irrespective of whether a permanence application was submitted or indeed was successful. It is clear at decision 4 that the panel members accepted this proposal to its full extent.

The first appellant's appeal

[10] LD appeals decision 7 to reduce contact to one hour once per month from the previous arrangement of fortnightly.

[11] The reasons appended to that decision record that

> "the purpose [of contact] given that [BD] is now in alternative care which is permanent (regardless of the outcome of the [permanence order] application) is that BD can develop a coherent life story. It is not necessary for contact to be so frequent in order for this to be achieved."

The second appellant's appeal

[12] MD appeals decision 8 reducing his contact from direct to indirect.

[13] The reasons appended to that decision record that

> "as with LD the panel took into account the purpose of ongoing contact and two panel members concluded that the … purpose of BD's life story could be adequately met with indirect contact rather than perpetuating the distress for both parties."

[14] The foregoing reference to distress pertains to a recent contact visit where MD became distressed which was said to have also caused the child to become distressed.

[15] Both appellants also appeal decision 9 suspending any contact for 8 weeks. The reasons appended to the decision set out that

> "Social work advised that BD, having formed a very strong attachment to her first foster carers, will find the transition to her 'forever family' difficult and confusing. For the initial period of this transition it is vital to minimise disruption to routines and contacts with others that would add to her confusion."

Submissions

[16] It was argued for the appellants, principally by Miss Berrill for the first appellant, that the above decisions were not justified on the basis that they amounted to an error of law. This was so because decisions 7 and 8 contravened Article 8 of the European Convention on Human Rights and were unlawful under section 6(1) of the Human Rights Act 1998.

[17] It was argued for the appellants that the approach adopted in relations to decisions 7 and 8 proceeded on an erroneous assumption that the child would be accommodated permanently away from the natural parents. Whether a permanence order should be granted, it was submitted, is a question of law for a court to decide in the future. Further, the view taken by the panel members and articulated within the reasons of the purpose of contact was entirely misconceived in that it diminished the status of parental rights. This was accordingly not compatible with Article 8 and would not be capable of being proportionate in terms of Article 8(2).

[18] In relation to decision 9, it was argued that the basis relied upon was insufficient to justify the decision made. In particular the hearing had not placed sufficient weight on the importance of the bond between parent and child in making the decision.

[19] With regard to remedy, both appellants accepted in principle that a CSO was justified and necessary. The only issue of controversy related to the question of parental contact. In the event of the appeals being sustained I was invited to make an order setting aside the decisions made on 19 November 2021 and returning matters to how they had been prior to the hearing. Mr Allen for the second appellant in particular reminded me that to do

otherwise would result in the decisions being appealed against nevertheless becoming the status quo.

[20] For the reporter Miss Hughes argued that the decisions had been justified as there had been adequate further factual material before the hearing to entitle the panel to reach the decisions. Further, the hearing had acted in accordance with the welfare of the child, which in terms of section 25 of the 2011 Act was the overriding consideration.

[21] With regard to the application of Article 8, it was submitted that the decisions taken at the hearing had been in pursuit of a legitimate aim. It was accepted that the approach taken inevitably infringed article 8(1) but that it had been lawful to do so under the 2011 Act. The measures taken in the circumstances must be regarded as proportionate. In particular I was referred to the case of *Johansen* v *Norway* (1997) 23 EHRR 33. Miss Hughes accepted that if the panel had proceeded on the sole basis of the child being accommodated permanently, it would not be justified under section 154. That was however not what had occurred. The appellants had never cared for the child since birth. Further, both appellants had fared poorly in a recent parenting assessment.

Analysis and decision

The test under domestic law

[22] An appeal to the sheriff from a decision of the children's hearing can only succeed if the decision made was not justified on the basis that it occurred through an error of law or a procedural irregularity: *W* v *Schaffer* 2001 SLT (Sh Ct) 86 at 87-88. As Sheriff Principal Nicholson made clear in *Shaffer*, the task of the sheriff hearing the appeal is not to substitute his or her own view of the material facts of the case for that of the children's hearing. There was no controversy in the present case as to the test to be applied under domestic law.

The nature of a CSO

[23] The order of the children's hearing appealed in the present case is a compulsory supervision order under section 83(1) of the 2011 Act. Those may be granted for up to one year (subsection 7(a)(i)) but may also be continued by the children's hearing up until a child reaches the age of 18 (subsection 7(a)(ii)). The subject matter of the present appeals relates to a measure under the CSO directing contact under subsection (2)(g). In the present case the order also contained a measure that the child be accommodated in foster care.

[24] It is important in my view to emphasise that the statute does not permit the granting of a CSO in perpetuity. At the very least there must be a review of the merits of such an order annually by a children's hearing. By contrast a permanence order, which can only be granted by a court, being satisfied that the criteria set out in section 84 of the Adoption of Children (Scotland) Act 2007 ("the 2007 Act") are met, is a perpetual order and requires no further review by a judicial body once made.

