



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 69
P399/21

Lady Paton
Lord Malcolm
Lord Woolman

NOTE

issued by LADY PATON

in the petition to the *Nobile Officium*

CITY OF WOLVERHAMPTON COUNCIL

Petitioner

against

(FIRST) THE LORD ADVOCATE and (SECOND) THE ADVOCATE GENERAL

Respondents

with

THE COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE IN SCOTLAND

Intervener

Petitioner: JJ Mitchell QC; Morton Fraser LLP

Respondents (Lord Advocate): M Ross QC, L Irvine; Scottish Government Legal Directorate;

(Advocate General): Pirie; Office of the Advocate General

Intervener (non-participating party): J Scott QC; Balfour + Manson LLP

23 December 2021

Background

[1] The background to this petition to the *nobile officium* of the Court of Session is set out in a Note dated 21 September 2021 delivered by Lord Menzies in *The Mayor and Burgesses of the London Borough of Lambeth and another* (“Lambeth”) as follows:

[1] Sometimes local authorities in England and Wales are unable to find suitable placements for vulnerable children within their care. They make arrangements for the child to be placed at a residential establishment in Scotland. Almost invariably, that involves the child being deprived of his or her liberty.

[2] Such measures must be authorised by the High Court of England and Wales. It has the primary responsibility for the care and welfare of the child. Because, however, the individual child is resident in Scotland, this court is also involved.

[3] At present there is a statutory lacuna. No legislation covers the recognition of such High Court orders. That is unsatisfactory. To date there have been 22 of these petitions. More are expected.

[4] The *Nobile Officium* is intended for exceptional circumstances, not routine applications. Those representing the Scottish and UK governments have told the court in the past that they were waiting for the decision of the UK Supreme Court *In the matter of T (a child)* [2021] UKSC 35, before deciding what statutory provisions were required. The UKSC handed down its decision in *T* on 30 July 2021. We understand that urgent consideration is now being given to filling the legislative lacuna as soon as possible. We regard that as necessary and important.”

The present case

[2] This is one of the cases referred to in *Lambeth*. RP was born in England on 3 August 2007. When aged 5, she was taken into care. In November 2020, when aged 13, following upon serious behavioural difficulties and a lack of any available suitable placement in England, Wolverhampton High Court Family Division decided that she should be placed in therapeutic accommodation in Scotland. On 26 November 2020 RP moved there. A significant feature of the placement is that it constitutes a deprivation of RP’s liberty. The present petition to the *nobile officium* was presented to the Court of Session because of the statutory *lacuna* referred to above. Various orders confirming and authorising the placement have been issued by both the High Court in Wolverhampton and the Court of Session in Scotland.

[3] On 28 July 2021, the Court of Session issued its most recent interlocutor authorising the placement to continue for another 3 months, that being the maximum permissible period for a child in Scotland to be subject to a “secure accommodation authorisation” in terms of

the Children's Hearings (Scotland) Act 2011. A By Order hearing was arranged for 28 October 2021.

By Order hearing on 28 October 2021

[4] Senior counsel for the petitioner referred to a social work report recording satisfactory progress on the part of RP. Senior counsel for the Lord Advocate stated that Scottish Ministers had considered the outcome of *In re T (A Child)* [2021] 3 WLR 643. They recognised that legislation was required. However serious concerns were expressed about the increasing frequency of placements from outside Scotland, and it was emphasised that the proposed legislation was not intended to be a long-term solution. Consultation would be undertaken, and the proposed regulations would be laid before Parliament. A time-line (indicative only) suggested that the regulations might be in force by mid-2022. The Lord Advocate gave certain undertakings, outlined below. Further steps, focusing particularly upon the interim period prior to the regulations coming into force, were agreed.

[5] *Undertakings on behalf of the Lord Advocate:* Senior counsel for the Lord Advocate acknowledged that she was peculiarly well placed to assist with future legislation and also with any interim measures necessary for parties and the courts before legislation was in place. Approximately 28 cases currently existed. Senior counsel undertook (i) to contact a Cross-Border Judicial Protocol Group chaired by Lady Wise (hereinafter "Cross-Border Group") which had been created in terms of the Judicial Protocol Regulating Direct Judicial Communications between Scotland and England and Wales in Children's Cases (24 July 2018) with a view to defining cross-border procedures where necessary; (ii) to liaise with other legal advisers involved in placement cases, if necessary forming a Working Party; and

(iii) to share with the Cross-Border Group any relevant papers and written submissions (with appropriate permissions, and redacted if necessary).

[6] *Further steps*: The terms of the interlocutor which the court should issue in respect of the child's continuing placement in Scotland until 28 January 2022 were agreed. All counsel intend to liaise with senior counsel for the Lord Advocate in co-operating with the Cross-Border Group.

Commissioner for Children and Young People in Scotland

[7] The Commissioner for Children and Young People in Scotland invited the court to give guidance on certain matters pending the enactment of the necessary legislation.

