OUTER HOUSE, COURT OF SESSION

[2022] CSOH 80

P970/21

OPINION OF LORD BRAILSFORD

In the Petition

KT

Petitioner

for

Judicial Review of decisions of Sheriffs at Hamilton

Petitioner: Aitken, Clan Childlaw
Respondent: Moynihan KC, Anderson Strathern

28 October 2022

[1] The petitioner is KT who resides at an address in South Lanarkshire. The petition concerns decisions of sheriffs at Hamilton in relation to an appeal to the sheriff against a decision of the children's hearing. The appeal related to a Compulsory Supervision Order ("CSO") which was made in terms of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") in respect of a child DJT, born 20 June 2014. The petitioner is the elder sibling of DJT. The petitioner is 16 years old. The CSO which was the subject of the appeal included a measure regulating the petitioner's contact with DJT, specifically to provide that there should be no contact between them. The appeal was at the instance of the mother of the

petitioner and DJT. Intimation of the petition was made to both KT's parents, the Principal Reporter to the Children's Hearings who was a party to the appeal and who was responsible for the administration of the children's hearing which had made the decision which was the subject of the appeal. Only the Principal Reporter lodged answers and was represented at the substantive hearing of this petition. He is referred to hereafter as "the respondent".

[2] The decision of the children's hearing which was the subject of the appeal to the sheriff was made on 22 July 2021 by the children's hearing in Hamilton. The petitioner participated directly at that children's hearing having been invited to attend by the second respondent and the chairing member of the hearing having determined, with reference to section 78(2)(a) of the 2011 Act, that her attendance was necessary for the proper consideration of the matter before the children's hearing, specifically her contact with DJT. The children's hearing continued the CSO in respect of DJT and included a measure which precluded contact between the petitioner and DJT. The first respondent lodged an appeal in terms of section 154 of the 2011 Act against the decision. The appeal included bringing under review the measure regulating contact between the petitioner and DJT. On 1 September 2021 a sheriff issued a first interlocutor in the appeal process. The interlocutor of 1 September 2021 appointed intimation of the appeal on the first and second respondent but did not appoint intimation on the petitioner. The appeal was not intimated on the petitioner. On 17 September 2021, a sheriff refused the appeal.

[3] Against the foregoing procedural background the petitioner sought declarator that the sheriff's determination of the appeal on 17 September 2021 without affording the petitioner any opportunity to participate in the decision-making process was, in the circumstances, incompatible with the petitioner's Article 8 ECHR rights and, thus, unlawful

and reduction of the sheriff's interlocutor of 17 September 2021. The respondent's position was that there was no merit in the challenge to the sheriff's decision. A secondary point was advanced that reduction of the interlocutor of 17 September 2021 was impracticable and unnecessary. It dealt with matters in addition to the contact for the petitioner and was not severable.

[4] Each party identified two issues for determination by the court. For the petitioner these were; (1) did KT have an involvement in the decision-making process relative to the appeal, seen as a whole, to a degree sufficient to protect her interest? (2) If KT did not have such involvement, should the court resolve that by making the declarator of unlawfulness sought in STAT 4(1) and reduce the sheriff's interlocutor disposing of the appeal as sought in STAT 4(2)? For the respondent the issues were: (1) Was there any illegality in the failure formally to intimate the first respondent's appeal to the petitioner? (2) If so, is it necessary to grant a remedy other than declarator to that effect?

Factual background

[5] There was substantial agreement between parties as to the relevant factual background. The following is a summary thereof.

[6] KT is the 16 year old sibling of DJT, who is aged 7. DJT is subject to a Compulsory Supervision Order ("CSO") made in terms of the 2011 Act. The respondent scheduled a review hearing to take place on 22 July 2021 to consider DJT's CSO. One of the issues to be considered by the children's hearing on 22 July 2021 was the regulation of KT's contact with DJT. The respondent invited KT to attend at children's hearings for DJT on each of 26 April 2021, 17 June 2021 and 22 July 2021. On each of those occasions, the chairing

member of the hearing allowed KT to attend at and participate in part of each children's hearing. The chairing member's decision was made, on each occasion, in terms of section 78(2)(a) of the 2011 Act, that is

> "the person's attendance at the hearing is considered by the chairing member of the children's hearing to be necessary for the proper consideration of the matter before the children's hearing."