[25] It follows from the above that there is no concept in Scots Law of a *de facto* permanent compulsory arrangement for the care of a child other by an adoption or permanence order. Both of those orders are for a court to decide. Short of such an order, it is plain that Parliament had in mind a system of periodic review by a quasi-judicial body, namely the children's hearing.

Human Rights Act 1998

[26] Lastly in terms of the domestic provisions, section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a manner which is incompatible with the Convention Rights set out in Schedule 1. Article 8 of ECHR is one of the Articles of

the Convention included within Schedule 1. The children's hearing acts in a quasi - judicial capacity. It is in my judgment beyond controversy that for the purposes of section 6 that it is a public authority.

Article 8 of ECHR and jurisprudence

[27] Article 8 provides the following:

> "RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[28] Member states to the Convention enjoy a margin of appreciation in enacting domestic law in accordance with Article 8, having regard to the applicable societal structure and issues of that member state. That can be seen as a demarcation between the roles of the national courts and international court in Strasbourg.

[29] As is readily apparent from the text of Article 8(2), the right to respect for private and family life is not absolute. The state is entitled to encroach upon that right where it is necessary to do so. The right of the state or any emanation of the state to do so however is equally not absolute. Such encroachments are subject to the principle of "proportionality". That is to say, did the encroachment occur in pursuit of a legitimate aim, and secondly was it proportionate to that aim? As to the second question, that has been held to require "no more than is necessary" to accomplish the legitimate aim (*De Freitas* v *Permanent Secretary for Ministry of Agriculture, Fisheries Lands and Housing* [1999] 1 AC 69 at 80).

[30] "Family life" for the purposes of Article 8 is widely defined and is by no means restricted to the concept of the marriage-based nuclear family. I need not elaborate upon that in the present case as the "mutual enjoyment by parent and child of each other's company" is a fundamental element of family life (*Olsson* v *Sweden (no 1)* (1988) A 130, paragraph 59). It is in any event a matter of concession by the respondent that the compulsory measures of care taken in the present case did encroach upon the appellants' Article 8 rights.

[31] The use of similar compulsory care measures was considered in *Johansen* v *Norway* (1997) 23 EHRR 33. In that case, the mother of a child sought redress before the Strasbourg court where her daughter had been taken into care by the state shortly after birth, thereby depriving the mother of her parental rights and of contact with her. It was readily accepted that Norwegian domestic law permitted this course of action and so was "in accordance with the law" for the purpose of Article 8(2). The question for the court to determine however was whether the action taken by the domestic authority had been proportionate, that is to say "relevant and sufficient" for the purpose. At paragraph 78, the Court, endorsing the view earlier reached by the Commission held as follows:

> "78. The Court considers that taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and that any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. In this regard a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this exercise, the Court will attach particular importance to the best interest of the child which, depending on their nature and seriousness may override those of the parent. In particular, as suggested by the Government, the parent cannot be entitled under Article 8 … to have such measures taken as would harm the child's health and development.
>
> In the present case the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents. These measures were particularly far reaching in

> that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests."

[32] At paragraph 80 of the Court's opinion, the Court acknowledged that it was in the best interests to ensure that bonds with a foster carer and prospective adopter were not interfered with and allowed to establish. Those factors the Court said, at paragraph 81 were relevant to the issue of necessity under Article 8(2). Concerns had been expressed by the respondent government that the applicant would be unlikely to cooperate with the state's measures and may further seek to disrupt the foster placement. The Court eventually held however at paragraph 84 that these concerns were not sufficient to render the measures taken of deprivation of parental rights and denial of contact, proportionate.

[33] From the above case, it can readily be identified as a matter of principle that the Strasbourg court views measures of care for children taken by the state which involve children being placed other than with a parent as a general rule to be temporary. This is so because of the importance of the bond between parent and child under Article 8. It is in my judgment important to emphasise that this right is mutual. In as much as a parent has a right to have contact with a child. Equally a child has a right to have contact with a parent.

[34] The foregoing approach by the Strasbourg court in my judgment explains why section 83 of the 2011 Act requires that CSO's be time-limited. Were it otherwise, the provision would at first blush be in conflict with Article 8 of ECHR.

Application to the present case

The decisions to reduce contact

[35] The children's hearing in the present case accepted a proposed course of action put to it by social workers. That was - in terms - that regardless of the statutory basis for same, the child would be accommodated by a new "forever family" and not with either of the birth parents. It was expressly stated that this would be irrespective of any application to a court for a permanence order. In doing so however in my judgment the children's hearing fell into a material error in law.

[36] The children's hearing failed to have proper regard to the nature of the order with which it was concerned. It ought to have recognised that the social work proposal was incompatible with the temporary nature of a CSO which could only be continued if the children's hearing deemed it necessary, otherwise would endure for no longer than a year. There could in my judgment be no legitimate question of this child being placed with a "forever family" when under a CSO without an application for a permanence order.