[8] *Cross-border monitoring and review*: Article 3.1 of the United Nations Convention on the Rights of the Child (UNCRC) requires "the best interests of the child" to be the primary consideration. This should be achieved by a holistic consideration of other articles in the UNCRC. The Commissioner endorsed the view expressed by the Inner House in *Cumbria County Council v X* 2017 SC 451, paras [39] and [40], namely that deprivation of liberty should be the subject of regular judicial monitoring and review, raising the difficult question of whether that function should be vested in the High Court in England and Wales or in the Court of Session, or jointly in both courts. As the Inner House observed (per Lord Drummond Young, at para [40]):

" ... we suggest that [the question] might be resolved as follows. The English court is the court that is primarily concerned with the welfare of the child, who was resident and domiciled in England at the time when the proceedings were initiated. That court accordingly has the continuing responsibility for ensuring that the child is properly cared for, and on that basis it would seem that it is the court that should be primarily responsible for the regular judicial monitoring and review of the placing of the child in secure accommodation. Nevertheless, questions may arise as to the care and control of the child in Scotland; this applies in particular to the enforcement of the secure accommodation order, especially if the child should abscond. It seems

appropriate that these matters should fall within the jurisdiction of the Scottish courts, because they relate to events that take place in Scotland. Furthermore, emergency measures may be required, and the Scottish court as the local court is in a better position to provide a remedy quickly and to secure its enforcement, without cross-border complications.”

[9] A current risk arising from joint judicial monitoring was the possibility that the child’s case might fall “between two stools”, with each jurisdiction assuming that the other was dealing with a particular matter. Another difficulty was that the placing court in England and Wales might not be familiar with the services and statutory framework in Scotland. Examples included (i) access to health care and (ii) education.

[10] *Health care:* The young people in question often had mental health problems, including problems relating to self-harm and/or suicide risk. Where the placement of a Scottish child was made by a Scottish court, there was an automatic referral to the Forensic Child and Adolescent Mental Health Services, which could offer special skills, clinical consultations, assessment of risk, and management of the case. That automatic referral did not necessarily happen when the placement was made by the High Court in England and Wales. The Commissioner’s concern was that the Court of Session should not simply “rubber-stamp” the order of an English court (cf the court’s observations in *Lambeth*), but should be satisfied about the rudiments concerning health, schooling and family. The social work report in the current case provided a good model of the sort of information which should be available to the Scottish court to enable that court to exercise its *parens patriae* jurisdiction. In the context of health care, the Commissioner had received information suggesting that local Scottish health authorities were often unaware that a child from England and Wales had been placed in Scotland. Such a child might suddenly require treatment by the local health service as a result of an emergency, and in those circumstances

treatment could be exceptionally difficult. As suggested in *Lambeth*, plans for the placement of such a child should be flagged up before any petition was presented to the Scottish court.

[11] *Education*: There were different educational structures in different jurisdictions. In Scotland, a child might be placed in a rural environment. A small local school might have to assist in planning for the arrival of a needy, disruptive child. An education plan was necessary. At present, without the necessary legislation or regulations in place, the child would not be identified as a “special needs” child (in contrast with the arrangements for a child from Scotland, identified as a “looked-after” child with certain automatic consequences including alerting the education system). The Scottish court should request reassurance that the school in question had been notified of the child’s arrival, and had some sort of plan in place. A holistic approach was required, including assessment of how the child would travel to school, what restraints would exist at the school, what educational supervision would be provided; what welfare service would be available; what family contact could be achieved (cf Article 37 of UNCRC).

[12] Often the High Court in England and Wales might be unaware of details relating to the Scottish structures concerning health, education, and family contact. Senior counsel submitted that a report ordered by the court might be helpful, such that the Scottish court could be satisfied that the child’s best interests were being looked after. As already submitted, the Social Work report in the present case provided a good model for both placement and 3-monthly review.

[13] The court should issue guidance about the sort of information which should be made available to it prior to granting the first order; should encourage the use of curators ad litem; and should ordain that any petition such as the present be intimated to the Commissioner for Children and Young People.

[14] In answer to a question from the bench concerning the possible involvement of a local social work department, senior counsel accepted that this presented a problem.

Local authorities had certain statutory duties, but such duties tended to be in respect of “looked-after” children, which did not include the children being placed in Scotland by the courts outside Scotland. It was possible that legislation would resolve this issue.

[15] *Child’s procedural rights*: Article 12 of the UNCRC concerned a child’s right to be heard. The Commissioner agreed that there should be intimation to a child where deprivation of liberty was concerned. But a question might arise if the child did not respond to intimation. The child might have views, yet not want to become a party in proceedings. Senior counsel submitted that there should be a mechanism to allow such a child’s views to be ascertained without necessarily becoming a party. In family cases, the court appointed a reporter. In cases involving deprivation of liberty of a child, appointment of a curator ad litem to the child might be appropriate (*M v C* 2021 SLT 359).

Summary

[16] The court has issued an interlocutor in the terms agreed in relation to RP’s continuing placement for the next 3 months. We would emphasise all that was said by this court in *Lambeth*: see para [1] above.

[17] Until the legislation referred to in *Lambeth* is in force, the court is of the view that the Cross-Border Group may be best placed to assess the practical details involved in (i) alerting the Court of Session, Scottish local authorities, social work departments, health providers, education departments, the Care Inspectorate, and others about the placement in Scotland of a child from outside Scotland; (ii) defining mechanisms whereby a non-Scottish court may be reassured that the relevant Scottish court has in fact been alerted to the placement;

(iii) specifying what reports should be ordered, and when; (iv) ensuring that information and/or court orders concerning the child are effectively communicated between the Scottish and non-Scottish courts; (v) other relevant matters.

[18] The court is expecting that the necessary legislation will now be addressed, and once in force these petitions will be superseded. Should there be any prolonged delay, it might be necessary to consider resorting to Practice Notes, Practice Directions, or Rules of Court in Scotland, and equivalents in courts outside Scotland. In Scotland, any Practice Note/Direction or Rule of Court would be a matter for the Lord President and the Scottish Civil Justice Council. As was appreciated by all counsel, one risk sought to be avoided by such procedural provisions would be the placement of a child in Scotland involving deprivation of liberty yet without the relevant Scottish courts and the relevant authorities being aware of the placement.