The petitioner did not suggest that the extent of her participation at any of these children's hearings was insufficient. On 22 July 2021, the children's hearing made a decision to continue DJT's CSO and included a measure that there was to be no contact between KT and DJT. That order conflicted with a measure on KT's own CSO which made provision for contact to operate. Despite the terms of KT's own CSO, the practical effect of the measure included on DJT's CSO was that no contact could operate, as to permit that would be incompatible with DJT's CSO and thus breach the "implementation authority's" statutory duty in terms of section 144 of the 2011 Act. The mother of each of KT and DJT did appeal the children's hearing's decision of 22 July. Her appeal was against all parts of the decision including, but not limited to, the measure regulating KT's contact with DJT. The relevant rules of court applying to the appeal are in Part VIII of the Act of Sederunt (Child Care and Maintenance) Rules 1997 as amended ("the CCMRs"). On 1 September 2021, the sheriff issued an interlocutor appointing the sheriff clerk to intimate the appeal to KT and DJT's mother and the respondent. No order for intimation was made in respect of KT. The sheriff considered the merits of the appeal on 17 September 2021. KT was not involved in the decision-making process relative to the appeal. She did not receive formal intimation of it. The sheriff neither sought nor otherwise had before him any representation from KT about the appeal even though, in part, it concerned her interests.

Relevant statutory provisions

[7] Sections 154-156 of the Children's Hearings (Scotland) Act 2011 are relevant in determination of the issues in the petition:

> "**154 Appeal to sheriff against decision of children's hearing**
>
> (1) A person mentioned in subsection (2) may appeal to the sheriff against a relevant decision of a children's hearing in relation to a child.
>
> (2) The persons are —
>
> (a) the child,
> (b) a relevant person in relation to the child,
> (c) a safeguarder appointed in relation to the child by virtue of section 30.
>
> (3) A relevant decision is —
>
> (a) a decision to make, vary or continue a compulsory supervision order,
> (b) a decision to discharge a referral by the Principal Reporter,
> (c) a decision to terminate a compulsory supervision order,
> (d) a decision to maket an interim compulsory supervision order,
> (e) a decision to make an interim variation of a compulsory supervision order,
> (f) a decision to make a medical examination order, or
> (g) a decision to grant a warrant to secure attendance.
>
> (4) An appeal under subsection (1) may be made jointly by two or more persons mentioned in subsection (2).
>
> (5) An appeal under subsection (1) must be made before the expiry of the period of 21 days beginning with the day on which the decision is made.
>
> **155 Procedure**
>
> (1) This section applies where an appeal under section 154 is made.
>
> (2) The Principal Reporter must lodge with the sheriff clerk a copy of —
>
> (a) the decision, and the reasons for the decision, of the children's hearing,
> (b) all information provided by virtue of rules under section 177 to the children's hearing, and
> (c) the report of the children's hearing.

(3) The appeal must not be heard in open court.

(4) The sheriff may (but need not) hear evidence before determining the appeal.

(5) The sheriff may hear evidence from —

(a) the child,
(b) a relevant person in relation to the child,
(c) an author or compiler of a report or statement provided to the children's hearing that made the decision,
(d) the Principal Reporter,
(e) where the appeal is against a decision to make, grant, vary or continue an order or warrant including a secure accommodation authorisation in respect of the child -

(i) the person in charge of the secure accommodation specified in the secure accommodation authorisation, and
(ii) the chief social work officer, and

(f) any other person who the sheriff considers may give material additional evidence.

(6) The sheriff may require any person to give a report to the sheriff for the purpose of assisting the sheriff in determining the appeal.

(7) Subsection (6) applies in relation to a safeguarder only if regulations under **[**section 34**]** so provide

156 Determination of appeal

(1) If satisfied that the decision to which an appeal under section 154 relates is justified, the sheriff—

(a) must confirm the decision, and
(b) may take one or more of the steps mentioned in subsection (3) if satisfied that the circumstances of the child in relation to whom the decision was made have changed since the decision was made.

(2) In any other case, the sheriff—

(a) must —

(i) where the decision is a decision to grant a warrant to secure attendance, recall the warrant,
(ii) where the decision is a decision to make an interim compulsory supervision order or a medical examination order, terminate the order,

(b) may take one or more of the steps mentioned in subsection (3).

(3) Those steps are —

(a) require the Principal Reporter to arrange a children's hearing for any purpose for which a hearing can be arranged under this Act,
(b) continue, vary or terminate any order, interim variation or warrant which is in effect,
(c) discharge the child from any further hearing or other proceedings in relation to the grounds that gave rise to the decision,
(d) make an interim compulsory supervision order or interim variation of a compulsory supervision order, or
(e) grant a warrant to secure attendance.