[37] It is important to highlight that an application for permanence requires that a stringent statutory test be met under section 84 of the 2007 Act. It can never be assumed that the court would make the order. Such an order may very well include a provision for some degree of contact with and by the natural parents. The granting of a permanence order would supersede any CSO that had been in place.

[38] In my judgment it is beyond peradventure that there cannot be any legitimate *de facto* permanence arrangement without a court order under domestic law. Such an arrangement would in my judgment further be incompatible with not only the Article 8 rights of a birth parent but also those of the child, and so would be unlawful under section 6(1) of the 1998 Act.

[39] In my judgment, the above error in law led to the panel addressing the question of contact on a misconceived basis. The hearing repeatedly in its reasoning used the phrase "coherent life story" in deciding to limit the awards of contact under the CSO to be enjoyed by the appellants. There can be little doubt that this approach was informed by the error I have identified above in accepting the proposal of a permanent arrangement for this child. There can equally be little doubt that the panel's decision was made with the intention correspondingly of reducing the role played by the natural parents in the life of the child in favour of the child's new "forever family".

[40] The decisions made regarding contact in the present case were accordingly in my view incompatible with the appellants' Article 8 rights. The children's hearing on any view failed to properly direct itself in law as to the scope and importance of the mutual right of contact under Article 8.

[41] It was argued for the respondent that the decisions made were made in the best interests of the child. This was an argument made also in the *Johansen* case. As the Strasbourg court made clear, such a welfare argument may well be powerful and valid in relation to the question of necessity under Article 8(2). In my judgment however the approach taken in the present case fails at an earlier stage. Encroachments under Article 8(2) are permissible if undertaken "in accordance with the law". In *Johansen* the action taken by the state was unquestionably permitted under Norwegian law. The purpose that lay behind the approach taken by the children's hearing in the present case was in my judgment not in accordance with the domestic law, namely the 2011 Act, for the reasons identified above.

[42] It was further argued for the respondent that there was material before the children's hearing that may in any event have justified them in reaching the decision regarding contact that they did. I do not however agree. It is in my judgment clear on any fair construction of

the decisions and reasons referred to above that the panel's reasoning was materially based upon the error identified above and indeed motivated towards fulfilment of the erroneous purpose of diminishing the role of the natural parents in the child's life.

[43] It follows from the foregoing that the decisions 7 and 8 made on 19 November 2021 were not justified and so cannot stand.

The suspension of contact for 8 weeks

[44] It was argued before the children's hearing that the child had developed a strong attachment to her previous foster carers and as such a period of adjustment was required to allow the new arrangement to settle.

[45] The written reasons however mention that this arrangement is with the child's "forever family" which for the reasons identified above is a phrase that ought not to have been used. In my judgment, the decision to suspend contact was subject to the same misconception as to the scope and extent of the mutual right to contact under Article 8 as that which I have discussed above.

[46] When an appeal is lodged under section 154, there will inevitably be a degree of delay before the matter can be argued before the court. That certainly was the case here. By the time the appeal hearing called before me, half of the eight week suspension had already passed. As at the continued date of the hearing where this decision is advised, the suspension period is all but over.

[47] Nevertheless, in my judgment this decision of the children's hearing also contained a material error in law and so was not justified. The reference to the child's "forever family" cannot in my view be excised from the decision. It is quite correct that the children's hearing had material before it which tended to suggest in practical terms that a period where

distractions are kept to a minimum would be in the best interests of the child, it is in my view an inescapable conclusion that the decision was also materially informed by the erroneous view taken of the role of contact and so cannot stand.

Remedy under section 156

[48] It follows from the above that both appeals fall to be sustained.

[49] There was in this case no dispute in principle that a CSO ought to be in place. The only controversy related to the approach taken relating to contact.

[50] In the event of these appeals being successful I was invited by both appellants to set aside the decisions taken and to make orders of my own, essentially returning the arrangements for contact to those that had been in place prior to 19 November 2021.

[51] In terms of section 156(3)(b), I set aside the ancillary orders for reduction in contact made by the children's hearing made within decisions 7 and 8 of the panel's decision and reasons, same having been reached due to an error in law.

[52] I am not however inclined to substitute my own order in respect of contact. The upshot of my decision to sustain these appeals is that the question of whether contact be exercised by either appellant is at large and falls to be considered of new. It seems to me that a properly directed children's hearing is far better placed to determine that issue. I therefore direct the respondent in terms of section 156(3)(a) to arrange a further children's hearing as soon as possible for that purpose.

[53] With regard to decision 9, the eight week period specified in the order will expire on 14 January 2022. To that extent, the outcome of this appeal so far as it relates to that decision may perhaps be seen as academic. I nevertheless set that decision aside for the reasons

expressed above. Given how little of the eight week period that remains it seems to me unnecessary that this matter be considered of new under section 156(3)(a).