(3A) If the sheriff continues or varies a compulsory supervision order under subsection (3)(b), the sheriff—

(a) must, if the order contains a movement restriction condition (or is being varied so as to include such a condition), require the order to be reviewed by a children's hearing on a day or within a period specified in the order,
(b) may, in any other case, require the order to be so reviewed.**]**

(4) If the sheriff discharges a child under subsection (3)(c), the sheriff must also terminate any order or warrant which is in effect in relation to the child.

(5) The fact that a sheriff makes, continues or varies an order, or grants a warrant, under subsection (1)(b) or (2)(b) does not prevent a children's hearing from continuing, varying or terminating the order or warrant."

Submissions

(a) Petitioner

[8] Counsel for the petitioner advanced three principles which he contended applied in the present matter and upon which he relied.

[9] First, the existence or non-existence of ''family life'' for the purposes of Article 8 ECHR was essentially a question of fact depending upon the real existence in practice of close personal ties.[1]

[10] Second, Article 8 includes procedural as well as substantive rights: the decision-making process leading to measures of interference must be fair.[2]

[11] Third, where a child is being cared for away from the family, what matters is the maintenance and development of the relationship between the siblings, whether through placing them together or through staying in regular contact with one another. In the context of a children's hearing respect is shown to that interest if, in the particular circumstances of the case, the sibling is enabled to have an involvement in the decision-making process, seen as a whole, to a degree sufficient to protect his or her interest.[3]

[12] It was accepted that these principles did not mean that every sibling has a right to participate by attendance in the forum where the decision-maker is hearing argument and determining matters. That level of participation may or may not be required having regard to the particular circumstances of each case. This was consistent with the Supreme Court's discussion, in ABC & XY at paragraphs [51] – [53], concerning each case requiring a bespoke solution.

[13] The courts attention was drawn to *MB* v *SCRA*,[4] where Lady Wise considered the rights of participation of a sibling in a different form of court application, a reporter's application for an Interim CSO which included regulation of sibling contact. In that case,

---

[1] *ABC* v *Principal Reporter* [2020] UKSC 26, 2020 SC (UKSC) 48 at para [28].
[2] *ABC* v *XY* at [27]
[3] *ABC* v *XY* at [29]-[30]
[4] [2021]CSOH 19, 2021 SLT 383

the Principal Reporter developed an informal procedure which enabled the sibling to make representations to the sheriff on the issue of contact and that sibling was informed of applications, hearings and the basis on which the sheriff was being asked to make the determination. Lady Wise held that this informal procedure was sufficient to satisfy MB's right to participate to an extent sufficient to protect his interests (save for an occasion when representations lodged were not considered by the sheriff).

[14] In the present case KT was not "…informed of the nature of the proceedings concerning the child and of (her) rights in relation to the proceedings."[5]. From KT's perspective, she had no rights in the proceedings. She received no formal intimation of papers setting out the issues under consideration or notice of the date of the appeal. She was given no opportunity to make any representation of any kind to the decision-maker about an order which directly concerned her interests. In relation to the issues of intimation and participation by way of representation, Lady Wise in *MB* at [31] with reference to the Supreme Court's decision in *ABC and XY*, reasoned, "What the UK Supreme Court has mandated is that issues of this type should be considered in every case, not that any particular outcome is inevitable." In the present case neither the sheriff nor the second respondent gave any consideration at all to how KT's rights should be protected in the appeal.

[15] The petitioner's position was submitted to be the same as that of the appellant in *DM* v *Locality Reporter*,[6] where no notice was given to the sibling in respect of the review

[5] *ABC and XY* at [53], relied upon in *MB* at [29])
[6] [2018] CSIH 73, 2019 SC 179

by a children's hearing of a contact measure on an Interim CSO. In that case, the Principal Reporter is noted, at [6], to have

> "acknowledged that there had been a breach of natural justice when the children's hearing made a contact direction removing the appellant's ability to spend time with his half-sister, in that the appellant had been given no notification of the hearing and no opportunity to make representations on the subject" (the Lord President, Carloway at [13] and [14]).

KT had no opportunity to make representations to the decision-making sheriff either in person or in writing.

[16] Counsel then developed his submission by advancing propositions as to what participation he contended KT should have been entitled in the appeal with which this petition is concerned. The sheriff could have ordered intimation of the appeal on KT in terms of CCMR 3.54(1)(e). In circumstances where her participation at the children's hearing had been considered "necessary for the proper determination of the **9?** matter", it should have been considered that intimation of an appeal against the decision made was equally "necessary". The second respondent avers that it was sufficient for the first respondent to represent the interests of the whole family in the appeal. That line was submitted to be inconsistent with the decisions by both the second respondent and the chairing member of the hearing that it was "necessary" that KT herself make representations to the children's hearing even though the first respondent also did so. There is no proper basis to distinguish the necessity of making a representation to the hearing when it is making a decision from the necessity to address the merits of that decision on appeal.

[17] Intimation of the appeal would have permitted KT to lodge answers to it within 7 days; CCMR 3.55(1). Thereafter, the extent of her participation would have been a matter for the sheriff. Applications to a sheriff in terms of the 2011 Act are *sui generis*. As explored

above, her right of participation need not necessarily extend to attendance at the appeal to be heard in person or with a representative. It would be a matter for the sheriff to determine what was necessary having regard to the protection of her interests in the matter being determined. However, what was incompatible with her procedural rights in terms of Article 8 was for her to have no ability at all to make a representation to the court. Both the sheriff and the respondent, as public authorities, had duties to ensure that the procedure was not incompatible with her procedural rights.

[18] Insofar as the respondent was not responsible for the sheriff failing to order intimation of the appeal on KT, the respondent could, and should, have taken one of two steps, either to have sought representations from KT on the extent of her participation in the appeal or on the substance of the appeal and to have ensured that these representations be considered by the sheriff (akin to the informal procedure developed by the second respondent in *MB*), or alternatively to have sought that the sheriff, prior to disposing of the appeal, give consideration to how to allow KT to participate in the decision-making process to a degree sufficient to protect her interests.

[19] In response to the respondent's argument that the order sought, reduction of the sheriff's decision, was impractical and unnecessary, the petitioner's position was that the sheriff's order did not make any variation to the CSO which would be overturned to the detriment of DJT if the order was reduced. The sheriff did no more than confirm the decision of the hearing. That decision remains extant. Bringing it under review again in the appeal would cause no prejudice to anyone including to DJT.

(b) Respondent

[20] Senior counsel for the respondent initially drew my attention to legislative changes since the date of the decision challenged in the petition. I was informed that this was the latest of a number of cases considering the participation rights of siblings in relation to compulsory supervision orders. The cases of *ABC and XY* were determined by the Supreme Court but in a third case heard by the First Division, *DM* v *Locality Reporter* 2019 SC 196, the court added a postscript highlighting the need for review of section 126 of the Children's Hearings (Scotland) Act 2011, the ineffective section ostensibly intended to widen the opportunities for review of contact directions. *ABC and XY* was decided by the Supreme Court on 18 June 2020 and on 1 October 2020 the Scottish Parliament passed the Children (Scotland) Act 2020. The 2020 Act amends the 2011 Act significantly in relation to the participation of siblings in contact decisions. The amendments came in to force on 26 July 2021, only days after the children's hearing (on 22 July 2021) in relation to DJT that is the subject of these proceedings. These proceedings turn on the old legislative framework but for the future the petitioner will have the rights provided by the amended legislation.

[21] The present case was then considered in the context of the facts. The children's hearing was under section 138 of the 2011 Act and the decision was to continue and vary the compulsory supervision order for DJT with measures stating that the child was to have no contact with his parents or two sisters, one of whom is the petitioner. No issue was taken directly with that decision because the petitioner was allowed to participate in the relevant part of the hearing and was represented by a solicitor. The petitioner was not a relevant person and, accordingly, had no right of appeal. The petitioner's mother did appeal to the sheriff under section 154. In terms of the Rule 3.54(1)(e) of the Act of Sederunt (Child Care

and Maintenance) Rules 1997 the sheriff clerk was required to assign a date for the hearing and to make intimation to a number of persons including "any other person the sheriff considers necessary …". The sheriff issued two interlocutors fixing the hearing and requiring intimation dated 1 and 3 September 2021. Neither made provision for intimation to the petitioner. The appeal was heard on 17 September 2021 and refused. The petitioner was not present or represented at the hearing. The complaint is that this was due to a failure on the part of the sheriff to intimate the appeal to her (statements 16 and 18 in the petition) and also failure on the part of the respondent to pick up the omission and to take steps to enable her to participate (statement 19).

[22] It was submitted that the petitioner's case was predicated upon the proposition that the petitioner had a right to participate in the appeal and that the respondent should have taken steps to ensure that the sheriff made "such other order as he considered appropriate to enable the petitioner to participate in the decision-making process to a degree sufficient to protect her interests". That proposition was said to "beg the question" what form or degree of participation was "sufficient to protect her interests".

[23] In answering that question counsel submitted that the decision of the Supreme Court in *ABC and XY* was not prescriptive in that regard. That decision recognised that in some circumstances collective representation of the wider family by, for example, a relevant person may be sufficient. That endorses the view of the Inner House in *ABC* 2019 SC 186 at §§19-20. Compliance with Article 8 does not necessarily require personal attendance by a sibling at the hearing: *DM* v *Locality Reporter* 2019 SC 196.

[24] The submission was developed to contend that the critical point was that the petitioner personally had no right of appeal. There was no reason to believe that the

petitioner's mother, who had a right of appeal as a relevant person, could not adequately represent the interests of the wider family, including the petitioner. The mother's grounds of appeal discussed the merits of sibling contact generally in paragraph 2 and included material relevant to the petitioner in paragraph 3. There was no "necessity" for the petitioner to be a direct participant. That was so having regard to the limited scope of the appeal, a submission where reliance was placed on dicta of Lord Malcolm.[7]

[25] Even if the foregoing argument was incorrect, counsel further submitted that there was no relevant basis to conclude that the Principal Reporter should have concluded that it was necessary to take steps to ensure the petitioner's participation. The petition proceeded on the basis that "the Petitioner did not receive formal intimation of the appeal." (Statement 14). The adjective "formal" was said to be significant. It was a matter of admission in statement 14 that the petitioner was aware of the appeal. It was also a matter of admission that she did not contact the Principal Reporter about the appeal. Given that the Supreme Court and the Inner House recognise that collective representation can be sufficient, the absence of any contact by the petitioner is material. There was no reason to believe that "formal" intimation to her would have been "necessary".

[26] The final argument advanced on behalf of the respondent was that in the event that the petition was granted, a declarator in terms of statement 4(1) would suffice. That would determine the petitioner's rights. Reduction in terms of statement 4(2) would serve no practical purpose. Reduction would necessitate a further hearing before the sheriff which would serve no practical purpose given the passage of time since the children's hearing

---

[7] see *W* v *Schaffer* 2001 SLT (Sh Ct) 86 at 87K-88A; applied in *CF* v *MF* 2017 SLT 945 at paragraph 50 (Lord Malcolm).

on 22 July 2021. The petitioner's mother can now seek a review of the compulsory supervision order at any time and, in any event, in April 2022, in line with section 133(a) of the Children's Hearings (Scotland) Act 2011, the Principal Reporter will have to initiate a review of the CSO to take place before its expiry in July 2022. Those are the more effective means to secure reconsideration of the petitioner's arguments in favour of contact with her brother.

Decision

[27] The issue between the parties concerns the question of the involvement of KT in the decision-making process relative to the appeal to the sheriff which is the background to the current petition. In essence this resolves to the question of whether KT's involvement in the decision-making process relative to the appeal was sufficient to protect her interests or, on the other hand, whether the decision not to intimate the relevant appeal hearing to KT constituted an illegal act which deprived her of a right to participation in that process.

[28] There is no dispute between parties that KT had an interest in the process, the issue of contact between her and her sibling who was the subject of the appeal plainly constitutes an interest. If follows therefore in my opinion that the determining issue is whether that interest required her to receive intimation of the relevant hearing before the sheriff and consequent thereon a right to attend or alternatively that interest was protected by another means such as participation by her mother in the appeal.

[29] There is now authority which is binding upon me to the effect that compliance with Article 8 ECHR does not necessarily require personal attendance by a sibling at a hearing. What is required, on the basis of authority, is that the decision maker in a situation such as

that pertaining in the present matter must take "… a nuanced approach which addresses the extent of family life in that relationship, the home circumstances, how far the interests of the parents, the sibling and the child coincide and the possibility that the child, the parents and other siblings may have Article 8 rights which are in conflict with those of the sibling." That being the case it is, in my view, necessary to consider as a matter of practicality whether the circumstances surrounding the relevant hearing protected KT's interest or failed so to do.

[30] The relevant factors in addressing that question are first that KT's mother, also the mother of DJT the subject of the appeal, had rights to participate in the appeal to the sheriff and was therefore able to address the wider interests of her family, including the question of inter sibling contact between KT and DJT. Second it was not disputed that KT's mother's grounds of appeal did discuss the merits of sibling contact. Moreover the mother's grounds of appeal did contain material relative to KT and contact with her sibling.

[31] Having regard to the foregoing factors it appears that the interests and rights of KT were matters which were expressly before, and therefore brought to the attention of, the decision maker at the time the decision complained of was made. Having regard to that consideration I have concluded that the respondent's submission that these features would entitle the decision maker to form the view that there was no need to formally intimate the relevant hearing to the petitioner for the reason that her interest was protected is, as a matter of law correct.

[32] It follows, having regard to the foregoing consideration, that the challenge in this petition fails. I will refuse the prayer of the petition.